

“OWING TO THE EXTREME YOUTH OF THE ACCUSED”: THE CHANGING LEGAL RESPONSE TO JUVENILE HOMICIDE

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These [juvenile] laws were drafted at a time when kids were throwing spit-balls Now they're committing murders.

— Carolea Goldfarb, Brooklyn District Attorney's Juvenile Division, 1994.¹

Our juvenile criminal act was written at a time when kids were knocking over outhouses, not killing people. We're looking at a whole new breed here.

— Eileen O'Neill, Cook County Assistant States Attorney, 1994.²

Our juvenile justice system was created at a time of more 'Leave it to Beaver' type crimes, less sophisticated and not incredibly violent. But what we see now is kids who have never been socialized properly . . . who are real predators Realistically that's what we're trying to deal with.

— Peter Deddeh, Chief of the San Diego District Attorney's Division, 1996.³

[The juvenile justice] system was developed with truants, vandals, and petty thieves in mind. But this model is not appropriate for the violent juvenile offender of today.

— Linda J. Collier, Lecturer at Cabrini College, 1998.⁴

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¹ Patricia Hurtado, *Legal Cracks in the Juvenile Justice System*, NEWSDAY, July 4, 1994, at A6.

² Neil Steinberg, *Judge Convicts Boy, 11, in Woman's Slaying*, CHI. SUN-TIMES, Oct. 7, 1994, at 14.

³ Adam Pertman, *States Racing to Prosecute Young Offenders as Adults*, BOSTON GLOBE, Apr. 11, 1996, at 1.

In the late 1980's and early 1990's, an alarming increase in the number of juvenile homicides spurred academics like John DiIulio of Princeton and James Alan Fox of Northeastern University to predict a coming tidal wave of "remorseless and morally impoverished youth." These predictions, which were based solely on projected increases in the nation's youth population, fueled the concern that the juvenile court was ill-equipped to deal with this new "breed" of delinquent, the so-called "juvenile superpredator."⁵ State and local prosecutors and crime conservatives jumped on the "superpredator" bandwagon, adopting the rhetoric in a full-scale assault on the legitimacy of the juvenile court. They referred to the court as "outdated" and claimed that the court was never intended to deal with serious and violent juvenile offenders, and instead proposed legislation to dismantle systematically the remaining protective elements of the juvenile court.

State legislatures heeded the call for tougher juvenile laws, and between 1990 and 1996, forty states passed laws to make it easier to prosecute juveniles as adults.⁶ Many of these new laws removed discretion from juvenile court judges and gave more power to prosecutors, resulting in less individualized justice and more decisions based solely on the nature of the charged offense. Along similar lines, juvenile records, which had been confidential, were made widely accessible; juvenile proceedings, which had been closed to the public, were opened in certain cases; and statutes that had stressed "rehabilitation" and "the best interest of the child," were rewritten to emphasize "punishment" and "the protection of the public."⁷

Despite the fact that juvenile crime declined significantly from 1994 to 2000, while the number of juveniles in the population simultaneously increased, prosecutors and politicians continued to call for tougher juvenile laws. This trend—lower rates of juvenile crime and an increasing juvenile population, completely discredited the "superpredator" theory, and led some of the academics who supported it to

⁴ Linda Collier, *Adult Crime, Adult Time, Outdated Juvenile Laws Thwart Justice*, WASH. POST, Mar. 29, 1998, at C1.

⁵ John DiIulio, Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us Into Wanting to Get to the Root Causes of Crime A Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31. For a devastating critique of the predictions of a "coming wave" of juvenile crime see FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* (1998), especially ch. 4.

⁶ THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 4 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

⁷ MELISSA SICKMUND, ET. AL., U.S. DEP'T OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE* 30 (1997).

back away from their earlier predictions.⁸ In fact, on January 17, 2001, the United States Surgeon General released a report in which he declared the “superpredator” theory a myth, finding that “there is no evidence that the young people involved in violence during the peak years of the early 1990’s were more frequent or more vicious offenders than youth in earlier years.”⁹

The continuing angry rhetoric of alarmists, however, convinced the public that there was still an epidemic of juvenile crime in America, and allowed the “superpredator” myth to continue to drive juvenile justice policy.¹⁰ For instance, in defending a federal bill, which would have allowed thirteen-year-olds to be jailed with adults, Congressman Bill McCollum declared of America’s children: “They’re the predators out there, they’re not children anymore. They’re the most violent criminals on the face of the earth.”¹¹

In this heated climate, between 1996 and 1999, forty-three states tinkered further with their transfer laws, increasing the numbers of children tried as adults and housed in adult prisons. According to Amnesty International, in 1998 nearly 200,000 children under eighteen were tried as adults; some 18,000 children were housed in adult prisons, 3500 of whom shared living spaces with adults.¹² By the close of the twentieth century, the American juvenile court faced its greatest legitimacy crisis to date.¹³

⁸ See, e.g., David J. Krajicek, *Super-Predators: The Making of a Myth*, YOUTH TODAY, Apr. 1999, at 1, available at <http://www.ytyt.org/infobank/document.cfm/parent/502/103/> (last visited Feb. 10, 2003); Jacques Steinberg, *Youth Crime Wave Seems Washed Up*, ORANGE COUNTY REG., Jan. 3, 1999 at A21; Elizabeth Becker, *As Ex-Theorist on Young ‘Super-Predators’, Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A10.

⁹ YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 5 (2001). The criminologist John Laub has argued that over the course of the twentieth century criminologists have invented new labels to describe basically the same population of serious and violent juvenile offenders, and the that term “superpredators” was only the latest such label. John Laub, *A Century of Delinquency Research and Delinquency Theory*, in A CENTURY OF JUVENILE JUSTICE 179, 186 (Margaret K. Rosenheim et. al. eds., 2002).

¹⁰ The media is also partly responsible for the public’s errant perception of runaway juvenile crime. Between 1993 and 1996, there was a 20% decline in homicides in America. During that same period of time, however, there was a 721% increase in the number of homicides reported on the ABC, CBS, and NBC evening news. Less than one-half of one percent of America’s kids were arrested for a violent offense in 1996. Yet two-thirds of the times children are depicted on the evening news, it is in connection with violence. VINCENT SCHIRALDI & JASON ZIEDENBERG, RUNAWAY JUVENILE CRIME?: THE CONTEXT OF JUVENILE ARRESTS IN AMERICA, JUST. POL’Y INST. 1–8 (1998).

¹¹ *Morning Edition*, (National Public Radio broadcast, June 25, 1996).

¹² See AMNESTY INTERNATIONAL, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE U.S. JUSTICE SYSTEM (1998).

¹³ A December 1998 Peter D. Hart & Associates Public Opinion Survey, commissioned by the Children’s Court Centennial Committee in connection with Cook County’s com-

In this essay, we seek to dispel the myth that the juvenile court was never intended to deal with serious and violent offenders; a myth that has largely been unchallenged, especially in the mainstream media, and one that critics of the juvenile court have used to undermine its legitimacy. The discovery of homicide data from the Chicago police department from the early twentieth century, the era in which modern juvenile justice came of age, provides us with new historical data with which to put this dangerous myth to rest, by showing that the nation's model juvenile court—the Cook County Juvenile Court—*did* hear many cases of juvenile homicide. In addition, the database has helped us to reconstruct important parts of the overall legal response to juvenile homicide in this period. We have discovered that the early twentieth century legal response to juvenile homicide was far more flexible than today's approach, and that there were more institutional checks in the system to protect children from overly aggressive prosecution of their cases in the criminal justice system.

The essay first provides a brief overview of the foundational philosophy of the juvenile court movement, and addresses the question of whether the juvenile court actually heard cases of serious and violent offenders in the early twentieth century. It then analyzes two cases to highlight the influential role that the coroner's jury and the grand jury played in the handling of juvenile homicide cases. The historical section of the essay concludes with an examination of the emerging battles waged between the state's attorney and the juvenile court over jurisdiction in the 1920's and 1930's, which culminated in the Illinois Supreme Court legitimizing a system of concurrent jurisdiction that had been developing informally since the beginning of the century. Under this system of concurrent jurisdiction, which re-

memoration of the 100th anniversary of the founding of the juvenile court, revealed that the public had little confidence in the ability of the juvenile court to impact positively on the lives of the children and families it serves. When asked "How much confidence do you have in the ability of the juvenile court's efforts to help children and families at risk?," only 6 % of the 1059 youth and adults surveyed said "a great deal of confidence;" 11% responded "quite a bit of confidence," 48% said "just some confidence," 28% said "very little confidence," and 2% said "no confidence at all." Peter D. Hart & Associates, Research/Public Opinion Strategies, Study #5230b Dec. 15, 1998 (on file with authors). Interestingly, the public's lack of confidence in the court apparently does not mean that it thinks that the answer is to give up on youthful offenders. In fact, just the opposite is true—63% believed that "all youths are capable of recovery and redemption, because children are young and constantly changing, so we should not give up even on those who have committed violent crimes," while only 27% said "it was too late to rehabilitate some youths who are more dangerous or multiple offenders, and the best solution is prison, since punishment is the only way to send a message." *Id.* at 15.

mained in place until the mid-1960's, either the juvenile or criminal courts could hear the cases of juveniles who were accused of serious and violent offenses, including manslaughter and murder. The contemporary section of the essay, which focuses on current responses to juvenile homicide, compares today's approach with past practices, and spotlights the central role that prosecutors now play in determining how juvenile cases should be handled. After contrasting three recent cases with the ones discussed from the early twentieth century, the essay ends with an analysis of what engaging the past can teach us about living in the present, and what lessons this exercise offers for future juvenile justice policymaking.

PART I. THE FLEXIBLE LEGAL RESPONSE TO JUVENILE HOMICIDE IN
THE EARLY TWENTIETH CENTURY

A. DID THE JUVENILE COURT HEAR CASES OF SERIOUS AND VIOLENT JUVENILE
OFFENDERS?

Before the creation of the juvenile court in 1899, the state prosecuted children's cases in a similar fashion to adult cases, although some differences had emerged over the course of the nineteenth century. Scholars of juvenile justice have pointed out that antebellum reformers through the construction of houses of refuge, which were often nothing more "than a mini-prison for children," introduced many of the legal innovations that progressive reformers would draw upon to build the juvenile court.¹⁴ These innovations, as the law professor Barry Feld has summarized, included "a formal age-based distinction between juvenile and adult offenders and their institutional separation, the use of indeterminate commitments, and a broadened legal authority that encompassed both criminal offenders and neglected and incorrigible children."¹⁵ The leaders of the juvenile court movement, though often critical of the institutionalization of children, did credit these earlier reformers for at least firmly establishing the principle that the state had a responsibility toward its children (*parens patriae*) and its corollary that youthful offenders should be housed separately from adult criminals.

¹⁴ Steven L. Schlossman, *Delinquent Children: The Juvenile Reform School*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, 334 (Norval Morris & David J. Rothman eds., 1995).

¹⁵ BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 51 (1999).

The juvenile court movement, which began in the 1890's in Illinois and spread both nationally and internationally, lobbied for the creation of specialized courts to hear the cases of *all* children, including adolescents, because they were understood to be qualitatively different from adults.¹⁶ Led by the visionary philanthropist Lucy Flower and the progressive reformer Julia Lathrop, the moral crusaders for the juvenile court campaigned for the establishment of a juvenile law that would allow judges the discretion necessary to apply individualized treatments in order to rehabilitate children, instead of punishing them.¹⁷ As Judge Richard S. Tuthill, who presided over the nation's first juvenile court, which opened in Cook County, Illinois in July, 1899, declared: "the basic principle of the [juvenile court] law is this: That *no child under 16 years of age shall be considered or be treated as a criminal; that a child under that age shall not be arrested, indicted, convicted, imprisoned, or punished as a criminal.*"¹⁸ Significantly, he added:

It of course recognizes the fact that such children may do acts which in an older person would be crimes and be properly punishable by the State therefore, but it provides that a child under the age mentioned shall not be branded in the opening years of its life with an indelible stain of criminality, or be brought, even temporarily, into the companionship of men and women whose lives are low, vicious, and criminal.¹⁹

Thus, in principle, the juvenile court was designed to hear all the cases of juvenile offenders.

In addition, a 1905 revision of Illinois' juvenile law gave the court original and exclusive jurisdiction over all cases of "any male

¹⁶ Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1094 (1991); FELD, *supra* note 15, at 46.

¹⁷ David S. Tanenhaus, *Justice for the Child: The Beginning of the Juvenile Court in Chicago*, 27 CHI. HIST. 4-19 (1998-99) [hereinafter Tanenhaus, *Justice for the Child*]; David S. Tanenhaus, *Beyond the Myth of Immaculate Construction: The Evolution of Juvenile Courts in the Early Twentieth Century*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 9, at 42 [hereinafter Tanenhaus, *Beyond the Myth of Immaculate Construction*]. Zimring has recently argued that the juvenile court was designed primarily to divert children from the criminal justice system, and that its goal of intervening in the lives of children and their families has been overstated. See Franklin E. Zimring, *The Common Thread—Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 9, at 142, 155.

¹⁸ Richard S. Tuthill, *History of the Children's Court in Chicago*, in CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 1 (Samuel J. Barrows ed. 1904).

¹⁹ *Id.* at 1-2.

child under 17 years or any female child under the age of 18 years.”²⁰ This revised law, which raised the court’s jurisdictional upper age limit from sixteen years, included no offense-related exceptions to the general principle that children’s cases should be heard in the juvenile court. Thus, in principle and under Illinois law, the juvenile court had jurisdiction over the cases of serious and violent offenders.²¹

In the early twentieth century, however, the city’s juvenile court judges did not assert their original and exclusive jurisdiction in every case. Due to lingering concerns about the constitutionality of the state’s juvenile law, juvenile court judges did not want to give the Illinois Supreme Court an opportunity to declare that the law was unconstitutional.²² Instead, they entered into a “gentleman’s agreement” with the state’s attorney that allowed the court to hear most of the cases of serious and violent offenders, but also gave the state’s attorney the opportunity to prosecute some cases in the criminal justice system. Under this informal system of concurrent jurisdiction, the state’s attorney could potentially prosecute any child over the state’s age of criminal responsibility, which was set at ten years.²³

The juvenile court also opted not to exercise its jurisdictional claims in the cases of older children who committed serious crimes while on probation, even though the court could retain jurisdiction over juveniles in the system until they turned twenty-one. Thus, judges, by not fighting to keep the cases of all children in the juvenile justice system, were using a form of “passive transfer,” in which, by doing nothing, the court allowed for a child to be tried as an adult.²⁴

The juvenile court did also actively transfer a few cases each year to the criminal court, though much less than one percent of its calendar. Between the years 1915 to 1919, for example, the court

²⁰ ILLINOIS STATE JOURNAL, LAWS OF THE STATE OF ILLINOIS 153 (1905).

²¹ HELEN JETER, THE CHICAGO JUVENILE COURT, 14–15 (1922).

²² In *Lindsay v. Lindsay*, 100 N.E. 892 (Ill. 1913), the Illinois Supreme Court sustained the state’s juvenile court law, but the jurisdictional conflict between the juvenile and criminal courts would not be resolved until 1935. See *People v. Lattimore*, 199 N.E. 275 (Ill. 1935).

²³ David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 6, at 13–43 [hereinafter Tanenhaus, *The Evolution of Transfer*]. Grace E. Benjamin used the term “a gentleman’s agreement” to describe this practice. Grace E. Benjamin, *The Case for the Juvenile Court: Social Aspects of a Simple Legal Problem*, 16 CHI. BAR REC. 233 (1935).

²⁴ Tanenhaus, *The Evolution of Transfer*, *supra* note 23, at 21.

only transferred 70 out of 11,799 cases, or 0.6 %.²⁵ As Judge Merritt Pinckney explained,

a child, a boy especially sometimes becomes so thoroughly vicious and is so repeatedly an offender that it would not be fair to the other children in a delinquent institution who have not arrived at his age of depravity and delinquency to have to associate with him. On very rare and special occasions, therefore, children are held over on a mittimus to the criminal court.²⁶

Almost all of these cases involved boys who were recidivists and at least sixteen years of age, and the few cases of first offenders were those of boys close to seventeen years of age, whose crimes “included daring holdups, carrying guns, thefts of considerable amounts and rape.”²⁷

By the early 1920’s, it appears that a local culture of transfer had developed in Chicago, in which judges acquiesced in the informal system of concurrent jurisdiction and explained their decision to actively transfer some cases as a means of protecting younger children housed in reform schools. The “gentleman’s agreement” and the active transferring of cases led to some juvenile offenders being tried as adults in the criminal justice system.

Although the juvenile court did not hear every single case of a juvenile accused of a serious and violent offense in the early twentieth century, the court did hear the vast majority, including cases of juvenile homicide. Using the Chicago Homicide Database, we have located twenty-four cases from the early twentieth century, in which either the coroner’s jury or the police referred a homicide case to the juvenile court. Once we factor in that juvenile homicides often involved more than one defendant, it becomes clear that the juvenile court on average heard more than one case of juvenile homicide per year in this period (1906–1930).²⁸ Although this total number is rela-

²⁵ JETER, *supra* note 21, at 89.

²⁶ SOPHONISBA P. BRECKENRIDGE & EDITH ABBOTT, *THE DELINQUENT CHILD AND THE HOME* 208–209 (1912).

²⁷ JETER, *supra* note 21, at 89.

²⁸ The fact that it took six years before any cases of juvenile homicide were referred to the juvenile court suggests that it took awhile for other institutions, such as the coroner’s jury and the police, to consider the juvenile court as the appropriate place to refer these cases. Also since the defendant’s age is not always listed in the police ledger and the outcome of cases was not always recorded, the following are most likely only a subset of all the cases of juvenile homicide that were referred to juvenile court. In chronological order, the case numbers are: 254, 638, 2215, 2714, 3627, 4994, 3956, 3800, 5492, 3033, 3131, 3532, 6503, 6828, 6494, 7889, 7762, 8203, 9156, 9050, 9168, 8337, 8717, 10,483. See Leigh Bienen,

tively small, it does reveal that the juvenile court was created at a time when kids were not only throwing spitballs and knocking over outhouses, but they were also killing people.²⁹

Even more significant, however, than the fact that the juvenile court *did hear* cases of juvenile homicide in the early twentieth century, is how flexible in this period the overall legal response to juvenile homicide was. The next two sections of this essay, through close examination of specific cases, reveal the important roles played by the coroner's jury and, to a lesser extent, the grand jury in restraining the prosecution of juveniles in the criminal justice system. The coroner's jury, as we will demonstrate, kept many children out of both the juvenile as well as the criminal justice systems. The final section explores the beginnings of the breakdown of this flexible system of responding to juvenile homicide, which witnessed the fraying of the gentleman's agreement, the legalizing of concurrent jurisdiction, and the manufacturing of the myth that the juvenile court was never intended to hear the cases of serious and violent offenders.

B. THE CASE OF MARY RADEK AND THE ROLE OF THE CORONER'S JURY

On September 1, 1910, Mary Radek, an eight-year-old Bohemian girl who had been rushed by ambulance to the Cook County Hospital the day before, died from a ruptured appendix and peritonitis. Although the coroner's physician, Henry Reinhart, initially reported that a blow from a baseball thrown by an older girl had fatally injured Mary, a week later stories about the case of Mary Radek appeared in the city's newspapers. The *Daily News* reported, "to-day rumors began to circulate about the manner of her death and, if

Chicago Homicide Project, Homicide Cases 1870–1930, Book One (2000) (unpublished manuscript) (on file with authors) [hereinafter Chicago Homicide Database].

²⁹ According to Eric Monkkenon's calculations, in New York City the rate of juvenile homicide as a percentage of all homicides was actually higher in the nineteenth century than in the late twentieth century. He states:

About 9.7% of the killers in early New York City were younger than eighteen. If we set our definition of youth a bit lower, the historical comparison changes: 5% of the murderers in nineteenth-century New York City were younger than sixteen, contrasted with only 3% of those in late-twentieth-century New York City.

See ERIC MONKKONEN, MURDER IN NEW YORK CITY 82 (2001). Unfortunately, Monkkenon allows the "superpredator" thesis to influence his comparisons of the past and present, and argues, "the late-twentieth-century phenomenon of callous, very young murderers stands apart from the nineteenth century, even though the nineteenth century had high numbers of young murderers." *Id.* at 84. Given the evidence he presents about juvenile homicide in the past, it is not clear why he draws this conclusion about today's kids.

statements made in a daily Bohemian publication are correct, the little girl died as the result of a brutal beating and kicking administered by an older girl and not, as has been stated, because she was hit by a baseball.”³⁰ The coroner had scheduled an inquest hearing for the day after the girl’s death, but no one appeared, and the hearing was then rescheduled for the following week. On Monday, September 9, a coroner’s jury was summoned; the six-man jury heard testimony from four witnesses and then rendered their verdict about the cause and circumstances of Mary Radek’s death.

Before examining the verdict in this specific case, we need to reconstruct the role of coroner’s juries in homicide investigations, since these juries often determined whether juvenile cases should be prosecuted, and, if so, which court system—the juvenile or criminal—should hear them. The coroner’s jury was an ancient institution whose roots dated back to medieval England, and in Chicago these juries continued to wield a great deal of influence through at least the 1920’s.³¹ Under Illinois law,

every Coroner, whenever and as soon as he knows or is informed that the dead body of any person is found or lying within his county, supposed to have come to his or her death by violence, casualty, or any undue means, he shall repair to the place where the dead body is and take charge of the same and forthwith summon a jury of six good and lawful men of the neighborhood where the body is found or lying, to assemble at the place where the body is, at such time as he shall direct, and upon view of the body inquire into the cause and manner of the death.³²

³⁰ *Girl Beaten to Death, Report*, CHI. DAILY NEWS, Sept. 7, 1910, at 2.

³¹ The best accounts of the operations of the coroner’s jury in Chicago date back to the early twentieth century. See CHICAGO BUREAU OF PUBLIC EFFICIENCY ADMINISTRATION OF THE OFFICE OF CORONER OF COOK COUNTY ILLINOIS (1911); ILLINOIS ASS’N FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY 357–376 (John H. Wigmore, ed. 1929). Other useful accounts include ELIZABETH DALE, THE RULE OF JUSTICE: THE PEOPLE OF CHICAGO VERSUS ZEPHYR DAVIS (2001); *United States Life Ins. Co. v. Vocke*, 129 Ill. 557 (1889). On the workings of coroner’s juries in Illinois in the early 1970’s see Richard P. Fahey & Deborah J. Palmer, *An Inquest on the Cook County Coroner* (1971) (unpublished manuscript, on file at the D’Angelo Law Library, University of Chicago). For an introduction to the role of the coroner’s jury in English law, see generally THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 (1985). For accounts of coroner’s juries in the United States, see generally ROGER LANE, MURDER IN AMERICA: A HISTORY (1997); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY (1981); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).

³² Quoted in CHICAGO BUREAU OF PUBLIC EFFICIENCY ADMINISTRATION OF THE OFFICE OF CORONER OF COOK COUNTY ILLINOIS, *supra* note 31, at 18.

In the Progressive Era (1890–1920), a time when experts were demanding a larger role in the administration of urban governance, reformers criticized the political nature of the coroner’s office as well as the role of coroner’s juries.³³ A number of states replaced the office of the coroner, who was often an elected official, with a medical examiner, who was required to be a trained and licensed physician.³⁴ In Illinois, however, the coroner’s office remained an elected office, and coroner’s juries continued to be summoned to issue verdicts in cases of suspicious deaths.³⁵

The political nature of the office also cast a long shadow over how coroner’s juries were selected, and how inquest hearings were conducted. In 1911, in a report prepared for the judges of the Circuit Court of Cook County, the Chicago Bureau of Public Efficiency stated that “one of the worst abuses in connection with the Coroner’s office is the ‘professional’ jury system,” and noted that “in practically all of the inquests held at the county morgue, numbering more than 1000 annually, ‘professionals’ constitute the juries. There are fourteen ‘professional’ jurors who do the jury service on all but a very small percentage of cases. Seven of the fourteen have served on juries at the morgue continuously since 1907 and some of the seven even longer.”³⁶ Progressive reformers also documented the corruption and graft in this system. As it turned out, jurors who were supposedly paid one dollar per hearing had to pay a fee in order to be selected for jury duty.³⁷ They would pay a deputy coroner, who conducted inquests and choose jury members, fifty cents per hearing.³⁸ This combination of ‘professional’ jurors and graft raised questions about the entire process.

In theory, coroner’s juries should not have had much influence in the handling of juvenile homicide cases because their verdicts, which were supposedly limited to ascertaining the cause of death, were only advisory and did not legally bind the police, the state’s attorney, or

³³ For classic studies on progressivism, see generally, RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* (1955); SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM, 1885–1914* (1957); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1967).

³⁴ FRIEDMAN & PERCIVAL, *supra* note 31, at 208–209; LANE, *supra* note 31, at 201.

³⁵ The office of the coroner was written into the Illinois Constitution of 1870 and was not abolished until very late in the twentieth century. Fahey and Palmer describe the operations of the coroner’s office and coroner’s juries in 1969 and 1970. Fahey & Palmer, *supra* note 31.

³⁶ CHICAGO BUREAU OF PUBLIC EFFICIENCY ADMINISTRATION OF THE OFFICE OF CORONER OF COOK COUNTY ILLINOIS, *supra* note 31, at 7.

³⁷ *Id.* at 9.

³⁸ *Id.*

the grand jury.³⁹ Accordingly, even if a coroner's jury exonerated an accused person, the police could still hold a prisoner in jail, the state's attorney could still seek an indictment, and a grand jury could still return a true bill.

In practice, however, the coroner's jury had a great deal of influence in deciding homicide cases. In the famous *Illinois Crime Survey* of 1929, Arthur Lashly lamented that coroner's juries often exceeded their statutory power. He noted:

The jury invariably includes in the verdict not only the cause of death, but undertakes also to determine, in the first instance, the question of whether a crime was committed, the character of the crime and who committed it, if the killer is known, and will often order the release of persons in custody charged with the killing, on the ground that the killing was justifiable or that there was no evidence to hold the accused. This is an assumption of the prerogatives of the police and prosecutor which would not be nearly so significant were it not for the fact that the police and prosecutor in criminal cases are inclined to accept the coroner's verdict as final, not only with respect to the cause of death, but also as to whether due to felonious, accidental, or excusable homicide.⁴⁰

Thus, if the coroner's jury exonerated the accused, this verdict most likely meant that the state's attorney would not prosecute the case.

Perhaps even more surprising was the fact that the state's attorney rarely participated in inquest hearings. As Lashly pointed out, the police were responsible for gathering and presenting evidence at these hearings, but "[t]he state's attorney's office in the average run of cases, has no representative at the inquest. Occasionally, in a case of great public interest, an assistant state's attorney is present. Such occasions are rare."⁴¹ He added:

It is submitted that this is most unfortunate for the state. The adverse interest is practically always represented, and although the deputy coroner does most of the questioning and the proceedings are informal, and cross-examination of witnesses is not permitted, counsel for the accused is allowed, upon request, to question witnesses, and it often occurs that by artful leading questions a witness is put on record about the facts in a murder case in a light he never intended. When later at the trial in the criminal court he is confronted with the cold record of his answers to these questions at the coroner's inquest, the witness may be so effectively impeached, however unjustly, as to seriously impair the prosecution. If the state's attorney were present these very common occurrences

³⁹ Arthur V. Lashly, *Homicide*, in THE ILLINOIS CRIME SURVEY, *supra* note 31, at 596.

⁴⁰ *Id.*

⁴¹ *Id.* at 598.

might be wholly avoided. Indeed, it is hard to square efficient administration of prosecution in homicide cases with the practice of ignoring the inquest.⁴²

Explaining the absence of a representative of the state's attorney at most inquest hearings is beyond the scope of this essay, but the lack of a prosecutor at these hearings certainly enhanced the power of the coroner's jury to serve as check against trying juveniles in the criminal justice system.

With regards to cases of juvenile homicide from 1900 to 1930, we located more than sixty cases in which a coroner's jury exonerated either a single accused or multiple juvenile defendants.⁴³ The vast majority of these cases (fifty-two, or eighty-three percent) involved either a child or adolescent shooting somebody "accidentally," most often a friend or family member.⁴⁴ The frequency of gun-related deaths involving minors in the early twentieth century prompted children's activists, such as Jane Addams, to speak out against the easy availability of guns. As Addams wrote in *The Spirit of Youth and the City Streets*, "there is an entire series of difficulties directly traceable to the foolish and adventurous persistence of carrying loaded firearms," and after reprinting a newspaper article about a

⁴² *Id.* at 598–599.

⁴³ This figure includes cases listed in the police ledgers as being seventeen years of age or younger at the time of the homicide. Unfortunately, the age of the defendant was not always listed. Thus, the following sixty-two cases, which are in chronological order, are probably only a subset of all juvenile cases that were exonerated by coroner's juries. See Chicago Homicide Database, *supra* note 28, Case Nos. 737, 1073, 1380, 2342, 2346, 652, 2399, 3977, 4319, 6712, 6512, 5694, 7183, 6419, 5853, 6525, 6757, 5635, 7021, 5870, 6095, 6363, 6790, 6109, 6021, 6210, 6491, 5945, 5838, 8857, 8961, 8547, 8070, 9013, 8195, 8205, 7915, 8580, 8594, 8707, 9368, 8710, 9168 (turned over to Juvenile Authorities), 8494, 9173, 7834 (turned over to Juvenile Authorities), 9323, 8260, 8939, 7862, 10,864, 10,415, 11,158, 10,876, 10,104, 10,998, 9523, 10,901, 9566, 10,173, 10,052, 10,853. Note that two juveniles (Case Nos. 9168 and 7834) were exonerated, but also turned over to the juvenile court. One of these cases involved a fifteen-year-old girl who killed her husband, and in the other case the coroner's jury recommended that the boy be sent to the juvenile court in order to have mental tests conducted.

⁴⁴ See Chicago Homicide Database, *supra* note 28, Case Nos. 1380, 2342, 652, 3977, 6712, 6512, 5694, 7183, 6419, 5853, 6525, 6757, 5635, 5870, 6095, 6363, 6790, 6109, 6021, 6210, 6491, 5945, 5838, 8857, 8961, 8547, 8070, 9013, 8195, 7915, 8594, 8707, 9368, 8710, 8494, 9173, 7834, 9323, 8939, 7862, 10,864, 10,415, 11,158, 10,876, 10,104, 10,998, 9523, 10,901, 9566, 10,173, 10,052, and 10,853. In 1912, twelve-year-old Adlai Stevenson, Jr., the future Governor of Illinois and twice the nominee of the Democratic Party for the presidency of the United States, accidentally shot and killed fifteen-year-old Ruth Merwin at a Christmas Party in Bloomington, Illinois. A coroner's jury exonerated Stevenson. See PORTER MCKEEVER, ADLAI STEVENSON: HIS LIFE AND LEGACY 30–31 (1989); *Cleared of Blame in Merwin Tragedy: Verdict Exonerated Adlai Stevenson*, THE PANTAGRAPH, Jan. 1, 1913 at 1.

boy being goaded into shooting another boy, she added, "this tale could be duplicated almost every morning; what might be merely a boyish scrap is turned into tragedy because some boy has a revolver."⁴⁵ In verdicts, coroner's juries also often voiced their concerns about the availability of guns. For example, in a case involving a thirteen-year-old boy shooting his twelve-year-old friend, the jury declared: "From the evidence offered the jury are inclined to the belief that this is an accidental case . . . and [also] recommend that the police see to it that arrest and punishment under the law be meted out to people selling fire arms and to all individuals carrying fire arms unlawfully, also that the confiscation of said arms be made."⁴⁶

The death of Mary Radek did not involve a handgun, but according to the coroner's physician's initial report, her death appeared to be another form of "accidental" juvenile homicide; in this case, death by baseball.⁴⁷ According to the report, a twelve-year-old girl had thrown a baseball at Mary Radek, which hit her in the abdomen.⁴⁸ Although there are a couple of cases in the homicide database that involved children being killed after being hit accidentally in the head by baseball bats,⁴⁹ it seems highly unlikely that a twelve-year-old girl (or boy) could throw a ball hard enough to rupture another girl's appendix. The circumstances surrounding Mary's death appeared

⁴⁵ JANE ADDAMS, *THE SPIRIT OF YOUTH AND THE CITY STREETS* 60–61 (Univ. of Ill. Press 1972) (1909). She quoted the following article:

A party of boys, led by Daniel O'Brien, thirteen years old, had gathered in front of the house and O'Brien was throwing stones at Nieczgodzski in revenge for a whipping that he received at his hands about a month ago. The Polish boy ordered them away and threatened to go into the house and get a revolver if they did not stop. Pfister, one of the boys in O'Brien's party, called him a coward, and when he pulled a revolver from his pocket, dared him to put it away and meet him in a fist fight in the street. Instead of accepting the challenge, Nieczgodzski aimed his revolver at Pfister and fired. The bullet crashed through the top of his head and entered the brain. He was rushed to the Alexian Brothers' Hospital, but died a short time after being received there. Nieczgodzski was arrested and held without bail.

Id. at 61. According to the Chicago Homicide Database, Nieczgodzski was initially held over by the coroner's jury, but later acquitted in court. See Chicago Homicide Database, *supra* note 28, Case No. 1970.

⁴⁶ Inquest No. 56,848, Upon the Body of Hyman Seltzer, County of Cook, State of Illinois, on the 21 + 23 Day of Nov. 1910, Cook County Coroner's Inquest Records, 1871–1911 (available on microform at the Illinois Regional Archives Directory, Northeastern Illinois University, Chicago, Illinois).

⁴⁷ Inquest No. 55,849, Upon the Body of Mary Radek, County of Cook, State of Illinois, on the 2nd + 9th Days of Sept. 1910, Cook County Coroner's Inquest Records, 1871–1911, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ See Chicago Homicide Database, *supra* note 28, Case Nos. 8205 and 8580.

suspicious, and people from her neighborhood began to speak out about the case.

The newspaper descriptions of Mary's killer that appeared a week after her death made it sound as if one of today's so-called "superpredators" had been transported back in time. The *Chicago Daily Tribune* reported that the killer was "[o]ne 14-year-old girl in the neighborhood of Halsted and Fifteenth streets [who] is terrorizing a whole Bohemian settlement, according to the assertions of residents."⁵⁰ It added, "[t]he Bohemian residents of the neighborhood put the blame of the girl's death upon an older girl of a different nationality. They say they have appealed in vain for protection for their children to the police of the Maxwell street station."⁵¹ The article concluded with a terrifying description of the murder:

An older sister told of the death of the little girl. While she was playing in a vacant lot at the corner of Halsted and Fifteenth streets late Thursday afternoon, Aug. 30 with two other companions of the same age [8], they claim the older girl attacked them. The other girls ran away, but the Radek girl was unable to get away, and received blows on the head and stomach. Little Marin, 722 West Fifteenth street, one of the companions of the girl at the time of the attack, told the story last night. She said that the older girl first hit them all on the head with a baseball which she carried in her hand. Two of them ran away and when they turned around they claim they saw the big girl hitting the Radek child in the stomach with the ball in her hand. The mother of the accused girl denies that her daughter had anything to do with the death of Mary Radek.⁵²

It should be noted that this story, which a modern reader would assume to be front-page news, ran on page three, and the accused girl's name did not appear in the article.⁵³

The coroner's jury met the next day to determine the cause and circumstances of Mary Radek's death, and to decide what should be done with Verna Daly, the girl who had allegedly killed her.⁵⁴ There were only four witnesses at the inquest: Francis Radek, who was listed as a housewife and was probably Mary's mother; Lillie Marvan, who appears to have been a neighbor; David W. Carroll, the police officer who investigated the case; and Henry Reinhardt, the Coroner's Physician.⁵⁵ It is unclear why the neighborhood children,

⁵⁰ *Say Beating Killed Girl*, CHI. DAILY TRIB., Sept. 8, 1910, at 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Inquest No. 55,849, *supra* note 47.

⁵⁵ *Id.*

who, supposedly witnessed the brutal beating, including Mary's older sister, did not testify. In many other cases of juvenile homicide which we examined from this era, children did testify at inquest hearings.⁵⁶

The verdict of the coroner's jury offered a mixed message: Verna was responsible for Mary's death, but not entirely culpable for it. The jury declared:

From the evidence offered the Jury are of the opinion the result of a blow in the abdomen by a base ball, said thrown at the deceased with intent to do bodily harm by one Verna Daly living #729 W. 15th Street, on Aug. 30 1910. [T]he happening taking place in an Empty lot immediately across the street from the residence of the said Verna Daly. Owing to the extreme youth of the accused Verna Daly the Jury recommend that she be permitted to remain in the custody of her parents for the present [and] until the case is taken up by the Juvenile Court to which the police are requested to bring immediate notification.⁵⁷

Clearly, the jury did not think that this was a case of accidental homicide, but at the same time they believed that the girl belonged in the custody of her parents, not in jail, and that her case should be heard by the juvenile court, not the criminal court. Unfortunately, there are no extant juvenile court files from 1908, which makes it difficult, if not impossible, to know what ultimately became of Verna Daly.⁵⁸ Given what we know about the juvenile court's handling of girl's cases in this era, it is most likely that the court would have committed Verna for her minority to the State Reformatory for Girls at Geneva.⁵⁹

⁵⁶ See, e.g., Inquest No. 46,990, Upon the Body of Joseph Donnersberger, County of Cook, State of Illinois, on the 19th Day of Oct. 1908, Cook County Coroner's Inquest Records, 1871–1911; Inquest No. 56,848, Cook County Coroner's Inquest Records, 1871–1911, *supra* note 46; Inquest No. 58,337, Upon the Body of Alexander Griggs, Cook County, State of Illinois, on the 13th Day of Jan. 1911, Cook County Coroner's Records, 1871–1911.

⁵⁷ Inquest No. 55,849, *supra* note 47.

⁵⁸ There are approximately 2700 extant case files from the court's founding in 1899 until 1926, but it is not known why these select records were preserved. Every child who entered the juvenile court system was assigned a permanent case number and all his or her subsequent legal papers were filed under this number. The case files are impounded and researchers must receive permission from the presiding Chief Judge of the Cook County Juvenile Court to look at them. The records are held at the Cook County Circuit Court Archives, Richard J. Daley Center, Chicago, Illinois.

⁵⁹ See generally, ANNE MEIS KNUFFER, REFORM AND RESISTANCE: GENDER, DELINQUENCY, AND AMERICA'S FIRST JUVENILE COURT 79–98 (2001) (providing a comprehensive account of how in the early twentieth century the Cook County Juvenile Court handled cases of girl delinquency).

As this section has revealed, in the early twentieth century the coroner's jury, through exonerations and referrals to juvenile court, served as an institutional check that spared many children from being tried as adults. The coroner's jury, however, was only the first check in the flexible response system to juvenile homicide. Even if a coroner's jury recommended that a case be prosecuted, the state's attorney still had to convince the grand jury to issue a true bill. As we shall see, the state's attorney often had a difficult time securing indictments in cases of juvenile homicide, which may partially explain why prosecutors allowed the juvenile court to hear cases of children like Verna Daly.

C. THE JOSEPH DONNERSBERGER, JR. CASE AND THE ROLE OF THE GRAND JURY

I don't believe I'm going to live, mamma and I want you to let Frank McCarthy know that I forgive him for what he did. I want to let Joe McCarthy, too, know that I have no hard feelings against him. We all used to go to school together and I believe they are sorry for what happened to me,

declared Joseph Donnersberger, Jr., age thirteen, on Saturday, October 17, 1908, shortly before he died.⁶⁰ According to the *Chicago Daily News*, "Frank McCarthy . . . who inflicted the mortal wound with a paper cutter, sobbed bitterly at the juvenile court, where he is being held."⁶¹ Frank's twin brother, Joseph, was also involved in the stabbing, and the subsequent handling of the cases of these twelve-year-old boys reveals how in the early twentieth century the grand jury could act as a second institutional check against trying juveniles as adults.⁶²

All the press accounts led with the boy's forgiveness of his assailants, and they also all emphasized that not only had the boys gone to school together, but that their fathers, Anthony Donnersberger and Frank McCarthy, had grown up together and been friends for more than thirty years.⁶³ Adding to the drama was the fact that the accused boy's father was a police officer, to whom Joseph, as he lay dying in

⁶⁰ *Youth Forgives; Dies*, CHI. DAILY NEWS, Oct. 17, 1908, at 3. The *Chicago Daily Tribune* and the *Chicago Record-Herald* printed nearly verbatim accounts of Joseph's statements. See *Injured Boy Dies Forgiving*, CHI. DAILY TRIB., Oct. 18, 1908, at 3; *Boy Forgives and Dies*, CHI. REC.-HERALD, Oct. 18, 1908, at 5.

⁶¹ *Injured Boy Dies Forgiving*, *supra* note 60.

⁶² Chicago Homicide Database, *supra* note 28, Case No. 638.

⁶³ See *Youth Forgives; Dies*, *supra* note 60; *Injured Boy Dies Forgiving*, *supra* note 60; *Boy Forgives and Dies*, *supra* note 60.

the hospital, stated: "Have they sent you to take me home, Mr. McCarthy? The doctors say I'm dying, and I don't think I'll ever go home any more. I want you to tell Frank that I forgive him, and tell Joe there is no hard feeling. I know they feel bad about me, and that they are sorry I was hurt."⁶⁴ Policeman McCarthy, according to all accounts, after trying to console the boy's father, left the hospital in tears.⁶⁵

The reports of the stabbing were sketchy and contradictory. The *Chicago Record-Herald* said, "[t]he scuffle which resulted in the tragedy occurred when one of the McCarthys sought to take young Donnersberger's pencil box from him, according to statements made to the police. Frank McCarthy told the police that his brother was being worsted by the other boy and he went to his assistance and Donnersberger was stabbed."⁶⁶ Frank's brother Joseph told a different story. He explained that bullies had been chasing the brothers,

and we weren't trying to fight, but to get away from them. . . . My brother had the paper cutter in his hand—he was taking it home from school. . . . Somebody caught him and swung him around, and his right arm flew backwards. Joseph Donnersberger was standing near and the blade of the paper cutter cut him.⁶⁷

As the *Chicago Daily News* informed its readers, a coroner's jury, to be convened at the Donnersberger's home on October 19, would determine what would happen to Frank McCarthy.⁶⁸

As it turned out, the inquest hearing led the coroner's jury to recommend that both Frank and Joseph McCarthy "be held to the Grand Jury upon a charge of manslaughter until discharged by due course of law," although they also suggested that both boys "be admitted to bail."⁶⁹ At the hearing, fourteen witnesses testified, including eleven schoolboys from the neighborhood.⁷⁰ Henry Reinhardt, the coroner's physician, and the deceased boy's father and grandfather rounded out the list of witnesses.⁷¹ It is unclear why this coroner's jury thought that these boys should be tried as adults. There are a couple of possi-

⁶⁴ *Boy Forgives and Dies*, *supra* note 60.

⁶⁵ See *Youth Forgives; Dies*, *supra* note 60; *Injured Boy Dies Forgiving*, *supra* note 60; *Boy Forgives and Dies*, *supra* note 60.

⁶⁶ *Boy Forgives and Dies*, *supra* note 60.

⁶⁷ *Father is Unforgiving*, CHL. DAILY NEWS, Oct. 19, 1908, at 14.

⁶⁸ *Id.*

⁶⁹ Inquest No. 46,990, *supra* note 56.

⁷⁰ *Id.*

⁷¹ *Id.*

ble explanations. One possibility is that the boy's grandfather Joseph Donnerberger, "a prosperous real estate dealer and at one time president of the South Park board," might have influenced the jury.⁷² A second possibility has to do with the timing of this case; it appears that coroner's juries did not start regularly referring cases to the juvenile court until the Fall of 1910, about the time of the Mary Radek case. Thus, the McCarthy boys may have had a very different experience if their cases had occurred a couple of years later.

Even though the first institutional check in the legal system, the coroner's jury, did not stop the McCarthy boys from being tried as adults, other checks in the system—the grand jury and prosecutorial discretion—prevented this from happening. On November 8, 1908, the grand jury "no billed" Joseph, and two months later the State officially declined to prosecute Frank.⁷³ Both boys were spared from being tried and possibly convicted as adults, but the grand jury and the prosecutor also set them free. In the juvenile justice system, these boys would most likely have spent time in a reformatory, or at least been placed on probation.

A more detailed analysis of the grand jury's role in juvenile homicide cases needs to be written, but for our purposes in this essay we would like to stress only that in the early twentieth century, grand juries eliminated cases at a higher rate than today. According to a report by E.W. Hinton published in the *Illinois Crime Survey*, the grand jury in Cook County eliminated over thirty percent of all the felony cases it heard.⁷⁴ His research suggested that this rate of elimination may have had a great deal to do with the state's attorney, "as the state's attorney normally dominates the grand jury, and can obtain an indictment if he wishes it on a very slight showing."⁷⁵ This high rate of eliminations suggests that either the state's attorney did not think he had enough evidence to seek indictments aggressively in many cases, or perhaps that the grand jury exercised more power than Hinton attributed to it.

By the time that the *Illinois Crime Survey* was published in 1929, the flexible system of responding to juvenile homicide was beginning to break down, and the final section of this historical part of the essay

⁷² *Boy Forgives and Dies*, *supra* note 60.

⁷³ Chicago Homicide Database, *supra* note 28, Case No. 638.

⁷⁴ E.W. Hinton, *The Trial Courts in Felony Cases*, in *THE ILLINOIS CRIME SURVEY*, *supra* note 31, at 204–5.

⁷⁵ *Id.* at 206. See also Lashly, *supra* note 39, at 626 (noting that in murder cases, the grand jury no billed 12.55% of those charged with murder during 1926 and 1927).

briefly explores why it did, and what the consequences of this breakdown were for juveniles.

D. THE CASE OF MAJOR TUCKER AND THE BREAKDOWN OF THE FLEXIBLE LEGAL RESPONSE TO JUVENILE HOMICIDE

According to the police ledger, on August 4, 1926, Clifford Jackson, age sixteen, shot and killed Major Tucker, a forty-nine-year-old African American man.⁷⁶ Clifford, who had fired at some boys, hit Tucker by mistake.⁷⁷ Later that day, a coroner's jury held Clifford responsible together "with Wm. Weatherby, age 15, Rudolph Andrews, age 16, and Henry Stubbs, age 16, all colored, as accessories."⁷⁸ The Major Tucker case has many of the characteristics of late twentieth century American youth violence: a group of adolescent boys committed the offense, they were arrested as a group, and the use of a gun in the incident led to someone dying.⁷⁹ The fact that the boys were African Americans also raises questions about the disproportionate share of minorities in the American juvenile justice system, which has been a concern since the beginning of the twentieth century.⁸⁰ The legal response to the Major Tucker case partly reflected the flexible early twentieth century response to juvenile homicide that prevented most juveniles from being tried as adults, but it

⁷⁶ Chicago Homicide Database, *supra* note 28, Case No. 9156.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally, ZIMRING, *supra* note 5, at 17–31 (providing a comprehensive profile of American youth violence in the 1990's).

⁸⁰ See generally, EARL R. MOSES, *THE NEGRO DELINQUENT IN CHICAGO* (1936). As Moses calculated,

[i]n 1900 the Negro population of Chicago numbered 30,150, or 1.8 percent of the total population. Of the 8,056 male delinquents brought before the Juvenile Court of Cook County (Illinois) during the years 1900–1906, ten to seventeen years of age, 278 were Negroes, or 3.5 percent of the total delinquents brought into court. The Negro population of Chicago in 1910 numbered 44,103, or 2.0 percent of the total population. Negro male and female delinquents, however, had increased to 102 or 6.2 percent of the total delinquents (1636) for that year. There were 8,141 male delinquents, ten to seventeen years of age, brought before the Juvenile Court of Cook County during the years 1917–1923. Of that number 541 were Negroes, or 6.6 percent of the total male delinquents brought into court. In the decade from 1910 to 1920 the Negro population had increased to 109,594 or 4.1 percent of the total population. In 1920 Negro male and female delinquents had increased to 310, or 12.2 percent of the total delinquents (2550) for that year. By 1930 the Negro population had increased to 233,903 or 6.9 percent of the total population. In the last decade Negro male and female delinquents had increased to 21.2 percent (657) of the total (3095) delinquents for the year. A comparison of the percent increase in the population with the percent increase in delinquency shows that in recent years the relative increase has been far greater for the delinquents.

Id. at 13–15.



also foreshadowed the trend toward prosecuting more juveniles as adults.

The Major Tucker case revealed concurrent jurisdiction in action. Although all the boys involved were charged with murder, Rudolph Andrews and Henry Stubbs remained in the juvenile justice system, while the other two, Clifford Jackson and William Weatherby, entered the criminal justice system. On August 9, M.L. Kelly, whose position was similar to a police probation officer, filed delinquency petitions against Andrews and Stubbs, and the juvenile court declared that each boy “was and is incorrigible,” placed both in the Juvenile Detention Home on West Harrison Street, in the custody of Joseph L. Moss, the Chief Probation Officer, and finally appointed an attorney, Marie Anderson, to represent each boy.⁸¹ On February 9, 1927, Judge Victor Arnold continued the Andrews case, and ordered that Stubbs be placed on probation.⁸² There is no further information about Andrews in his juvenile court file, which means that he probably did not appear before the court again. In early October, Judge Mary Bartelme permanently discharged Henry Stubbs, almost eight months to the day on which he had been placed on probation.⁸³

Meanwhile, the state’s attorney charged Clifford Jackson with murder, and also sought to have William Weatherby indicted, presumably for murder.⁸⁴ In September, however, the grand jury no billed Weatherby.⁸⁵ Jackson was indicted the next month, but then “by agreement,” presumably with the state’s attorney’s office, his case was transferred by the trial court to the juvenile court.⁸⁶ Unfortunately, Clifford Jackson’s juvenile court file no longer exists, and it is impossible to discover what happened to him. Thus, all of the ju-

⁸¹ The information in this paragraph comes from the boys’ juvenile court files. See Juvenile Record #10,326, In the Matter of Rudolph Andrews, August 9, 1926, Cook County Circuit Court Archives, *supra* note 58; Juvenile Record #103,270, In the Matter of Henry Stubbs, August 9, 1926, Cook County Circuit Court Archives, *supra* note 58.

⁸² Juvenile Record #10,326, Cook County Circuit Court Archives, *supra* note 58; Juvenile Record #103,270, Cook County Circuit Court Archives, *supra* note 58.

⁸³ Juvenile Record #10,326, Cook County Circuit Court Archives, *supra* note 58; Juvenile Record #103,270, Cook County Circuit Court Archives, *supra* note 58.

⁸⁴ Chicago Homicide Database, *supra* note 28, Case No. 9156.

⁸⁵ *Id.*

⁸⁶ Indictment No. 41232, The People of the State of Illinois Versus Clifford Jackson, Rudolph Andrews and Henry Stubbs (Sept. 27, 1926). Although Andrews and Stubbs are listed in the indictment, the juvenile court had already found them delinquent. The page from the docket book, which included the information about this case, is available at the Cook County Circuit Court Archives, *supra* note 58. According to Lashly, trial courts certified six cases of murders to the juvenile court in 1926 and 1927, including five cases of “colored males.” Lashly, *supra* note 39, at 627.

veniles involved in the death of Major Tucker had very different experiences in the legal system. Andrews had his case continued by the juvenile court; Stubbs spent eight months on juvenile probation; Weatherby walked; and Jackson, the shooter, although indicted, was transferred to juvenile court. The case of Major Tucker reveals a wide range of possible outcomes in a case of juvenile homicide from the mid-1920's, none of which involved the juvenile being tried as an adult.

Yet, the mid-1920's were also a turning point in the handling of the cases of serious and violent offenders, as the state's attorney began prosecuting more juveniles as adults. This more aggressive prosecution of juveniles as adults set the stage for the Illinois Supreme Court to hear a series of cases to determine which court system—the juvenile or criminal—had jurisdiction over these cases of serious and violent offenders.⁸⁷ Ultimately, the Illinois high court legalized concurrent jurisdiction, granted the state's attorney the power to determine whether a child would be brought to juvenile or criminal court, and also stripped the juvenile court of its exclusive jurisdiction over children already in the juvenile justice system.⁸⁸

Before concluding this historical section of the essay it is worth examining the rhetorical path to the legalization of concurrent jurisdiction, since along its way the critics of the juvenile court created the myth that the juvenile court was never intended to hear the cases of juvenile felons. The Illinois Supreme Court drew upon this language to declare in the *Lattimore* case,

[i]t was not intended by the legislature that the juvenile court should be made a haven of refuge where a delinquent child of the age recognized by the law as capable of committing a crime should be immune from punishment for violation of the criminal laws of the state committed by such child subsequent to his or her being declared a delinquent child.⁸⁹

⁸⁷ See *People v. Fitzgerald*, 152 N.E. 542 (Ill. 1926); *People v. Bruno*, 179 N.E. 129 (Ill. 1931); *People v. Lattimore*, 199 N.E. 275 (Ill. 1935). In this period, many state legislatures were raising the maximum age jurisdiction of their juvenile courts, and also beginning to exclude some serious offenses, generally murder and other crimes punishable by death or life imprisonment. See Tanenhaus, *The Evolution of Transfer*, *supra* note 23, at 25.

⁸⁸ See Tanenhaus, *The Evolution of Transfer*, *supra* note 23, at 27–28 (discussing these cases).

⁸⁹ *Lattimore*, 199 N.E. at 276. In the same year, the Court of Errors and Appeals of New Jersey used much the same language about the juvenile court's mission, when it stated that "[i]t is inconceivable that the Legislature intended to make the juvenile court a sanctuary for juvenile felons." *Ex parte Daniecki*, 177 A. 91, 92 (N.J. Ch. 1935).

In the same year, Chief Justice Denis E. Sullivan of the Criminal Court used similar arguments in his campaign for an amendment to the states' juvenile law that would strip the juvenile court of jurisdiction over cases involving felonies.⁹⁰ Chief Justice Sullivan declared that the legal system was soft on crime, due to the fact that "[t]he out-dated Juvenile Court Act permits highly dangerous gunmen and thieves, or even murderers, to be accorded leniency intended only for bad boys or bad girls who have committed no serious crime and who are not habitual offenders."⁹¹ If this amendment had passed, the criminal court would have had sole jurisdiction over the cases of any boy or girl over ten years of age, accused of committing a felony. Thus, by the mid-1930's critics of the juvenile court were already calling it "outdated" and manufacturing the myth that the juvenile court was never intended to handle the cases of "today's" serious and violent offenders.

At the same time that this myth was being bandied about, defenders of the juvenile court countered this charge with the argument that historically the juvenile court, by transferring dangerous juveniles to the criminal court, had protected the public's safety and that judges would continue to do so. As the nation was mired in the Great Depression, critics as well as defenders of the juvenile court had reached a consensus that there was a class of juveniles who should be tried as adults.⁹² Yet, the participants in these debates vehemently disagreed over how large that class was, and whether the juvenile court or the state's attorney should determine which young people belonged to it. That debate continued over the course of the twentieth century, and has now entered the new millennium.

The flexible legal response to juvenile homicide, which depended upon a series of institutional checks against the aggressive prosecution of juveniles as adults, had begun to break down in the mid-1920's. Although more research needs to be done on the specific parts of this system, such as when exactly the influence of coroner's juries declined, the decision by the state's attorney to disregard

⁹⁰ See Frank H. Bicek, *The Juvenile Court*, 16 CHI. BAR REC. 221, 221 (1935); *Women Protest Juvenile Cases in Criminal Court*, CHI. DAILY NEWS, Apr. 18, 1935, at 23.

⁹¹ L. Mara Dodge, *Our Juvenile Court Has Become More Like a Criminal Court: A Century of Reform at the Cook County (Chicago) Juvenile Court*, 26 MICH. HIST. REV. 51, 60 (2000).

⁹² See Tanenhaus, *The Evolution of Transfer*, *supra* note 23, at 26-29. There were some defenders of the juvenile court, such as Judge Joseph Siegler of the Juvenile and Domestic Relations Court of Essex County, New Jersey, who argued that no juvenile should ever be tried as an adult. *Id.* at 29.

the unwritten gentlemen's agreement in order to prosecute more juveniles offenders as adults foreshadowed late twentieth century trends. The second half of this essay examines these contemporary practices.

PART II. THE RIGID RESPONSE TO JUVENILE HOMICIDE IN THE LATE TWENTIETH CENTURY

A. THE ORIGINS OF THE NEW TRANSFER REGIME

In the 1990's, in response to an alarming increase in juvenile violence, many states enacted tough transfer laws.⁹³ As the quotations from prosecutors at the beginning of this essay revealed, the myth that the juvenile court was never intended to deal with violent offenders became a common rallying cry of critics of the court. These cries grew to a fever pitch with the birth of the "superpredator" myth in late 1995. Using the sound bite "adult time for adult crime" as their mantra, critics of the court pushed for laws to make it easier to prosecute juveniles as adults.⁹⁴ Their successful efforts produced a

⁹³ In the decade from 1984 to 1994, the number of murders committed by youth tripled from 823 to 2320. The overall serious violent crime rate (including homicide, rape, robbery and aggravated assault) among youths aged twelve to seventeen also soared—from twenty-nine offenses per 1000 youth in 1986 to fifty-two in 1993. RICHARD A. MENDEL, AM. YOUTH POLICY FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 30–31 (2000). As Frank Zimring has demonstrated,

[t]he most important reason for the sharp escalation in homicide [among offenders thirteen to seventeen] was an escalating volume of fatal attacks with firearms. . . . That homicide increases are only gun cases has two important implications. First, it would require only a small number of attacks to change the death statistics during the 1985–1992 period. Because gunshot wounds are deadly, a relatively small number of woundings can produce a relatively large number of killings The second implication of the guns-only pattern is that the hardware used in many attacks seems to be the major explanation for the expanding rate rather than any basic change in the youth population involved in the assaults.

ZIMRING, *supra* note 5, at 35–36. The best introduction to theory and practice of transfer is THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 6. For a history of the statutory exclusion of specific offenses, including murder, see generally Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 6, at 83–144.

⁹⁴ MENDEL, *supra* note 93, at 30–31. It's hard to pinpoint who coined the phrase "adult time for adult crimes" but the phrase clearly permeated the political scene in the mid-1990's. In fact, virtually every major Republican gubernatorial candidate in the mid-1990's jumped on this bandwagon, including: Governor George Allen of Virginia, Governor Tom Ridge of Pennsylvania, Governor George Pataki of New York, Governor Pete Wilson of California, Governor William F. Weld of Massachusetts, and Governor John Engler of Michigan. See Laurence Hammack, *Compassion May Be Lost; Gov. Allen Accepts Report that Proposes*

legal response to serious and violent juvenile crime which flushed pre-teens, first-time offenders, and even non-violent offenders into an adult criminal court system that had all but abandoned the concept of rehabilitation. As a result of harsh mandatory minimum sentencing policies, the abolition of parole, and "truth-in-sentencing laws" which required convicted defendants to serve most or all of their prison terms, criminal court judges could no longer use youthfulness to mitigate sentences. Juveniles convicted in adult court were all but assured of receiving "adult time" for their crimes. In fact, juvenile transfers convicted of murder received longer sentences on average than their adult counterparts.⁹⁵ Under this rigid legal response system, the extreme youth of an offender could lead to an extreme sentence, in which a pre-teen could spend the rest of his or her life incarcerated for a crime committed before he or she had even reached puberty. By the mid-1990's, youth had ceased to be a mitigating factor in adult court, and instead had become a liability.⁹⁶

The new transfer laws differed from past practices. Historically, transfers had been reserved for older teens who were recidivists or who had committed especially heinous crimes. Since the United States Supreme Court's 1966 decision in *Kent v. United States*, judicial waiver had been the most common approach to transferring juveniles to the criminal court.⁹⁷ The *Kent* decision enumerated a list of substantive factors to guide judges in making transfer decisions, and many states simply adopted these standards in their juvenile codes verbatim or with minor modifications.⁹⁸ The 1990's revolution in the

Tougher Penalties on Juveniles, ROANOKE TIMES & WORLD NEWS, Oct. 6, 1995, at C1; *Gov. Ridge Announces Signing of Key Juvenile Justice Bill: 'If You Commit an Adult Crime, You Will Do Adult Time'*, PR NEWswire, Nov. 22, 1995; John R. Sorensen, *Pataki Plan on Juveniles Includes Longer Sentences in Adult Jails*, THE BUFFALO NEWS, Dec. 10, 1995, at 16A; *Morning Edition: Governor Pete Wilson of California Sets State Agenda* (National Public Radio broadcast, Jan. 9, 1996) (Transcript #1777-10 on file with author); *The Young Killers: Adult Crimes Warrant Adult Time*, WORCESTER TELEGRAM & GAZETTE, June 10, 1996, at A6; Judy Putnam, *Engler Proposes "Punks" Do "Adult Time For Adult Crimes;" "What Many of These Punks Need is Not a Social Worker but a Prison Cell,"* GRAND RAPIDS PRESS, July 27, 1995, at C3.

⁹⁵ On average, the maximum prison sentence imposed on transfers convicted of murder was 23 years and 11 months, nearly 2.5 years longer than the average maximum sentence for adults over age 18 who were convicted of murder. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 178 (1999).

⁹⁶ *Id.*

⁹⁷ 383 U.S. 541 (1966).

⁹⁸ These factors include the seriousness of the offense, prosecutive merit, the sophistication and maturity of the child, the child's past history of delinquency, responses to prior ju-

transfer laws, however, differed from past efforts to try more children as adults in two significant ways: 1) the decision to transfer was less often a judicial decision; it was now increasingly the province of prosecutors or the legislatures, and 2) younger children could now be tried as adults for a wider array of offenses.⁹⁹

Minority youth bore the brunt of this new crackdown on juvenile offenders. In 1997, for example, an estimated 8400 juveniles were waived from juvenile court to adult court by judges, and minority youth were much more likely to be transferred to the adult court system for all offense categories.¹⁰⁰ Although white youth made up fifty-seven percent of cases petitioned to juvenile court for offenses against persons, they represented only forty-five percent of such cases waived to adult court. African Americans comprised forty percent of all petitioned cases involving offenses against persons but fifty percent of waived cases. The overrepresentation of minority youth in transferred drug cases was even greater. While white youth made up fifty-nine percent of juvenile court drug cases, only thirty-five percent of all drug transfers involved white youth. African Americans constituted thirty-nine percent of juvenile court drug cases but sixty-three percent of those transferred to adult court.¹⁰¹

venile court efforts at rehabilitation, and the ability of the juvenile court's dispositions to rehabilitate the child and protect the public. *Id.* at 566–67.

⁹⁹ Twenty-three states now have at least one provision, typically governing children charged with murder or other violent felonies, which places no bottom age limit for juveniles to be transferred to criminal court. PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER PROVISIONS 15 (1998). Legislative exclusion, however, is not entirely a late twentieth century phenomenon. As Tanenhaus has written:

more research needs to be done into the question of how many children's cases were actually legislatively excluded from juvenile courts in this period [i.e. the 1920's and 1930's]. By 1930, for example, twenty state legislatures had excluded at least some offenses. They included: capital crimes (California [if aged eighteen to twenty-one], Delaware and Vermont); crimes punishable by death or life imprisonment (Georgia, Indiana, Iowa, Massachusetts, Montana, New York [except in Chautauqua County]); murder (New Jersey and Pennsylvania) and felonies (Idaho and Utah). The other states' excluded offenses did not fit into the above categories. In Florida, rape, murder, manslaughter, robbery, arson, burglary, or attempts to commit one of these crimes were excluded. Louisiana excluded capital crimes as well as attempted rape, but only capital crimes were excluded in the Orleans Parish. New Hampshire excluded capital and certain other offenses. In North and South Carolina, any felony punishable by ten or more years imprisonment was excluded. Rhode Island excluded murder as well as manslaughter. In Tennessee, crimes punishable by life imprisonment or death were excluded, but in some counties only murder and rape were excluded.

Tanenhaus, *The Evolution of Transfer*, *supra* note 23, at 42.

¹⁰⁰ EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME, 12 (2000), available at www.buildingblocksfor youth.org/justiceforsome/jfs.html.

¹⁰¹ *Id.* at 12–13. In Cook County, Illinois, recent statistics indicate an even more disproportionate impact of a select drug transfer law. In 1985, the Illinois General Assembly

Judicial waivers, however, represent only the tip of the iceberg of transferred juveniles. But because prosecutorial waivers and legislative waivers are more difficult to track, it is currently not known how many total youths under eighteen years of age are prosecuted as adults each year; at least one estimate places the number as high as 200,000.¹⁰² What is clear, however, is that as a result of the new transfer laws of the 1990's, the bulk of transfer decisions are now made by prosecutors or legislatures. A recent multi-jurisdictional study of adult courts in eighteen large urban counties revealed that eighty-five percent of all transfer decisions during a six-month period from January 1, 1998, to June 30, 1998, were made by prosecutors (forty-five percent) or legislatures (forty percent) instead of judges.¹⁰³ Again, minority youth comprised the overwhelming majority of transfers. During the study period, eighty-two percent of all cases that were filed in adult courts involved minority youth; fifty-seven percent of the total were African Americans, twenty-three percent were Latinos, and the rest were Asians and American Indians.¹⁰⁴ In all offense categories, the highest percentage of youths prosecuted as adults were African American, including more than eighty-five percent of drug charges and fifty-seven percent of violent offenses.¹⁰⁵ African Americans (forty-three percent) and Latinos (thirty-seven percent) were also more likely to receive a sentence of incarceration than white (twenty-six percent) youth.¹⁰⁶

passed a law which made the crime of drug dealing within 1000 feet of school property an "automatic transfer" offense for juveniles aged fifteen and older. The law was then amended to include drug dealing within 1000 feet of public housing property. Data recently compiled by the Cook County Public Defender's Juvenile Transfer Advocacy Unit shows that in the past year, 390 of the 393 youth who were transferred pursuant to the laws were African American and Latino. See Marc Mauer & Steven Drizin, *Transfer Laws Victimize Fairness*, CHI. SUN-TIMES, Dec. 27, 2000, at 41. These results were entirely predictable given that the population of the Chicago Housing Authority, the largest owner of public housing property in Cook County, is overwhelmingly minority, and that more minority youths live within 1000 feet of a school in the Cook County than do whites. See Sarah Karp, *State Drug Law Hits City Teens, Minorities*, CHI. REP., May, 2000, at 3.

¹⁰² POE-YAMAGATA & JONES, *supra* note 100, at 12. See also SNYDER & SICKMUND *supra* note 95, at 106. Not all of the estimated 200,000 youths under eighteen who are prosecuted as adults each year are "transfers." Many of these youths come from the thirteen states where the upper age limit for juvenile court jurisdiction is fifteen or sixteen, meaning that their cases originate in adult court and that they are considered "adults" as soon as they are arrested for a crime. *Id.*

¹⁰³ Jolanta Juszkievicz, *Youth Crime/Adult Time: Is Justice Served?*, BUILDING BLOCKS FOR YOUTH, Feb. 2001, at 15, available at www.buildingblocksforyouth.org.

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 18.

New York, Florida, and Texas had laid the groundwork for the transfer revolution of the 1990's.¹⁰⁷ New York's Juvenile Offender Law, passed in 1978, in the wake of a high profile double homicide committed by fifteen-year-old Willie Bosket, was a watershed event in the history of transfer. Bosket had shot and killed two men on the subway and wounded another. At the time, the maximum punishment for his crimes was only five years. Two days after Willie was sentenced, Governor Hugh Carey, in the midst of a tight re-election battle in which his opponent was labeling him as "soft on crime," embraced a new law proposing to try more juveniles as adults. A week later, Carey called the legislature back into special session and the Juvenile Offender Act was born. It was the first of the so-called automatic transfer or legislative waiver laws, requiring that prosecutors try kids as young as thirteen as adults for murder and imposing similar adult-like penalties on conviction.¹⁰⁸

Florida's pioneering contribution to the history of transfer laws began in earnest in 1981 with the first of a series of laws which gave prosecutors the power over the decision to transfer children to the adult criminal courts for prosecution.¹⁰⁹ In 1979, Florida enacted limited prosecutorial waiver legislation but soon amended it in 1981 to give prosecutors nearly unfettered discretion to transfer sixteen and seventeen-year-olds to the adult court system. Prosecutors could file a criminal information against any sixteen or seventeen-year-old charged with any violation of Florida law if in their "judgment and discretion, the public interest requires that adult sanctions be imposed."¹¹⁰ Prosecutors could also "direct file" in criminal court against children aged fourteen and older who had previously been adjudicated delinquent of one of several violent felonies and who were subsequently charged with such an offense.¹¹¹ Finally, Florida bor-

¹⁰⁷ On changing state legislation in the 1970's and 1980's, see CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 169-177 (1998).

¹⁰⁸ Willie Bosket's story and the birth of New York's Juvenile Offender Law are chronicled in FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* 226-27 (1995). See also SIMON I. SINGER, *RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM* 1-20 (1996).

¹⁰⁹ Florida's experience with prosecutorial waiver was first analyzed by Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991). For a more recent critique of Florida's system, see VINCENT SCHIRALDI & JASON ZIEDENBERG, *THE FLORIDA EXPERIMENT: AN ANALYSIS OF GRANTING PROSECUTORS DISCRETION TO TRY JUVENILES AS ADULTS* (1999), available at www.cjcj.org.

¹¹⁰ FLA. STAT. ANN. § 39.0402(e)(4) (West 1988).

¹¹¹ *Id.*

rowed a page from New York's statute books, passing an automatic transfer law that required prosecutors to seek an indictment of any child, regardless of age, who is charged with a life felony or a capital crime. Prosecutors had the discretion over what charges to bring, but once they decided to charge a life felony or a capital crime, they had no choice but to take the case before a grand jury.¹¹²

In 1994, Florida greatly expanded its prosecutorial waiver statutes, giving prosecutors the power to file charges directly in criminal court against children aged fourteen and above accused of a wide array of person, property and weapons offenses.¹¹³ The net effect of these changes was both instantaneous and dramatic. In 1995, Florida prosecutors waived 7000 juveniles to adult court, nearly as many as the 9700 juveniles waived by judges throughout the rest of the country.¹¹⁴

Unlike Florida and New York, which chose to expand the number of children transferred to adult court by taking the decision out of the hands of judges and giving it to prosecutors or legislators, Texas's solution to juvenile violent crime was the Texas Determinate Sentence Act, a law which foreshadowed what would later become known as "blended sentencing."¹¹⁵ Passed in 1987, this sentencing scheme applies to violent juveniles and habitual offenders, aged ten to sixteen, charged with any of six serious felonies (capital murder, murder, aggravated sexual assault, aggravated kidnapping, deadly assault on a law enforcement officer or a court participant, and attempted capital murder).¹¹⁶ The decision to invoke the statute is entirely entrusted to the prosecutors. If a prosecutor decides to invoke the statute, he presents the delinquency petition to a grand jury,

¹¹² FLA. STAT. ANN. § 39.0205(c) (West 1988).

¹¹³ FLA. STAT., ANN. § 985.227 (West 2002) enabled prosecutors to file directly in the criminal court against fourteen-years-olds charged with murder; manslaughter; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; aggravated battery; lewd or lascivious assault or act in the presence of a child; arson; armed burglary; burglary involving damage to a dwelling or structure; grand theft; carrying, displaying, using, threatening, or attempting to use a weapon during the commission of a felony; unlawful throwing, placing, or discharging of a destructive device or bomb. GRIFFIN ET AL., *supra* note 99, at A21.

¹¹⁴ SCHIRALDI & ZIEDENBERG, *supra* note 109.

¹¹⁵ TEX. FAM. CODE ANN. §§ 53.045, 54.04(d)(3) (Vernon 1996); Robert O. Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 TEX. TECH L. REV. 1897 (1990); Robert O. Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile Determinate Sentencing Proceedings as an Alternative to Criminal Prosecutions*, 19 ST. MARY'S L.J. 943 (1988).

¹¹⁶ TEX. FAM. CODE ANN. § 53.045(a) (Vernon 1996).

which may approve the petition in the same manner that the grand jury votes on the presentment of an indictment. Once a petition is approved, juveniles receive the same substantive and procedural rights as adult criminal defendants, including the right to a jury trial. Upon conviction, juveniles begin their determinate sentences in Texas Youth Commission facilities, and at age eighteen, a court conducts a sentencing review hearing to decide whether they will serve out the duration of their time in the juvenile correctional system or be sent to the adult prison system to finish their sentences.¹¹⁷ In 1995, the Texas legislature expanded from the original list of six crimes to thirteen offenses for which youths could receive determinate sentences, and increased the maximum length of determinate sentences from thirty to forty years.¹¹⁸

Most states today use a combination of judicial waiver, legislative waiver, prosecutorial waiver, and blended sentencing to deal with violent juvenile offenders.¹¹⁹ While judicial waiver statutes are still the most common transfer provisions, legislative waivers and prosecutorial waivers now make up the bulk of transferred juveniles. These two more rigid transfer schemes are concerned generally with only two of the *Kent* factors—the age of the offender and the seriousness of the offense. None of the factors relating to the child's potential for rehabilitation is relevant. Prosecutorial waiver statutes generally do not provide any guidelines for the exercise of prosecutorial discretion, giving prosecutors carte blanche over when to file cases in criminal court. Unlike judicial waiver decisions, which can be reviewed by appellate courts, prosecutorial waiver decisions are not subject to judicial review.¹²⁰ Nor are the charging decisions of prosecutors that trigger automatic transfers. The only check against abuses of prosecutorial discretion in both statutory schemes is the grand jury, which today, unlike the grand juries at the turn of the century, rarely, if ever, rejects prosecutorial requests for charges.

Earlier in this essay, we argued that in the formative years of the Cook County Juvenile Court, a series of institutional checks against the aggressive prosecution of juveniles as adults served to limit the

¹¹⁷ Dawson, *supra* note 115 at 984–999; TEX. FAM. CODE ANN. § 54.11(k) (Vernon 1996).

¹¹⁸ TEX. FAM. CODE ANN. §§ 53.045, 54.04(d)(3).

¹¹⁹ GRIFFIN ET AL., *supra* note 99, at 1. See also Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 6, at 45–81.

¹²⁰ Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 140 (1998).

numbers of juvenile offenders who were tried as adults. The case of Mary Radek highlighted the important role of the coroner's jury in deflecting juvenile cases from the criminal court. The Joseph Donnensberger, Jr. case illustrated the role that the grand jury assumed in rejecting criminal charges in cases brought by prosecutors against children. The Major Tucker case demonstrated that even in cases that originated in criminal court, criminal court judges had the power to either send juveniles back to the juvenile court or to impose juvenile sanctions.¹²¹

In this section of the paper, we will use three contemporary cases to demonstrate what happens to juvenile offenders under the new transfer regime, a scheme that has few, if any, checks on prosecuting children as adults and leaves judges and jurors with few options but to convict juvenile defendants in adult court and sentence them harshly. The plight of today's violent juvenile offender is dramatically illustrated by the cases of three African American children: Lacreasha Murray, Nathaniel Abraham, and Lionel Tate.¹²²

1. *The Case of Lacreasha Murray and the Problem of Police Interrogations*

In late May 1996, the Travis County District Attorney's Office charged eleven-year-old Lacreasha Murray with capital murder in connection with the death of two-year-old Jayla Belton. Belton, who died of massive injuries, including a ruptured liver and several broken ribs, had been left in the care of Lacreasha's grandparents, who operated an unlicensed child-care facility in their home. Police suspected Lacreasha because she had been in Jayla's company near the time of her death, and an autopsy report revealed that the toddler's injuries would have caused death within minutes of their infliction.¹²³

¹²¹ Twenty-three states today provide some mechanism by which a juvenile who is being prosecuted as an adult in criminal court can petition the criminal court to transfer the case back to the juvenile court either for adjudication or sentencing. As of 1998, these "reverse waiver" provisions were operational in twenty of the thirty-five states that had either prosecutorial waiver or automatic transfer statutes. GRIFFIN ET AL., *supra* note 99, at 9-10. See also Feld, *supra* note 93, at 119-124.

¹²² In the historical part of the essay, we referred to the cases by the names of the victims. These early twentieth century cases did not generate much press coverage, and the stories were framed in terms of the victim, not the accused. In this section we use the names of the accused children, since these cases received extensive media coverage and the accused, not the victim, became the focus of the story. The tendency to make the accused, not the victim, the focus of the story is not a new development. See, e.g., DALE, *supra* note 31, at 20.

¹²³ Enedelia J. Obregon, *County Seeks Rare Indictment on Girl in Toddler's Death*, AUSTIN AM.-STATESMAN, June 13, 1996, at B1; Dave Harmon, *Jury Selection Today in Girls' Trial*, AUSTIN AM.-STATESMAN, July 30, 1996, at 01.

In announcing the charges of murder and injury to a child, District Attorney Ronnie Earle declared, "This case appears to be unprecedented in our local history . . . it just shows that Austin is not immune from the hideous malady sweeping the country of children killing children."¹²⁴ In June, Lacrosha became the youngest girl indicted for capital murder when a grand jury approved Earle's petition to try her under the juvenile court system's Determinate Sentence Act. Capital murder charges were automatic under Texas law because the victim was under the age of six. Due to her age, Murray was ineligible for the death penalty, but she could receive a maximum sentence of forty years in prison, a sentence that Earle vowed to seek on the day the indictment was returned.¹²⁵

The prosecution's case against Lacrosha rested primarily on statements that she had given to Austin detectives during a controversial two hour and thirty minute videotaped interrogation. The detectives interrogated her at the Texas Baptist Children's Home, a shelter in which social workers had placed Lacrosha after Jayla's death. During the questioning, Lacrosha did not have the assistance of her parents or other relatives, an adult guardian, or an attorney. Detectives began the interview by reading Lacrosha her *Miranda* rights off a pre-printed card. Instead of asking her to explain back to them what the rights meant, they accepted her simple affirmation that she understood them.

After inducing Lacrosha to admit that she was the only person in the back room where Jayla was sleeping on the afternoon of her death, the detectives told her that a doctor "with over twenty years of experience" had found that the baby sustained her injuries during the time that Lacrosha was in the back room. Throughout the interrogation, Lacrosha denied having any knowledge of how the baby was injured, even stating on one occasion, "I didn't do nothing, I promise to God." Unable to make her crack, one detective suggested to Lacrosha that the baby may have been hurt in an accident, repeatedly telling Lacrosha that perhaps the baby slipped out of her arms while she was carrying her. After repeated prompting, Lacrosha finally told the detectives what they wanted to hear—when she had picked up the baby to take her to her grandpa, the baby fell and hit her head on the floor. The detectives then asked Lacrosha if she kicked the baby and after

¹²⁴Bob Banta, *Girl, 11, Arrested in Toddler's Death, Child Is Youngest in Recent Memory in Travis County*, AUSTIN AM.-STATESMAN, May 31, 1996, at A1.

¹²⁵Enedelia J. Obregon, *Girl, 11, Should Get 40 Years, Earle Says*, AUSTIN AM.-STATESMAN, June 15, 1996, at B1; *Q & A with Ronnie Earle And Staff*, AUSTIN AM.-STATESMAN, Aug. 18, 1996, at F2.

more prompting, Lacrosha says: "Don't know, maybe . . . I was trying to run back and pick her up, probably I was trying like, my feet probably kicked against her side or something."¹²⁶

Detectives then typed up the "confession" and presented it to Lacrosha to read. "Can you read pretty good?" a detective asked Lacrosha. "No," she responded, "but I try hard." As she struggled to read the statement, Lacrosha asked "what is a home-a-seed?" The detectives corrected her pronunciation. She then asked again "what's that?" Her question went unanswered.¹²⁷

The detectives continued to interrogate her because her statement did not account for all the bruising on the toddler's body. They prodded her for more details of the beating and repeatedly accused her of not telling the truth. Finally, Lacrosha refused to answer any more questions, bringing the interrogation to a halt.¹²⁸

Before her trial, Lacrosha's public defender sought to have her statements suppressed, arguing that Lacrosha did not understand her *Miranda* warnings and that the statements were the product of suggestive questioning. The trial court, however, held that Lacrosha was not in police custody at the time when the statements were made, and admitted her statements into evidence. The State's case consisted of the videotape and testimony from medical experts that the injuries sustained by Jayla were not accidental in nature and that they occurred within a few hours of her death, the very time period when she was in a room frequented by Lacrosha. A psychologist hired by the State testified that Lacrosha "could hold her own under police questioning," but told the jury, during cross-examination, that he did not believe that Lacrosha intended to kill Jayla.¹²⁹ As a result of this testimony, prosecutors backed away from the capital murder charge, urging jurors to convict her of the lesser charge of intentional injury to a child, a charge which also carries the same maximum sentence of up to forty years in prison.¹³⁰ After deliberating for two days, the jury

¹²⁶ A complete copy of the transcript of Lacrosha's interrogation on May 29, 1996 can be found at <http://www.peopleoftheheart.org>, a website devoted to her case.

¹²⁷ *Id.*

¹²⁸ *Id.* Portions of Lacrosha's interrogation also appeared in news articles. See, e.g., Bob Herbert, *In America: A Child's Confession*, N.Y. TIMES, Nov. 15, 1998, §4, at 15; Polly Ross Hughes, *Home at Last; After Second Conviction Is Overturned in Death of Toddler, Teenager Awaits Word on Third Trial*, HOUSTON CHRON., July 4, 1989, at 1.

¹²⁹ Dave Harmon, *Lesser Verdict Is Pursued in Girl's Trial*, AUSTIN AM.-STATESMAN, Aug. 6, 1996, at A1.

¹³⁰ *Id.*

convicted Lacreasha of the lesser charges of intentionally injuring a child and criminally negligent homicide.¹³¹

Under Texas Determinate Sentencing Act, the jury could sentence Lacreasha from probation to forty years in prison. They split the difference and sentenced her to a twenty-year term. Under the terms of the “blended sentence,” Lacreasha would have to spend at least three years in a juvenile prison before becoming eligible for parole. If she was not rehabilitated, she would have to remain in the juvenile prison until age twenty-one, and could then be transferred to an adult prison to serve out the remainder of her sentence.¹³²

Lacreasha’s conviction was only the first chapter in a legal saga that was to take many twists and turns. In a rare move, just two months after presiding over her jury trial, Judge John Dietz granted a motion for a new trial. He granted the motion after hearing a day and a half of testimony about the unfairness of the trial, focusing largely on the ineffective representation provided by Lacreasha’s trial attorney. Dietz told the stunned observers in the courtroom that he was granting a new trial on his own motion, not the defense’s motion, declaring, “this system is an adversarial system, designed to search for the truth In this situation, I have to tell you, I have cause to question as to whether or not justice is served.”¹³³ District Attorney Ronnie Earle, in the midst of a hard fought reelection campaign, was so taken aback by the ruling that he remarked “Excuse me while I get back up off the floor This is a nightmare. You couldn’t have shocked me more if you told me that Jesus Christ came back.”¹³⁴

Prosecutors re-tried Lacreasha for Jayla’s death. The second trial allowed both sides to correct the mistakes of the first trial. The prosecution beefed up its motive evidence, suggesting that the motive for the killing was Lacreasha’s anger at having to clean up the vomit of Jayla who had been sick when she arrived at the Murray home that morning. A new expert, Dr. Vincent DiMaio, the Medical Examiner of neighboring Bexar County, testified that Jayla had been stomped to death, telling jurors that the tread pattern on Murray’s shoes

¹³¹ Dave Harmon, *Girl Found Guilty of Toddler’s Death*, AUSTIN AM.-STATESMAN, Aug. 8, 1996, at A1.

¹³² Dave Harmon, *Girl Gets 20 Years in Death of Toddler*, AUSTIN AM.-STATESMAN, Aug. 10, 1996, at A1.

¹³³ Juan R. Palomo, *Murray Gets Retrial in Girl’s Death*, AUSTIN AM.-STATESMAN, Oct. 3, 1996, at A1.

¹³⁴ *Id.*

seemed to match bruises left on Jayla's torso perfectly.¹³⁵ The defense, who had failed to call any expert witnesses at Lacreasha's first trial, countered with an expert of its own. Dr. Linda Norton, a Dallas pathologist, testified that Jayla was a chronically battered child.¹³⁶ Dr. Norton disagreed with the State's evidence about the time of the injuries, finding that Jayla's injuries could have been inflicted hours before her death and that many of the bruises were a result of the efforts by doctors in the emergency room to revive her through CPR. Dr. Norton also disputed the testimony that the two parallel marks on Jayla's torso were caused by a shoe, and stated that a broom handle or belt were more likely to have caused them.¹³⁷

Despite the vigorous defense put on by her new lawyers, Lacreasha was convicted a second time of intentionally injuring a child. This time around, however, Judge Dietz sentenced her to twenty-five years in prison, a sentence to which both the prosecution and the defense had agreed.¹³⁸

After her second conviction, and during the appeal, Lacreasha's case became a cause celebre. Barbara Taft, a legal secretary at a prestigious Austin law firm, quit her job and began working full-time on Lacreasha's case. She set up a website and organized monthly marches to protest her conviction.¹³⁹ *New York Times* columnist Bob Herbert wrote a series of articles, which were highly critical of the role of police and prosecutors in the case, and made a strong argument that Lacreasha was innocent.¹⁴⁰ The television news magazine show *60 Minutes* did a piece on the case entitled "Juvenile Injustice?" in which correspondent Mike Wallace got the Medical Examiner, Dr.

¹³⁵ Dave Harmon, *Murray's Shoe Matches Marks, Examiner Says*, AUSTIN AM.-STATESMAN, Feb. 4, 1997, at B1.

¹³⁶ Judge Dietz, in an interview with Mike Wallace of CBS's 60 Minutes, took the blame for the defense's failure to call any experts, claiming that he did not authorize the defense to spend the money needed to hire an expert. *60 Minutes: Juvenile Injustice* (CBS television broadcast, June 20, 1999), available at 1999 WL 16209064 [hereinafter *60 Minutes*].

¹³⁷ Dave Harmon, *Witness: Toddler Had Abusive History*, AUSTIN AM.-STATESMAN, Feb. 13, 1997, at B1.

¹³⁸ Dave Harmon, *Jury Finds Murray Guilty in Second Trial*, AUSTIN AM.-STATESMAN, Feb. 18, 1997, at A1.

¹³⁹ Polly Ross Hughes, *Legal Secretary Fights for Girl, Now 15, Accused of Killing Tot*, HOUSTON CHRON., July 4, 1989, at 22.

¹⁴⁰ See, e.g., Bob Herbert, *In America: A Travesty in Texas*, N.Y. TIMES, Apr. 18, 1999, § 4, at 19; Bob Herbert, *In America: Truth in Travis County*, N.Y. TIMES, Nov. 26, 1998, at A39; Bob Herbert, *In America: Without Evidence*, N.Y. TIMES, Nov. 22, 1998, § 4, at 17; Bob Herbert, *In America: How Did Jayla Die?*, N.Y. TIMES, Nov. 19, 1998, at A35; Bob Herbert, *In America: A Child's Confession*, N.Y. TIMES, Nov. 15, 1998, § 4, at 15.

Vincent DiMaio, to back away from his testimony that the marks on Jayla's torso were a perfect match to the tread of Lacreasha's shoe.¹⁴¹

On April 15, 1999, the Court of Appeals of Texas reversed Lacreasha's conviction, ruling that the trial court had erred when it admitted Lacreasha's recorded and written statements into evidence at her trial.¹⁴² The Court took issue with the trial court's finding that Lacreasha was not in custody at the time of her interrogation, holding that "it is appropriate for Texas courts to consider the age of the juvenile in determining whether the child is in custody."¹⁴³ The appropriate standard, wrote the Court, is "whether, based upon objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted."¹⁴⁴ Looking at this question through the eyes of Lacreasha, an eleven-year-old girl who had never been through the legal system before, who was isolated and alone throughout the interrogation, who was the target of the police investigation, and who was never told she was free to leave or that she could call her grandparents, the Court ruled that Lacreasha was in custody at the time of the interrogation.¹⁴⁵

On April 21, 1999, after serving three years in state custody for a crime she still adamantly insists she did not commit, Lacreasha Murray was freed from the Texas Youth Commission.¹⁴⁶ As of the time of this writing, prosecutors still have not decided whether they plan on trying her for a third time.¹⁴⁷ In the meantime, Lacreasha's defense attorneys have proffered new forensic evidence: magnified slides from Jayla's autopsy that show that her injuries occurred sev-

¹⁴¹ 60 Minutes, *supra* note 136. See also Diane Holloway, *TV Show Questions Murray Conviction; In '60 Minutes' Piece*, AUSTIN AM.-STATESMAN, Jan. 17, 1999, at B1.

¹⁴² *In re L.M.*, 993 S.W.2d 276 (Tex. App. 1999). See also Leah Quin, *Lacreasha Case Overturned, Court Rules Interview with Police Inadmissible*, AUSTIN AM.-STATESMAN, Apr. 16, 1999, at A1; *Interrogating Children*, WASH. POST, Apr. 20, 1999, at A22.

¹⁴³ *In re L.M.*, 993 S.W.2d at 289.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 291. Texas law requires that before police may interview a child who is in police custody, officers must take the child before a magistrate to determine that the child is capable of understanding his *Miranda* rights and of knowingly and intelligently waiving them. TEX. FAM. CODE ANN., §51.095 (Vernon 1996). In the wake of the Lacreasha Murray case, Texas legislators passed a new law, dubbed "The Lacreasha Murray" law which made clear that children in the custody of the Department of Protective and Regulatory Services are considered "in custody" and must be taken to a Magistrate before being questioned. Juan B. Elizondo, Jr., *Lacreasha Law Clears Bush's Desk*, AUSTIN AM.-STATESMAN, June 20, 1999, at B1.

¹⁴⁶ John W. Gonzalez, *Accused Child-Killer Released to Go Home; Teen Awaits 3rd Trial in Tot's Beating Death*, HOUSTON CHRON., Apr. 22, 1999, at 36.

¹⁴⁷ Polly Ross Hughes, *Home at Last; After Second Conviction Is Overturned in Death of Toddler, Teenager Awaits Word on Third Trial*, HOUSTON CHRON., July 4, 1999, at 1.

eral hours before she died during a time-frame when she was not in the care of Lacrosha. They believe that this evidence clears Lacrosha of any crime.¹⁴⁸

The Lacrosha Murray case reveals not only a potential miscarriage of justice (*i.e.* the real possibility that an innocent person had been sentenced to twenty-five years in prison) but also demonstrates the inherent problems raised by prosecuting children as if they were adults.¹⁴⁹ Her case raises disturbing questions about police interrogations of children, and suggests the need for reforms in this early step in the legal process.¹⁵⁰

¹⁴⁸ Leah Quin, *Microscope Might Come to LaCresha's Aid; Cells Show Toddler Who Died Was Hurt Before Girl Saw Her, Expert Says*, AUSTIN AM.-STATESMAN, Oct. 25, 2000, at A1.

¹⁴⁹ On the inherent problem in trying children as adults, see YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter YOUTH ON TRIAL].

¹⁵⁰ On the eve of the centennial of the juvenile court, in July 1998, the Cook County court system received a wake-up call about one of the special problems inherent in interrogating children—the increased risk of false confessions. This wake-up call, the Ryan Harris case, is said to have “come to symbolize how poorly the justice system handles kids.” On July 27, 1998, an eleven-year-old girl named Ryan Harris disappeared. Her body was discovered less than twenty-four hours later only two blocks from where she was last seen. She had been badly beaten about the head, her underpants stuffed in her mouth in an apparent attempt to gag her, and there was evidence she had been sexually assaulted. On Sunday, August 9, 1998, the Chicago Police charged two boys, aged seven and eight, with the murder of Ryan Harris in a delinquency petition with first-degree murder. According to the police, the boys gave statements that contained details of the crime that only the true killers would have known after being interrogated by detectives without a parent, guardian or attorney by their side. Three weeks later, in a stunning move, prosecutors announced that they were dropping charges against the boys because the crime lab had discovered semen on the girl’s underpants. DNA found on Ryan Harris was later shown to match perfectly with the DNA of Floyd M. Durr, an adult already charged with sexually assaulting three other young girls in the Englewood neighborhoods. In the wake of the Ryan Harris case, the Illinois General Assembly passed a new law requiring that all children under the age of thirteen who are suspects in homicides and sexual assault cases must have an attorney present with them before police may interrogate them. A bill to require that all interrogations of suspects in homicide cases be videotaped was also introduced in the Illinois General Assembly but has so far failed to be enacted into law. For information about the Ryan Harris case and other Illinois cases involving children and adults who may have falsely confessed to murder and the need to videotape custodial interrogations, see Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois’ Problem of False Confessions*, 32 LOY. U. CHI. L.J. 335 (2001). See also Marla Donato, *2 Boys, 7 and 8, Cited in Killing*, CHI. TRIB., Aug. 10, 1998, at 1, available at 1998 WL 28844384; Abraham McLaughlin, *Easing Get-Tough Approach on Juveniles: Chicago, Backing the National Trend, Stresses Rehabilitation Over Punishment for the Very Young*, CHRISTIAN SCI. MONITOR, Aug. 16, 1999, at 1, available at 1999 WL 5381608; *Metro Briefs*, CHI. SUN-TIMES, July 30, 1998, at 20, available at 1998 WL 5591543; Maurice Possley, *Police Reports Could Aid Boys: How Cops Built Case; Adult Male Listed as Early Suspect*, CHI. TRIB., Aug. 16, 1998, at 1, available at 1998 WL 2886101; Maurice Possley & Steve Mills, *Tests Find Semen on Girl’s Clothes*, CHI. TRIB., Sept. 5, 1998, at 1, available at 1998 WL

2. *The Lionel Tate Case and the Problem of Mandatory Sentencing*

Six-year-old Tiffany Eunick died on July 28, 1999 after playing for much of the day with twelve-year-old Lionel Tate, a 166-pound boy who claimed that he had been practicing professional wrestling moves on the girl as they played in his Pembroke, Florida home. The medical examiner's findings did not support Lionel's claims that he and Tiffany were involved in innocuous roughhousing. Lionel's story that he had picked up Tiffany in a bear hug while they were playing tag and accidentally hit her head on a coffee table did not square with the evidence of her extensive injuries, including head trauma, lacerations to her liver, and several broken ribs. Broward County prosecutors brought Lionel's case before a grand jury, seeking charges of murder in adult court. After listening to medical testimony and other witnesses, the grand jury indicted Lionel for first-degree murder, making him among the youngest children in the country to face such charges in adult court.¹⁵¹ Under Florida's statutory scheme, if Tate were convicted of first-degree murder, the judge would have no choice but to sentence him to life in prison without the possibility of parole.¹⁵²

On February 15, 2000, Broward County prosecutors reportedly offered to let Tate plead guilty to second-degree murder in exchange for a sentence of three years in a juvenile center, one year of house arrest, ten years of psychological testing and counseling, and 1000 hours of community service.¹⁵³ Lionel, his mother, and his attorney, Jim Lewis, rejected the offer. The case took a bizarre twist when Lewis announced that he planned to argue that his client was imitating the moves he had learned from watching professional wrestlers on television. When Lewis sought to subpoena several pro wrestling

2892765; Jeremy Manier & Sue Ellen Christian, *Crime Lab Findings All in a Day's Work*, CHI. TRIB., Sept. 6, 1998, at 14, available at 1998 WL 2893015; John McCormick & Peter Annin, *Who Killed Ryan Harris?* NEWSWEEK, Oct. 5, 1998, at 42; Pam Belluck, *Boys' Release in a Murder Doesn't End a City's Pain*, N.Y. TIMES, Sept. 26, 1998, at A8, available at 1998 WL 5428643; Christi Parsons, *Ryan OKs Safeguard for Young Suspects*, CHI. TRIB., July 8, 2000, at 1A; Dave McKinney, *Videotape Bill Fails in House: Police Won't Have to Film Confessions*, CHI. SUN-TIMES, Mar. 26, 1999, at 18, available at 1999 WL 6531564. For more information about these topics generally, see the website of the Northwestern University Legal Clinic: <http://www.law.northwestern.edu/depts/clinic/news/index.htm#false>.

¹⁵¹ Jodie Needle, *Boy Charged with Murder in Death of Playmate*, 6, SUN SENTINEL, Aug. 12, 1999, at 1B.

¹⁵² Karla Schuster, *Judges Tough Choice: Life or Leniency for Young Killer*, SUN SENTINEL, Jan. 28, 2001, at 1A.

¹⁵³ *Crucial Events in the Murder of Tiffany Eunick and the Trial of Lionel Tate*, at <http://www.sun-sentinel.com/news/daily/detail/0,1136,3600000000016/036,00.html> (last visited Jan. 26, 2001).

stars to testify at trial, including the Rock, Sting, and Hulk Hogan, the move prompted a backlash from attorneys representing the wrestlers. "Tate's defense is an 'I saw it on t.v. so I go free' excuse," exclaimed Jerry McDevitt, a Pittsburgh attorney who represents Dwayne "the Rock" Johnson.¹⁵⁴ He "is just a 12-year-old punk who didn't learn that you don't beat up little girls."¹⁵⁵ The World Wrestling Federation, the largest organization of professional wrestling promotions, sued Lewis for libel.¹⁵⁶

Two weeks before the trial was to begin, on January 5, 2001, prosecutors again offered Lionel the same plea deal. He rejected it a second time.¹⁵⁷ It was a decision that Tate, his mother, and his attorney would come to regret. After deliberating just over three hours, jurors returned a verdict convicting the boy of first-degree murder.

Florida's rigid, inflexible transfer and sentencing scheme left many of the participants in the Lionel Tate case unhappy and feeling that the result was too harsh. "I wish there was another alternative. It's horrible," remarked Kathleen Pow-Sang, a juror in the Tate case who wept and prayed with others in the jury room as they struggled for a way out of a decision they felt was being forced on them by an unjust law. She told reporters that she and other jurors "were all annoyed" that the case was not brought in juvenile court.¹⁵⁸ "I don't think anybody there thought that [Lionel] intended to kill her, but the

¹⁵⁴ Paula McMahon, *Judge Excuses Wrestlers from Testifying in Murder Trial*, SUN SENTINEL, Apr. 12, 2000 at 1A.

¹⁵⁵ *Id.*

¹⁵⁶ Brad Bennett, *Attorney Second-Guesses Strategy*, MIAMI HERALD, Jan. 26, 2001, at A8.

¹⁵⁷ Can a twelve or thirteen-year-old child like Lionel Tate be expected to appreciate the consequences of pleading guilty to murder in adult court? Can he or she truly understand the jeopardy faced by rejecting a plea? Can a present-oriented, impulsive adolescent possibly fathom a sentence of life without the possibility of parole? These are just a few of the questions of "adjudicative competence" posed by the Lionel Tate case and others. Such questions, which raise concerns about the fundamental fairness of trying children as adults, were ignored by policymakers in their rush to pass punitive laws. The answers to these and other questions are being studied by the Research Network on Adolescent Development, an initiative funded by the John D. and Catherine T. MacArthur Foundation. Although more research is necessary, two of the Network's members, Richard Bonnie and Thomas Grisso, after reviewing the research on the ability of juvenile offenders to participate meaningfully in their defenses and other studies about the decision-making ability of adolescents, have recommended that "juvenile court jurisdiction should be exclusive in cases involving defendants below the age of fourteen at the time of the alleged offense." Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL, *supra* note 149, at 92.

¹⁵⁸ Caroline J. Keough, *'I Wish There Was Another Alternative. It's Horrible; Jurors Say They Felt Decision Was Imposed on Them by an Unjust Law*, MIAMI HERALD, Jan. 26, 2001, at 8A.

state didn't have to prove that. I think it was too easy for them" said Steve Danker, another juror. Danker told reporters that he desperately wanted to factor Lionel's age into the verdict but had sworn not to do so during jury selection. During voir dire, prospective jurors who had said they couldn't render a verdict without considering Lionel's age had been dismissed.¹⁵⁹

Both the assistant state's attorney who prosecuted Tate and the attorney who defended him were troubled by the final result. Tate's attorney Jim Lewis, holding back tears, second-guessed the decision to reject the plea and implored members of the jury and others to convince the trial judge to show leniency: "I don't think that any compassionate, rational human being would sit still and let this child spend the rest of his life in prison."¹⁶⁰ Ken Padowitz, the man who prosecuted Tate, announced that after Tate's mandatory life sentence was imposed, he would take the unusual step of recommending to Governor Jeb Bush that he commute Tate's sentence.¹⁶¹ In fact, a little over a week after the verdict, Padowitz and Lewis revealed that they had a mutual understanding before trial that if Lionel were found guilty of first-degree murder, they would travel together to Tallahassee to ask the governor for mercy.¹⁶²

Even before the Tate verdict, Florida legislators had begun to question whether the state's inflexible laws left too few options for serious juvenile offenders. The case of Nathaniel Brazill, a thirteen-year-old first time offender who shot and killed his teacher, Barry Grunow, sparked one such legislator, Ron Klein, a Democratic Senator from Boca Raton, to propose that Florida create a blended sentencing option to give judges the ability to mitigate a mandatory life without parole sentence for juveniles convicted of murder.¹⁶³ In the wake of the Tate verdict, Klein vowed to step up his efforts to come up with some alternatives for a system that has, in his words, grown "pretty rigid." "In the legislature," Klein was quoted as saying, "we sit here and create laws in a vacuum: this crime gets this punish-

¹⁵⁹ *Id.*

¹⁶⁰ Brad Bennett, *Attorney Second-Guesses Strategy*, MIAMI HERALD, Jan. 26, 2001, at 8A.

¹⁶¹ Paula McMahon, *Prosecutor Favors Lighter Sentence for 13-Year-Old Convicted of First-Degree Murder*, SUN SENTINEL, Jan. 27, 2001, at 1A.

¹⁶² William Yardley, *Pretrial Pact: A Break For Boy, Court Foes Agreed to Seek Clemency*, MIAMI HERALD, Feb. 4, 2001, at 1A.

¹⁶³ Rick Bragg, *Teacher Slaying Forces Debate on Trying Children as Adults: No Leniency, No Middle Ground in Florida*, NEW ORLEANS TIMES-PICAYUNE, June 25, 2000, at A21.

ment But you know something? Sometimes there are extenuating circumstances.”¹⁶⁴ Klein may have also found an unlikely ally in Harry Shorstein, the Jacksonville State’s Attorney, a man known for aggressively prosecuting juveniles as adults. In the aftermath of the Tate verdict, Shorstein remarked: “Our system doesn’t give us the means with which to deal with these types of cases. Without sounding harsh, there’s not much we can do with the very, very serious cases under the law we have now. We are writing them off.”¹⁶⁵

Perhaps these reactions to the Lionel Tate case signal the beginning of a movement to repeal mandatory sentencing laws of serious and violent juvenile offenders, but only time will tell. And, as the next case suggests, in the meantime we must pay close attention to the inherent problems raised by aggressively prosecuting children and adolescents who are not yet developmentally capable to participate in their own defenses.

3. *Nathaniel Abraham and the Problem of Aggressive Prosecution*

In his 1997 State of the State Address, Michigan Governor John Engler boasted, “In 1996, after a four year battle, we enacted the toughest juvenile crime package in the nation.” Singling out juvenile crime as “one of the nation’s most serious problems,” Engler announced, “[N]ow, juveniles who commit adult crime will do adult time. These violent young felons will do their time under the watchful eyes, not of social workers, but of prison guards.”¹⁶⁶ Michigan’s new juvenile crime package made sweeping changes. Before the new laws took effect in 1997, no child under the age of fifteen could be tried as an adult. Under the new package, the age limit was lowered from fifteen to fourteen.¹⁶⁷ Moreover, the new laws greatly empowered prosecutors, giving them sole discretion over whether to file charges against juveniles charged with serious crimes in either juvenile or criminal court.¹⁶⁸

A third provision of the package enabled prosecutors to ask a juvenile court judge to impose adult sanctions against a child of any age facing any charge pursuant to a “blended sentencing” scheme. In order to activate “blended sentencing,” prosecutors had to designate

¹⁶⁴ Yardley, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ Gov. John Engler, *State of the State Address (Jan. 28, 1997)*, SOUTH BEND TRIB., Jan. 29, 1997, available at www.southbendtribune.com.

¹⁶⁷ MICH. COMP. LAWS ANN. § 712A.4 (West 1993).

¹⁶⁸ MICH. COMP. LAWS ANN. § 600.606 (West 1996).

the case at the outset as a case in which the juvenile would be tried in the same manner as an adult. A judge would then have to decide, based upon a balancing of *Kent*-like factors but giving greater weight to the seriousness of the offense and the child's prior history, whether to grant the State's request. If the request were granted, the juvenile's trial and sentencing would take place in juvenile court with all the procedural protections and guarantees given to adult criminal defendants. If convicted, the trial court had three sentencing options at its disposal: 1) juvenile sanctions, meaning the juvenile would be released no later than age twenty-one; 2) blended sanctions in which the juvenile is sentenced to both a juvenile and an adult sentence; the adult sentence is stayed but could be imposed any time up to age twenty-one if the juvenile violates the terms of his juvenile sentence; or 3) adult penalties.¹⁶⁹

In 1995, when this "blended sentencing" option was first proposed, one of its supporters was Judge Eugene A. Moore, then president of the state probate judges association and a thirty-year veteran of hearing juvenile cases. In a letter to *The Detroit News*, dated August 13, 1995, Judge Moore explained, "the Association proposes that juvenile judges retain jurisdiction over serious juvenile offenders providing for a periodic review of these cases and the power to place non-rehabilitated offenders in our adult prisons until they are safe and back on the streets."¹⁷⁰ Little did Judge Moore know that he would be the first to put the new blended sentencing laws to use in the landmark case of Nathaniel Abraham.

About 10:30 p.m. on October 29, 1997, a bullet sped through a clump of trees next to the Sunset Plaza Party Store in suburban Detroit and struck eighteen-year-old Ronnie Greene, Jr. in the head as he exited a convenience store.¹⁷¹ Two days later, after receiving a tip from a neighbor that Nathaniel Abraham had been seen firing a rifle, police apprehended Abraham from his grammar school. At the time of his arrest, Abraham was dressed in Halloween attire, wearing face paint and makeup. He was eleven years old, stood four feet nine inches, and weighed approximately sixty-five pounds.¹⁷²

¹⁶⁹MICH. COMP. LAWS ANN. § 712A.2d (West 2002). See also GRIFFIN ET AL., *supra* note 99, at app. 40, app. 41.

¹⁷⁰*Moore v. Moore*, DETROIT NEWS, Jan. 16, 2000, at C8.

¹⁷¹Jim Dyer, *Children Accused of Killing Children: Younger Life Lost, Younger One in Jeopardy*, DETROIT NEWS, Feb. 10, 1998, at A1.

¹⁷²20/20: *He's Only a Child, Should an 11-Year-Old Be Tried as an Adult?* (ABC television broadcast, Feb. 13, 1998), available at 1998 WL 5433498; *Adult Murder Trial for Boy, 11*, CHI. TRIB. Nov. 4, 1997, at 3; William Claiborne, *Teenager's Trial as Adult Puts*

At the time of his arrest, Nathaniel was no stranger to the Pontiac police; the sixth grader was a suspect in twenty-three crimes, including a number of burglaries, home invasions, and assaults.¹⁷³ The arresting officers took the boy down to the police station for questioning, stopping on the way to inform his mother. Nathaniel's mother was present with him during the questioning and both he and his mother signed a document indicating that they understood and agreed to waive the boy's *Miranda* rights. After initially denying involvement in the shooting, Abraham finally admitted to firing the shot that killed Greene, although he claimed he was just target shooting at some trees with the stolen .22 rifle.¹⁷⁴

Oakland County prosecutors did not accept Nathaniel's contention that the shooting was an accident. They had a neighbor, Michael Hudack, the same man who tipped them off about Nathaniel, who claimed that Nathaniel had been firing the gun at him just hours before Greene's death. Prosecutors quickly rounded up other witnesses who claimed that Nathaniel had vowed to shoot someone and had bragged about killing someone shortly after Greene's death.¹⁷⁵ Using Michigan's new blended sentencing provisions, prosecutors charged Abraham as an adult in juvenile court with first-degree murder, two firearms violations, and attempted murder in connection with the shooting at Hudack. If convicted of first-degree murder, Abraham would receive a sentence of life in prison without the possibility of parole.¹⁷⁶ In defending the decision to charge Abraham as an adult, James Halushka, assistant district attorney, said: "It's horrifying that someone this young can be so violent, he's a violent, violent person. He may be 11 chronologically, but he's a menace to society."¹⁷⁷

"When am I going to go home," were the first words uttered by the eleven-year-old Nathaniel Abraham to his attorney, Daniel Bagdade, upon meeting him in court for the first time. Bagdade, who recalled these words two years later on the eve of thirteen-year-old

Focus on Trend; Michigan Boy Was 11 at Time of Homicide; 46 States Have Lowered Barriers, WASH. POST, Nov. 5, 1999, at A3; Ron French & Kim Kozlowski, *Does Nate Understand His Plight?: While a Courtroom Full of Lawyers Debate, Accused Teen Asks, 'When Do I Get to Go Home?'*, DETROIT NEWS, Oct. 22, 1999, at A1.

¹⁷³ Dyer, *supra* note 171, at A1.

¹⁷⁴ *13-Year-Old and Michigan Juvenile Law—Under Fire in Murder Trial*, Court TV Online Trials, at www.courtvtv.com/trials/abraham/sentence_text_ctv.html.

¹⁷⁵ 20/20: *He's Only a Child, Should an 11-Year-Old Be Tried as an Adult?*, *supra* note 172.

¹⁷⁶ *Adult Murder Trial for Boy, 11*, *supra* note 172, at 3.

¹⁷⁷ Charles Laurence, *Boy 11, Accused of Murder Opens Debate Over Lost Generation*, DAILY TELEGRAPH LONDON, Nov. 4, 1997, at 16.

Nathaniel's trial, remarked, "He didn't have a clue what was going on . . . he still doesn't."¹⁷⁸ Nathaniel's lack of understanding was evident to Judge Moore in May of 1998 when he ruled that prosecutors could not use Abraham's confession in his trial, finding that the boy, whom psychologists had found functioned at the level of between a six and eight-year-old, could not have understood his *Miranda* rights and the consequences of giving them up.¹⁷⁹ Prosecutors appealed the decision and nearly a year later, the Court of Appeals of Michigan reversed Judge Moore's decision, holding that Nathaniel's "level of mental impairment falls far short of the severity required to render defendant incapable of knowingly waiving his *Miranda* rights."¹⁸⁰

When Nathaniel Abraham's case finally went to trial in November 1999, he found himself in the middle of a media firestorm, the likes of which had never been seen before in the modern history of juvenile court. The attention to his case only escalated when, in the midst of jury selection, the flamboyant Michigan trial lawyer, Geoffrey Fieger, best known for his representation of Dr. Jack Kervorkian, assumed the lead role in representing Nathaniel.¹⁸¹ Court T.V. provided gavel to gavel coverage of the proceedings,¹⁸² and Fieger arranged for Nathaniel to be interviewed by Ed Bradley of CBS's *60 Minutes* during the trial.¹⁸³

Fieger argued that the shooting of Ronnie Greene, Jr. was an accident, the result of "child's play" with a gun. He argued that as a mildly retarded child, who functioned intellectually at the level of a

¹⁷⁸ French & Kozlowski, *supra* note 172.

¹⁷⁹ James A. McClear, *Murder Confession Thrown Out: Judge Says Nathaniel Abraham, 12, Wasn't Clear on Rights During Pontiac Investigation*, DETROIT NEWS, May 8, 1998, at C1.

¹⁸⁰ *In re Abraham*, 599 N.W.2d 736, 741 (Mich. Ct. App. 1999). The decision of the Michigan appellate court in the Abraham case is in stark contrast to the decision of the Texas Court of Appeals in the Lachesha Murray case. See *supra* text accompanying notes 127-46. In the Murray case, the court viewed the interrogation through the eyes of the 11 year-old-girl, giving great weight to her youth, inexperience, and lack of understanding of the consequences of speaking to the police. In the Abraham case, the appellate court criticized the trial court for giving too much weight to these developmental factors, holding that if factors such as a defendant's youth, learning disabilities, and emotional impairment are given too much weight, the obligations of police would be elevated to "unreasonable levels." *Abraham*, 599 N.W.2d at 741.

¹⁸¹ Pete Waldmeir, *Trial of Boy Accused of Murder Is Perfect Case for Fieger*, DETROIT NEWS, Oct. 22, at C1.

¹⁸² Rob Brown, *Death Row's Lethal Lottery*, SUNDAY HERALD, Nov. 14, 1999, at 15, available at 1999 WL 22707060; French & Kozlowski, *supra* note 172.

¹⁸³ Louise Knott, *CBS May Interview Nathaniel: Judge Allows Pontiac Teen Accused of Slaying to Be on '60 Minutes' Program*, DETROIT NEWS, Oct. 28, 1999, at D1.

six to eight-year-old, Nathaniel could not form the intent necessary to kill.¹⁸⁴ Prosecutors painted a far more sinister portrait of the boy, arguing that Nathaniel was a premeditated killer who had talked of killing someone in the days before the shooting and followed through with his plans. After eighteen hours of deliberation over four days, the jury reached its verdict.¹⁸⁵ Nathaniel was acquitted of first-degree murder but convicted of second-degree murder, meaning that jurors found that he either intended to kill or injure Greene or knew that his actions created a high risk of death or injury but could not find that he plotted to kill Greene.¹⁸⁶

The jury's verdict set the stage for Judge Eugene A. Moore's much-anticipated sentencing of Nathaniel Abraham. He could sentence Nathaniel as a juvenile, as an adult, or impose a blended sentence that treated Nathaniel initially as a juvenile and then later as an adult. If the judge sentenced Nathaniel only as a juvenile, he could commit the boy to a maximum-security juvenile detention center, but Nathaniel would have to be released before he turned twenty-one, even if he had not been rehabilitated and still posed a serious threat to public safety.¹⁸⁷ Alternatively, the judge could sentence Nathaniel only as an adult and send him to adult prison for eight to twenty-five years. The judge also had the option of using a blended sentence that would allow him to commit the boy first to a juvenile detention center, but then hold a second sentencing hearing when Nathaniel was between his eighteenth and twenty-first birthdays.¹⁸⁸ At the second hearing, if the judge determined that Nathaniel had not yet been rehabilitated, he could transfer him to adult prison to serve the remainder of his eight to twenty-five year sentence. The prosecutors recommended that the judge exercise this third option.¹⁸⁹

Judge Moore turned to history to frame his decision in terms of the foundational principles of American juvenile justice: that children are qualitatively different from adults, and that the state has a responsibility to implement individualized treatment plans that would

¹⁸⁴ William Claiborne, *13-Year-Old Convicted in Shooting; Decision to Try Youth as an Adult Sparked Juvenile Justice Debate*, WASH. POST, Nov. 17, 1999, at A03.

¹⁸⁵ *Id.*

¹⁸⁶ *Boy 13, Convicted of Second Degree Murder*, CHI. TRIB., Nov. 17, 1999, at 19.

¹⁸⁷ See *In re Abraham*, No. 97 63787 FC (6th Cir. Jan. 13, 2000), available at http://www.court tv.com/trials/abraham/sentence_text_ctv.html.

¹⁸⁸ *Id.*

¹⁸⁹ Aldina Vazao Kennedy & Latoya Hunter, *Abraham Sentenced to Juvenile Detention*, at http://www.court tv.com/trials/abraham/011300_2ctv.html (last modified Jan. 13, 2002).

seek to rehabilitate juvenile delinquents.¹⁹⁰ After providing a brief history of American juvenile justice, including Michigan's rewriting of its juvenile laws in the 1990's, the judge turned to "the case at hand, Nathaniel Abraham."¹⁹¹ He reviewed the boy's case and assessed the three possible dispositional options. He rejected sentencing Nathaniel as a adult, since this decision would imply:

[That] we have given up on the Juvenile Justice System. Can we be certain that between now and the time he turns 21 that we can't change his behavior? Must we say today that Nathaniel, at age 13, must be put into an adult prison system? No, the testimony and/or reports are clear that the adult prison system is not designed for youth. It is only a last resort if the Juvenile system has failed. Testimony and the psychological examination demonstrate that in the last two years, while awaiting trial, Nathaniel has made progress in the Juvenile system. It is also clear that the adult system has very few treatment alternatives for a 13-year-old. In addition, at 13, Nathaniel may be subject to brutalization in prison that could destroy any hope of rehabilitation.¹⁹²

For these reasons, Judge Moore rejected this option.

The judge then briefly discussed sentencing Nathaniel as a juvenile, while noting "if we rehabilitate the Defendant, then the public is safe. If we don't, he *may* kill again."¹⁹³ This succinct two paragraph discussion of sentencing Nathaniel as a juvenile suggested that the judge would follow the prosecutors' recommendations and use the third option, a blended sentence.

In a bold move, Judge Moore rejected the blended sentence, and instead sentenced Nathaniel as a juvenile. He explained:

[I]f we were to impose a delayed sentence, we take everyone off the hook. Sentencing Nathaniel as a juvenile gives us 8 more years to rehabilitate him. We as a community know that he will be back among us at age 21. If we are committed to preventing future criminal behavior, we will use our collective efforts and financial resources to rehabilitate him and all the other at-risk youth in our community. If we commit ourselves to this, we can ensure our safety now and in the future. The safety net of a delayed sentence removes too much of the urgency. We can't continue to see incarceration as a long term solution. The danger

¹⁹⁰ The text of Nathaniel Abraham's Sentence is on-line at http://www.court tv.com/trials/abraham/sentence_text_ctv.html (last updated Jan. 26, 2000).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

is that we won't take rehabilitation seriously if we know we can utilize prison in the future.¹⁹⁴

This decision stunned court watchers, but Judge Moore was not finished.

He concluded by directing remarks to Nathaniel Abraham. After explaining to the boy "[y]ou have done probably the worst thing any one can do and that is to kill another human being,"¹⁹⁵ he declared:

We as a community have failed you, but you have also failed us and yourself. I will be keeping a very close eye on you and your progress. When you are able to fully understand what I am telling you, I urge you to take advantage of the help we are trying to give you. The only thing you can do to begin to repair the damage you have caused to the Green [sic] family is succeed. Don't let Mr. Green's [sic] death be in vain. Help us help you and in turn help many other children in this community. No one can do it for you. You must do it for yourself.¹⁹⁶

Just how much of Judge Moore's landmark decision was understood by Nathaniel Abraham—a decision which gave the boy a second chance at a productive, meaningful life—is unclear. The boy, who fidgeted and doodled during the judge's twenty-minute speech,¹⁹⁷ turned to his attorney, Daniel Bagdade, after the judge had concluded, and asked, "What happened?"¹⁹⁸ When Bagdade told him that he was going to a juvenile facility instead of an adult prison, the boy "just sort of looked down and shrugged his shoulders."¹⁹⁹

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ L.L. Brasier & Hugh McDiarmid, Jr., *Abraham Avoids Hard Prison Time: 13-Year-Old Killer Is Sent to Juvenile Detention Facility*, DETROIT FREE PRESS, Jan. 14, 2000, at 1.

¹⁹⁸ David Goodman, *Judge Spares 11-Year-Old Killer from Life in Prison*, AP WIRES, Jan. 14, 2000. See also Mitch Albom, *We Can't Afford the Death of Hope*, TIMES UNION (Albany), Jan. 19, 2000, at A15.

¹⁹⁹ Albom, *supra* note 198, at A15. A similar reaction from an equally befuddled twelve-year-old child in the center of a high profile murder trial is described by Gitta Sereny, in her classic 1998 book about Mary Bell, an eleven-year-old girl who was accused and later convicted of murdering two small boys in Northern England in 1968. GITTA SERENY, *CRIES UNHEARD: WHY CHILDREN KILL; THE STORY OF MARY BELL* (1998). Nearly thirty years after being convicted, Bell, who was far more intelligent than Nathaniel Abraham, spoke to Sereny about what it felt like to be on trial for murder as a small child:

In the court, while they were talking and talking, I remember thinking of what I would say when it was my turn, I'd tell them I wanted my dog. I wanted him with me when they sent me to be hanged. That's what I thought would happen: I'd be sent to the gallows and they might just as well have said that right away because it was just as meaningless as life imprisonment or . . . well . . . death. None of it meant a damn thing, not a thing.

The reaction to Judge Moore's decision was swift and mixed. Eliana Drakopoulos, a spokesperson for Amnesty International, who had used Nathaniel's picture to adorn the cover of a report titled "Betraying the Young,"²⁰⁰ stated, "This is a victory for human rights and, hopefully, a small step forward in the way the United States treats its children in the juvenile justice system."²⁰¹ The Reverend Al Sharpton, who was present at the sentencing to show his support for Nathaniel, said, "The judge said some strong and compassionate things. He convicted the system but he incarcerated Nathaniel. We do not believe Nathaniel is guilty of murder."²⁰² Nicole Greene, sister of the victim, decried the verdict, "My brother did not deserve to be gunned down like a dog in the street . . . A lot of people have forgotten who the real victim is—and it's Ronnie Greene Jr."²⁰³

For their part, neither the defense attorneys nor the prosecutors were pleased with the judge's decision. Geoffrey Fieger continued to insist that Nathaniel was innocent and vowed to seek a new trial: "The fact of the matter is that Nathaniel isn't guilty of murder. He's a child playing with a gun."²⁰⁴ Oakland county assistant prosecutor Lisa Halushka, who had hoped for a blended sentence, was equally dismayed, "I'm disappointed. Disappointed and hopeful. I'm hopeful the judge is right and eight years can rehabilitate him."²⁰⁵

The state officials who bore the brunt of Judge Moore's wrath seemed unfazed and unwilling to reconsider the harsh 1996 package of juvenile justice laws. Susan Shafer, spokesman for Governor John Engler, told reporters, "the governor feels when the Legislature made this decision, it gave prosecutors and judges the ability to use this power on a case by case basis. He thinks it was a good law and it was put there to allow prosecutors and judges to use it as they see fit."²⁰⁶ State legislators, stung by Judge Moore's criticism, were more critical. "What bothers me about (Moore's) opinion is there comes a point where you have to be concerned about the safety of the public," said Republican State House Speaker, Chuck Perricone. "Are twelve

Id. at 124.

²⁰⁰ French & Kozlowski, *supra* note 172; AMNESTY INTERNATIONAL, *supra* note 12.

²⁰¹ *Young Murderer Quotes*, AP WIRES, 15:53:00, Jan. 13, 2000.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*; see also Louise Knott & Orlander Brand-Williams, *Young Killer Gets Juvenile Detention: State's Get-Tough Policy Blasted by Sentencing Judge*, DETROIT NEWS, Jan. 14, 2000, at A1.

²⁰⁵ Goodman, *supra* note 198.

²⁰⁶ *Id.*

and thirteen-year-old young men short of full development? Of course. But I don't know of any twelve and thirteen-year-olds that don't understand that murder is wrong."²⁰⁷ State Senator William Van Regenmorter, a Republican who sponsored the blended sentencing law, called Judge Moore's decision illogical. "There is a really powerful motivation for rehabilitating because at the age of twenty-one, if you're not, you're going to go to prison."²⁰⁸

The cases of children such as Lachesha Murray, Lionel Tate, and Nathaniel Abraham all put the new transfer regime on trial, by raising troubling moral and legal questions about the aggressive prosecution of children and adolescents who were not developmentally capable of fully participating in their own defenses. We are still awaiting the public's verdict on this new regime.

CONCLUSION: INSTALLING INSTITUTIONAL CHECKS

Through a comparison of past practices with contemporary trends, we have argued that the twentieth century has witnessed a transformation in the legal response to juvenile homicide. The flexible system that often protected children from being prosecuted as adults in the early twentieth century has been replaced over time. The new transfer regime, which coalesced in the 1990's, was characterized by more transfer mechanisms to an adult criminal justice system that had replaced the rehabilitative ideal with punitive procedures, such as the abolition of parole and the reliance upon "truth-in-sentencing" laws. Whereas youth had been a mitigating factor in juvenile homicide cases in the early twentieth century, it had become a legal liability by century's end.²⁰⁹

²⁰⁷ *Id.*

²⁰⁸ Knott, *supra* note 183.

²⁰⁹ According to Donna Bishop and Charles Frazier:

There has also been some discussion of a "leniency gap" within the criminal courts, the suggestion being that transferred offenders receive lesser punishments than comparable adults, in part because they are "first-timers" to the criminal justice system and in part because judges make allowances for their youth and immaturity. . . . If we compare the sentences imposed on transferred youths with those imposed on adults, we see that, for each of the violent offense categories and for weapons and "other" crimes, transferred youths are more often sentenced to prison, and for longer periods of time, than their older counterparts. For drug offenses, transferred youths and older offenders are about equally likely to be sentenced to prison but transferred offenders receive significantly longer sentences on average. For property crimes, transferred offenders are slightly less likely than adults to be incarcerated in either prison or jail and, when incarcerated, they are sentenced to slightly shorter terms. Overall, when the sentences of transferred youths are compared to those age eighteen and over, it appears that transferred youths are sentenced more harshly, both in terms of the probability of receiving a prison sentence and the length of the sentences they receive.

As the three cases described in the last section revealed, at least some participants in the legal process tried to find ways around the current rigid regime, while many others expressed dismay about what these mandatory laws made them do to children.²¹⁰ These efforts by lawyers, judges, and laypersons suggest that there is a real need to move beyond this new transfer regime. Accordingly, in this concluding section of the essay, we propose installing a series of checks into the legal response to juvenile homicide in order to prevent not only the overly aggressive prosecution of children and adolescents as adults, but also the infliction of cruel and unusual punishments.

First, we propose a minimum age for transfer of at least fifteen²¹¹ and preferably sixteen, which is based upon on-going developmental research into the capacity of children and adolescents to serve as trial defendants.²¹² The requirement of adjudicative competency in crimi-

In other words, we see no evidence that criminal courts recognize a need to mitigate sentences based on considerations of age and immaturity.

Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 6, at 227, 236–37.

²¹⁰ For a theoretical analysis of how laws allow human beings, especially legal actors, to harm people, see Robert Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et. al. eds., 1992).

²¹¹ The Institute of Judicial Administration–American Bar Association Standards of 1996 calls for fifteen as the minimum age for transfer. *JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH* 5 (Robert E. Shepherd, ed. 1996).

²¹² Thomas Grisso's review of the existing literature on youths' capacities to serve as trial defendants finds that if future studies affirm what existing ones have already indicated, then "arguments could be made for a legal presumption of incompetence to stand trial for youths younger than fourteen, when they face proceedings that may lead to criminal adjudications (including juvenile court transfer hearings)." Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in *YOUTH ON TRIAL*, *supra* note 149, at 163–64. It would be a mistake, however, to assume that trying older adolescents as adults avoids the problem of adjudicative competency. Grisso's review of the literature also revealed:

For youths who are fourteen to sixteen years of age, current research suggests that learning disabilities or emotional disorders often produce delays in cognitive or psychosocial development that reduce their capacities related to adjudicative competence. Of course, not all such youths need to be found incompetent, even if they manifest significant trial-related deficits in an evaluation; some will respond adequately to special efforts to assist them in their decisions as defendants, such as being taught by their attorney. For some, however, important deficits in defendant abilities will persist. These conclusions suggest the need to enhance the courts' attention to the potential for adjudicative incompetence in this age group, possibly by mandating a review of competence for all adolescents prior to their participation in criminal court proceedings or in juvenile proceedings that may lead to criminal adjudication.

Id. Since delinquent populations also tend to have higher rates of developmental delay due to "a greater proportion of adolescents with intellectual deficits, learning disabilities, emo-

nal proceedings, according to Richard J. Bonnie and Thomas Grisso, “serves three conceptually independent social purposes—preserving the dignity of the criminal process, reducing the risk of erroneous convictions, and protecting the defendant’s decision-making autonomy.”²¹³ The rise of the new transfer regime threatened to undermine these pillars of a just legal system. If children and adolescents were not competent to stand trial, then there was a potential constitutional crisis brewing, since the United States Supreme Court in *Drope v. Missouri* held, “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”²¹⁴ Thus, the frenzied legislative efforts to get tough on juvenile crime in the 1990’s may have unintentionally weakened the very foundations of the entire criminal justice system.

As we saw in the cases of Lacreasha Murray, Lionel Tate, and Nathaniel Abraham, prosecuting these children who were under fourteen as adults produced all of the socially undesirable outcomes that the concept of adjudicative competency is designed to prevent. Lacreasha’s case led to a potentially erroneous conviction, Lionel’s case revealed that a child without the autonomy to make critical decisions about his defense wound up with a life sentence without the possibility of parole, and Nathaniel’s case raised international concerns about the dignity and fairness of the American legal system.

A minimum transfer age of fifteen or sixteen would keep all children, younger adolescents, and some middle adolescents in the juvenile justice system.²¹⁵ As Judge Moore reminds us, we can certainly retain this successful practice from the past: the use of the juvenile court to handle the vast majority of cases involving serious and violent juvenile offenders.²¹⁶ Contrary to popular myth, the juvenile

tional disorders, and reduced educational and cultural opportunities,” prosecuting these adolescents as adults is also problematic. *Id.*

²¹³ Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL*, *supra* note 149, at 76.

²¹⁴ *Drope v. Missouri*, 420 U.S. 162, 171 (1975). In addition, as Bonnie and Grisso had noted, the Supreme Court has held in *Godinez v. Moran*, 509 U.S. 389, 398 (1993), “that the legal tests for competence to stand trial and competence to plead guilty (and waive counsel) are the same.” Bonnie & Grisso, *supra* note 213, at 99, n. 5.

²¹⁵ It should be noted that adolescents who commit homicide are generally at least fifteen years of age. “Homicide arrests are rare events under age 13 and infrequent under age 15. More 15-year-olds are arrested for homicide than the total of all ages under 15, and more 16-year-olds are arrested for homicide than the total of all ages under 16.” ZIMRING, *supra* note 5, at 146.

²¹⁶ The juvenile court is arguably America’s most copied legal innovation:

court heard cases of juvenile homicide in the early twentieth century, and it is still capable of doing so in the early twenty-first century.

Yet, even if a minimum threshold of fifteen or sixteen were to be universally established, there would still be too many adolescents tried as adults. Many of the delinquent youth who are transferred to the adult court system suffer from learning disabilities, emotional, and behavioral problems that make them function at levels below their chronological age.²¹⁷ All juveniles who are transferred or who face being transferred should be evaluated to assess the level of their functioning and those who operate below the threshold age for transfer, even if they are chronologically above the threshold age, should also be exempt from transfer.

Another reason why a minimum threshold age is important is that juvenile crime, unlike adult crime, is a group phenomenon. Many youth who are only peripheral participants in a crime are transferred to adult court.²¹⁸ Many of them, who like all adolescents are

In every American state, juvenile courts have been created to respond to criminal charges against offenders under a maximum age that varies from sixteen to eighteen. The use of a juvenile court for youth crime is in fact almost universal throughout the developed nations. No major industrial democracy incorporates the processing of very young offenders into the normal operation of its criminal courts. A century after its creation, the juvenile court is the uniform major premise in policy toward youth crime in every advanced legal system.

Franklin E. Zimring, *The Punitive Necessity of Waiver*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 6, at 207, 207. The juvenile court movement spread across much of the globe in the early twentieth century. By the mid-1920's, all the states in the United States, except for Maine and Wyoming, had passed juvenile court laws, and the following countries had enacted similar legislation: Great Britain, 1908; Canada, 1908; Geneva (Switzerland), 1910; France, 1912; Belgium, 1912; Hungary, 1913; Croatia, 1918; Argentina, 1919; Austria, 1919; Madras (India), 1920; the Netherlands, 1922; Madagascar, 1922; Bengal (India), 1922; Japan, 1922; Germany, 1923; Brazil, 1923; Spain, 1924; and Mexico, 1926. HENRY H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 23 n.1 (1927). In addition,

in the following countries they are known to exist but the dates of their formal enactment are unknown: Australia, South Africa, Czechoslovakia, Egypt, New Zealand, Poland, Sweden. In Norway, Denmark, Finland, and Portugal there are no juvenile courts, but children are dealt with under a special code, administered usually by a guardian council or a child-welfare commission, and not subject to punishment under a certain age. In Russia there was a juvenile court, but since 1922 the whole question of juvenile delinquency, including its study and treatment, has been made a branch of social education, and has been turned over to education authorities; special committees for cases of 'non-adults' attached to the departments of public educations were entirely substituted for courts.

Id.

²¹⁷ On the high prevalence rates of mental disorder among delinquent youths, see Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL*, *supra* note 149, at 33–65.

²¹⁸ On group involvement in adolescent violence, see ZIMRING, *supra* note 5, at 29–30.

particularly vulnerable to peer pressure, could be better served in juvenile court with no increased risk to public safety. Punishing all juveniles who are arrested in a group crime equally penalizes them for a developmental trait that is peculiar to teens. For this reason, we call for an “accountability” exception to automatic transfer statutes.²¹⁹

There are also a series of checks now in place in some states—reverse transfer, blended sentences and “youth” discounts—which have the potential to restore youth to its historical role as a mitigating factor in the prosecution and punishment of minors. These checks all provide needed flexibility to the legal response to juvenile homicide and allow for courts to give due weight to developmental factors which distinguish youthful defendants from adult defendants.

REVERSE TRANSFER

Approximately twenty-four states have provisions that enable criminal court judges to send juveniles who have been transferred to criminal court back to juvenile court.²²⁰ Such “reverse transfer” statutes are especially important in jurisdictions that rely extensively on automatic transfer and direct-file. In these jurisdictions, reverse transfer can act as a check against overcharging by prosecutors by allowing for an examination of the minor’s role in the alleged offense, potential for rehabilitation, and other factors beyond the minor’s age and the seriousness of the charged offense. Reverse transfer statutes also mitigate the consequences of overly broad transfer statutes that sweep into criminal court accomplices, non-violent, and first-time offenders.

We support reverse waiver statutes but recognize that they are not a panacea to the current problem of the overuse of transfer. Juvenile court judges are better situated to make decisions about transfer-

²¹⁹ Prosecutors may be concerned that at the time they make charging decisions there is insufficient information to determine the respective roles of the group members in a crime. They may also argue that an absolute accountability exception would allow those who order or solicit juveniles to commit crimes to be immune from transfer. These are legitimate concerns which can be addressed either by giving the criminal court judge the option to sentence a transferred juvenile to juvenile sanctions, if after trial, prosecutors have failed to prove that the juvenile was a major actor in the crime, by allowing juvenile court judges to transfer accomplices, or by narrowing the accountability exception to exclude those who plan crimes or order or solicit others to carry them out.

²²⁰ SNYDER & SICKMUND, *supra* note 95, at 102, 106. The most recent state to adopt a reverse waiver statute is Illinois. In July, 2002, Governor George Ryan signed into law Public Act 92-0665 which gives juveniles, aged fifteen and older, charged with possessing drugs within 1000 feet of a school, the right to a hearing in criminal court to determine if they will be tried and sentenced as juveniles or adults. See Act of July 16, 2002, 2002 Ill. Legis. Serv. P.A. 92-665 (West) (codified at 705 Ill. Comp. Stat. 405/5-130 (2002)).

ring youth than are adult court judges. Because juvenile court judges deal with youth on a daily basis, they are more likely to be sensitive to the developmental issues that influence juvenile criminality and are more likely to be knowledgeable about programming alternatives for youthful defendants. Moreover, adult probation officers and adult clinicians who often conduct evaluations of juveniles and make recommendations to criminal court judges in transfer hearings, also lack the knowledge and training of their juvenile court counterparts. Unless and until the criminal court system is re-oriented to make youth the powerful mitigating factor that it once was, including the education and training of all the actors in the criminal court in the basic developmental principles which inform decision-making in the best juvenile courts, reverse waiver will fail to adequately check the abuses of the current transfer regime.²²¹

²²¹ The recent case of Miriam White, an eleven-year-old girl who was tried as an adult for murder in Philadelphia, Pennsylvania's criminal court, demonstrates the failure of the adult criminal court system in general, and reverse waiver statutes, in particular, to check abuses of the transfer regime. On August 20, 1999, just five days shy of her twelfth birthday, Miriam ran out of her home in South Philadelphia clutching a knife. Unhappy at her foster home, and wanting to return to a residential placement facility for children with disabilities, she fled in a frenzy and then stabbed the first person she saw on the street, fifty-five-year-old Rosemary Knight, a hairdresser out walking her dog. The knife penetrated the upper left chest of Knight, killing her. Under longstanding Pennsylvania law, any person, regardless of age, charged with first-degree murder must be tried as an adult. Miriam was placed in a segregated unit of the adult jail where she languished while the system tried to figure out what to do with her. Her attorneys filed a motion asking the criminal court to transfer Miriam back to the juvenile court system where she could receive age appropriate services in a secure residential treatment facility. If kept in adult court and convicted of first-degree murder, Miriam faced a possible life sentence without parole. After a lengthy hearing, the trial court judge tried to broker a deal in which Miriam would plead guilty to charges in adult court and be given a blended sentence, a sentence not authorized by Pennsylvania's inflexible sentencing statutes. After Miriam and her attorneys rejected the deal, the judge denied the defense's motion to transfer Miriam back to the juvenile court. Published reports revealed that Miriam is mentally retarded, functioning at the level of a six or seven-year-old and that she has struggled with severe mental illness her entire life. In all likelihood, she was not competent to decide whether or not to take the plea and may even be so incompetent that she will never stand trial in the adult court. While these issues play out in her criminal court case, she will remain in isolation at the adult jail, deprived of the mental health services she desperately needs to have any chance of succeeding in life. See, e.g., Robert Schwartz & Marsha Levick, *Sending Miriam White's Case to Adult Court is a Step Backward*, PHILA. INQUIRER, Nov. 11, 2000 available at <http://www.jlc.org/home/updates/updateslinks/press.html>; David Zucchini, *Girl faces Adult Trial in S. Phila. Slaying: The Defense Rejected a Deal that Would Have Sent Miriam White, Now 13, for Treatment in Lieu of Prison*, PHILA. INQUIRER, Nov. 3, 2000, at A01; David Zucchini, *A System Haunted by Child Murder Suspect at 11, Miriam White Was Charged in a Woman's Killing, Experts Examine Her Troubled Past for Clues About Her Future*, PHILA. INQUIRER, Oct. 1, 2000, at A01; David Zucchini, *"A Question of Punishment vs. Rehabilitation; Miriam White, A Murder Suspect at 13, Presents a Dilemma to the Courts: Can She Heal? Could She Kill Again,"* PHILA. INQUIRER, Oct. 2, 2000, at A01.

BLENDED SENTENCES

Although more research on blended sentences needs to be done, we believe that they should be considered as another possible check on overly aggressive prosecution. There are several different variants of what have come to be known as “blended sentencing statutes,” and all have two things in common: greater procedural rights for juvenile defendants (typically jury trials and bail) and the ability to sentence juveniles to longer, adult-like, custodial sentences.²²² There are five basic models of these statutes which differ in terms of whether the juvenile or adult court retains the sentencing authority, whether the sentencing court can sentence the offender to juvenile sanctions, adult sanctions, or a combination of both, and whether the sanctions are exclusive (either juvenile or adult sanctions), inclusive (both juvenile and adult sanctions), or contiguous (first juvenile and then adult sanctions).²²³

In theory, blended sentencing statutes seem to meet the concerns of people who believe that “adult crimes require adult time” as well as of advocates for keeping as many serious and violent youthful offenders in the juvenile system as possible. By giving juveniles an incentive and an opportunity to earn their way out of the adult sentences, blended sentencing schemes recognize that juveniles are more amenable to rehabilitation than adults. This approach appreciates that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which under mandatory sentencing laws must now be imposed on serious and violent adult offenders.

²²² ZIMRING, *supra* note 5, at 172–73. See also, Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 6, at 145–179.

²²³ “Juvenile exclusive” statutes give the juvenile court judge the power to sentence a juvenile offender to either juvenile or adult sanctions (New Mexico). “Juvenile inclusive” statutes enable judges to impose both a juvenile and an adult correctional sanction on the offender, but allow the adult sanction to be suspended pending a parole or probation violation or revocation (Connecticut, Minnesota, and Montana). “Juvenile contiguous statutes” enable juvenile court judges to sentence minors to lengthy adult sentences but require a review of whether to impose the sentence on or before the offender ages out of the juvenile system (Colorado, Massachusetts, Rhode Island, South Carolina, Texas). In “criminal exclusive statutes,” the case originates and is tried in criminal court but judges are given the power to sentence offenders to either juvenile or adult sanctions. (California, Colorado, Florida, Idaho, Michigan, Virginia). In “criminal inclusive states, the criminal court has the authority to impose a dual adult and juvenile sentence and to suspend the adult sentence. PATRICIA TORBET & LINDA SZYMANSKI, *STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME* 12–13 (1996).

Unfortunately, the practice of blending sentencing appears to be falling far short of its conceptual ideals. In most jurisdictions, legislatures simply passed blended sentencing statutes, but retained their transfer statutes. This combination gave prosecutors an additional option to deal with serious juvenile offenders, and made the benefits of more flexible sentencing available to judges only if prosecutors chose to seek blended sentencing instead of transfer. Given the choice between blended sentencing and transfer, many prosecutors still prefer transfer. Indeed, in Minnesota it has become common for prosecutors to file a motion for criminal court certification and then “bargain down” for blended sentences in juvenile court. Similarly, the threat of criminal sanctions in New Mexico has led many juveniles to plead guilty to obtain juvenile sanctions.²²⁴ And in Texas, the number of transfers to criminal court increased fourfold in the first decade of that state’s experience with blended sentencing.²²⁵ As long as blended sentencing statutes supplement rather than supplant existing transfer statutes, it appears that they will fail to live up to their promise of providing juveniles with procedural due process, and may not even lower the number of transfers.

Blended sentencing statutes, depending upon how broadly they are drafted, may also widen the net of juveniles who face adult sanctions. Some blended sentencing statutes contain no age limits and others apply to both non-violent and violent crimes, exposing many younger offenders and less serious offenders to adult sanctions who otherwise would not have been exposed to them. In both the Lacresha Murray and Nathaniel Abraham cases, for example, blended sentences were sought against children who were only eleven years old at the time they were charged with murder.

Some blended sentencing statutes require that adult sanctions be automatically imposed for any violation of juvenile sentences, including new offenses and technical violations (*e.g.* curfew, truancy). If strictly enforced, many juveniles who may be on the road to rehabilitation, if they suffer a setback along the way, will receive automatic adult sanctions for minor transgressions. In Illinois, for example, a juvenile received an adult five-year sentence when he was arrested for shoplifting several compact discs from a local record store.²²⁶

²²⁴ PATRICIA TORBET ET AL., JUVENILES FACING CRIMINAL SANCTIONS: THREE STATES THAT CHANGED THE RULES 43 (2000).

²²⁵ ZIMRING, *supra* note 5, at 173.

²²⁶ See Tom Ragan, *Judge Unsure He Can Review Teen’s Adult Sentence; Circuit Court Stay Sought of Juvenile Court Ruling*, CHI. TRIB. (McHenry County Ed.), Jan. 27, 2000, at 5. After Jeffrey Hoey, a sixteen-year-old boy held up a convenience store with a pellet gun in

Blended sentencing statutes, if used in this way, actually set juveniles up for failure, tie judges hands when the juveniles step out of line, and ultimately restrict flexibility in sentencing.

Finally, whether or not blended sentences give juvenile offenders a real chance at earning their way out of adult sanctions depends on the quality of programming the juvenile system offers young people. Many of the states which adopted blended sentencing statutes did little or nothing to change the programming offered to juvenile offenders in and out of corrections. Without quality programming aimed at rehabilitating the serious and violent offender, many juveniles who receive blended sentences will end up in the adult system.²²⁷

Early indications also indicate that blended sentencing, like transfer, is being disproportionately used against minority offenders.²²⁸ Although it is too early to call blended sentencing a success or a failure, and more research needs to be done to judge the impact of these reforms, the problems discussed herein suggest that blended sentencing may not be mitigating the harshness of the transfer regime and may, in fact, be aggravating some of the inequities of that regime.

YOUTH DISCOUNTS

We also support “youth discounts,” a reform advocated by Barry Feld that would use youth as a mitigating factor in sentencing juveniles convicted in adult court. Feld, for example, recommends that fourteen and fifteen-year-olds would receive a discount of between two-thirds and three fourths of the adult sentence and sixteen and

1999, he became one of the first juveniles to be prosecuted under the state’s newly enacted blended sentencing laws. He was sentenced to two years of juvenile probation and given a five year suspended adult sentence. When Hoey shoplifted two CDs from a local Best Buy store a year later, prosecutors brought him back into court and the judge had no choice but to impose the adult sentence. *Id.* See also Charles Keeshan, *Teen Challenges State’s Juvenile Justice Act*, CHI. DAILY HERALD, Nov. 17, 1999, at 8.

²²⁷ This is precisely what happened in New Mexico. Although the legislature and the State’s Juvenile Justice Advisory Committee had recommended that the Department of Corrections (“DOC”) implement new specialized programming for serious juvenile offenders, the DOC refused to do so, believing that the small numbers of juveniles expected to be sentenced under the new laws did not justify the effort. When juvenile court judges learned that no new programming was created and no new money was appropriated to deal with these youthful offenders, they chose to send them to adult corrections rather than impose juvenile sanctions. TORBET ET AL., *supra* note 223, at xiv. Similarly, in Minnesota, an one-year lag between enactment of the blended sentencing reforms and funding led to delays in the development of new programming. *Id.* at xvi.

²²⁸ Both Minnesota and New Mexico case studies demonstrate that African American and Latino youth make up a disproportionate share of those who receive blended sentences or are subject to motions for criminal sanctions. TORBET ET AL., *supra* note 223, at 44.

seventeen-year-olds would get a discount of between one-half and one-third of the adult sentences. He would give deeper discounts to the younger offenders because they have less self-control and less opportunity to learn to make responsible choices. In Feld's sentencing scheme, such "youth discounts" only make sense in a sentencing systems which allow judges to impose "realistic humane and determinate sentences" on adult offenders.²²⁹ Thus, he calls for the abolition of mandatory minimum sentences and "truth-in-sentencing" laws that hamstringing judicial efforts to use youth as a mitigating factor.²³⁰

We endorse Feld's proposals because they respect the notion that juveniles are developmentally different than adults and that these differences make juveniles both less culpable for their crimes and less deserving of the harsh sanctions, which now must be imposed on serious and violent adult offenders. Even if mandatory minimum and "truth-in-sentencing" laws are to remain on the books, we call for a youth exception to such one size fits all sentences. Where we take issue with Feld, however, is over his continued calls to abolish the juvenile court as a prerequisite to reforming the sentencing schemes for juvenile offenders in criminal court. While a full-scale debate with Feld is beyond the scope of this article and our summary does not do justice to Feld's well-constructed argument for an integrated sentencing scheme, we believe that giving criminal court judges greater flexibility in sentencing juvenile offenders is valuable in and of itself and that one need not sacrifice the juvenile court to achieve this worthwhile goal.

Finally, three existing practices merit special attention—the incarceration of youth in adult jails and prisons, the use of life without the possibility of parole sentences for juvenile offenders, and the juvenile death penalty. We call for the abandonment of these practices and use examples both from the turn-of-the century and the present-day to support our position. These final checks do not prevent the prosecution of adolescents as adults, but are designed to prevent the state from inflicting cruel and unusual punishments upon them.

SEGREGATING YOUTH FROM ADULTS IN JAILS AND PRISONS

It is important to re-emphasize the need to segregate youthful offenders from adults in correctional institutions, a leading principle of the original juvenile court movement. Since at least the early nine-

²²⁹ FELD, *supra* note 15, at 314–319.

²³⁰ *Id.* at 319.

teenth century, American child-savers have condemned the practice of placing children in adult prisons due to the likelihood of sexual abuse and the lack of educational opportunities, except for schooling in crime.²³¹ The criminal justice system, according to its critics in the late nineteenth and early twentieth centuries, transformed malleable young people into hardened criminals. Sadly, these past concerns about “our penal machinery and its victims” are a present-day reality.²³² Youth in prisons are more likely to be sexually assaulted than in juvenile training schools, have fewer educational and counseling opportunities, and often report that they spend “much of their time talking to more skilled and experienced offenders who taught them new techniques of committing crime and methods of avoiding detection.”²³³ As a result, as Donna Bishop and Charles Frazier have recently argued, “even if the pains of punishment and confinement caused most juveniles to wish to avoid returning to prison, what they learned in prison provided a destructive counterbalance to their positive intentions.”²³⁴ Thus, it appears that history is repeating itself, as the preliminary research on the new transfer regime reveals that once again “the criminal justice system may actually contribute to criminal behavior.”²³⁵

²³¹ Schlossman, *supra* note 14, at 325–349.

²³² See, e.g., E.C. WINES, *THE STATES OF PRISONS AND OF CHILD-SAVING INSTITUTIONS IN THE CIVILIZED WORLD* (1879); JOHN P. ALTGELD, *OUR PENAL MACHINERY AND ITS VICTIMS* (1886); LOUISE DE KOVEN BOWEN, *JUVENILE PROTECTIVE ASS'N OF CHL., BOYS IN THE COUNTY JAIL: THEIR NEEDS* (1913). As a result of recent changes in transfer laws, juveniles are increasingly being placed in adult correctional facilities. Between 1985 and 1997, the number of youths under the age of 18 admitted to state prisons more than doubled from 3400 in 1985 to 7400 in 1997. JAMES AUSTIN ET AL., *BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 5* (2000).

²³³ Bishop & Frazier, *supra* note 205, at 257. Cf. FELD, *supra* note 15, at 272–279.

²³⁴ Bishop & Frazier, *supra* note 205, at 263–264.

²³⁵ *Id.* In his pioneering study, *Separating the Men from the Boys: The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in *SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK* (James C. Howell et al., eds. 1995), Jeffrey Fagan discovered,

76 percent of those processed in criminal were rearrested, compared to 67 percent of those processed in juvenile court. An even greater effect was observed for the likelihood of reincarceration; 56 percent of the criminal court group were subsequently incarcerated, compared to 41 percent of the juvenile court group. Offenders prosecuted in criminal court also had higher rates of rearrest for time at risk (2.85 offenses) than those prosecuted in juvenile court (1.67 offenses), and they were rearrested more quickly (457 days compared to 553 days for those processed in juvenile court).

By comparing the experiences of transferred and non-transferred juvenile offenders in Florida, Bishop, Frazier and their colleagues have found similar results to Fagan research on New York and New Jersey. They calculated that,



LIFE IN PRISON WITHOUT PAROLE SENTENCES

Even more disturbing is the trend to sentence more youthful offenders to life in prison without the possibility of parole. The overwhelming majority of American jurisdictions permit life without the possibility of parole sentences for juvenile offenders, and in Washington, children as young as eight can be sentenced to life; in Vermont, ten-year-olds can receive this sentence.²³⁶ As the cases of Lionel Tate and Nathaniel Abraham demonstrate, conviction of first-degree murder in adult court, in some states, can bring mandatory life without the possibility of parole sentences for pre-teens.²³⁷

In *The Spirit of Youth and the City Streets*, Jane Addams, the Nobel Prize winning social worker and crusader for the juvenile court, emphasized that youth above all is about possibility and that “we may either smother the divine fire of youth or we may feed it.”²³⁸ We reject life without the possibility of parole sentences because they smother the divine fire of youth. They are an expression of despair that has no place in any system that aims to take seriously youth as a mitigating factor.

Over the short term, 30 percent of the transfers were rearrested, compared to 19 percent of those processed in the juvenile court. Transfers were also more likely than those processed in the juvenile system to be arrested for most serious (felony) offenses. The incidence of offending was also higher in the transfer group: transfers had a rearrest rate of 0.54 offenses per person year of exposure, compared to 0.32 for those retained in the juvenile system. The transfers also reoffended more quickly (135 days) than those processed in juvenile court (227 days).

Bishop & Frazier, *supra* note 209, at 248.

²³⁶ LYNN COTHERN, COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILES AND THE DEATH PENALTY* 10–12 (2000). *See also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998).

²³⁷ Legal challenges to life without parole sentences for juvenile offenders, on grounds that such sentences are disproportionate to the crime in violation of the Eighth Amendment’s prohibition against cruel and unusual punishments and similar state constitutional provisions, have met with only limited success. *Compare* Harris v. Wright, 93 F.3d 581, 585 (9th Cir. 1996) (affirming constitutionality of life sentence for fifteen-year-old convicted of murder), *and* State v. Massey, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (affirming life sentence of thirteen-year-old convicted of murder), *with* Workman v. Kentucky, 429 S.W.2d 374, 377 (Ky. Ct. App. 1968) (invalidating mandatory life sentence of fourteen-year-olds convicted of rape), *and* Naovarath v. State, 779 P.2d 944, 946 (Nev. 1989) (finding life sentence of thirteen-year-old convicted of murder to be “cruel and unusual”). A little over one hundred years after the juvenile court’s birth, an Illinois trial court found that a mandatory life sentence to a fifteen-year-old accomplice in a double homicide was unconstitutional. Janan Hanna, *Mandatory Life Term for Teen Rejected*, CHI. TRIB., June 22, 2000, at 1. This decision was affirmed by the Illinois Supreme Court in *People v. Miller*, 781 N.E.2d 300 (2002).

²³⁸ ADDAMS, *supra* note 45, at 161.

JUVENILE DEATH PENALTY

The ultimate expression of despair in the criminal court system is the death penalty for juvenile offenders.²³⁹ The United States is one of only seven countries known to have executed offenders who were juveniles at the time of their crimes in the 1990's; the others countries were Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the Democratic Republic of Congo. Yemen and Pakistan have recently amended their laws to outlaw such executions. In the year 2002, the United States executed three juvenile offenders, all of whom were from Texas, and has executed eighteen juvenile offenders since 1990, more than the rest of the world combined.²⁴⁰

In 1989, the United States Supreme Court, in a landmark decision written by Justice Antonin Scalia, upheld the constitutionality of the death penalty for sixteen and seventeen-year-olds by a slim one-vote majority.²⁴¹ The year before the court had ruled that it was "cruel and unusual punishment" to execute those under age sixteen.²⁴² Of the thirty-eight death penalty states, twenty-two of them currently allow for juvenile offenders to be executed; nineteen set the minimum age at sixteen and the remaining four execute only seventeen-year-old offenders.²⁴³

There are many reasons why we oppose the juvenile death penalty. For the purposes of this article, we will focus on the basic principles of child and adolescent development which underpin the juvenile court: children, including sixteen and seventeen-year-olds, are not adults and their immaturity, impulsivity, lack of judgment and life experiences make them less culpable than adults for their crimes. Indeed, recent medical research involving brains scans reveals that the adolescent brain is different than the adult brain and that the dif-

²³⁹ Alex Kotlowitz, *The Execution of Youth*, NEW YORKER, Jan. 17, 2000, at 23.

²⁴⁰ For a listing of reported worldwide executions since 1990, see the website of the International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, at <http://www.internationaljusticeproject.org/juvworld.cfm>. For a history of the juvenile death penalty in the United States and an up-to-date account of the juveniles who are on death row, see Victor Streib, *The Juvenile Death Penalty: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–December 31, 2002*, at <http://www.law.onu.edu/faculty/streib/juvdeath.htm>. For a listing of reported worldwide executions since 1990, see the website of the International Justice Project at <http://www.internationaljusticeproject.org/juvworld.cfm>.

²⁴¹ See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

²⁴² See *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

²⁴³ Steven Drizin & Steven Harper, *Old Enough to Kill, Old Enough to Die*, S. F. CHRON., Apr. 16, 2000, at 1. In 2002, Indiana became the most recent state to raise the minimum age for death penalty eligibility to eighteen. Ind. Code § 35-50-2-3 (2002).

ferences are in very areas of the brain—the pre-frontal lobes—that regulate impulse control, and judgment. This brain research refutes commonly-held notions that the brain was fully developed before adolescence and provides additional scientific support for the notion that youth must serve to mitigate adolescent criminal conduct.²⁴⁴

Our opposition to the juvenile death penalty is also informed by perhaps the most famous case in the Chicago Homicide Database: the brutal murder of Bobby Franks, age fourteen, in 1924 by Nathan Leopold and Richard Loeb. Leopold (age nineteen) and Loeb (age eighteen), sons of Hyde Park millionaires and students at the University of Chicago, had randomly selected, kidnapped, and killed Franks, a neighborhood boy and distant cousin of Loeb's, on his way home from school. After being caught, Leopold and Loeb had eagerly confessed, but showed no remorse. They soon became known to the public as the “boy-murderers” who had committed the “crime of the century.”²⁴⁵

Clarence Darrow, the boys' attorney, in order to avoid a trial by jury and the pitfalls of an insanity defense, had them plead guilty and take their chances with a sentencing hearing before a lone judge.²⁴⁶ Throughout the hearing Darrow highlighted the youth of the accused and stressed that there had never been a case in Chicago in which the

²⁴⁴ NATIONAL INSTITUTE OF MENTAL HEALTH, *TEENAGE BRAIN: A WORK IN PROGRESS* (2001), at www.nimh.nih.gov/publicat/teenbrain.cfm. See also Matt Crenson, *Rebels Have a Cause: Brain Change*, ARIZ. REPUBLIC, Jan. 2, 1001, at E1; Sharon Begley, *Getting Inside a Teen Brain: Hormones Aren't the Only Reason Adolescents Act Crazy. Their Gray Matter Differs From Children's and Adults*, NEWSWEEK, Feb. 28, 2000, at 58; Sharon Brownlee et al., *Inside the Teen Brain: Behavior Can Be Baffling When Young Minds Are Taking Shape*, U.S. NEWS & WORLD REP., Aug. 9, 1999, at 44–48.

²⁴⁵ Chicago Homicide Database, *supra* note 28, Case No. 6034. That case, dated May 22, 1924 reads:

Franks, Robt.—Age 13—His nude body found in a culvert at 118th St and Penna. R.R. where he was hidden by Richard Loeb and Nathan J. Leopold. The two were indicted on June 5th after confessing to the murder giving as their motive that it was an “experiment in sensation” as well as the \$10,000 they asked as ransom. 8 dist. 9/10/24. Each sentenced to life term in Joliet Pen. On the Murder charge and 99 years for the kidnapping — Caverly.

The best account of this famous case and the subsequent histories of Leopold and Loeb is HAL HIGDON, *THE CRIME OF THE CENTURY: THE LEOPOLD AND LOEB CASE* (1975). For an analysis of how public reactions to the case have changed over time, see Paula Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. OF AM. HIST. 919 (1993).

²⁴⁶ Darrow's plea is reprinted in MAUREEN MCKERNAN, *THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB* 160–236 (1957). For more about the hearing see also *A Symposium of Comments From the Legal Profession*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 395 (1924) (discussing the Loeb–Leopold murder).

state had put to death a defendant who plead guilty and was under twenty-three years of age.²⁴⁷ Darrow also called upon psychiatrists and experts on juvenile delinquency to explain the boys' antisocial behavior. The testimony of "these men of science" attracted international attention to the case, and Robert McCormick, the publisher of the *Chicago Tribune*, even offered Sigmund Freud \$25,000 to visit Chicago and psychoanalyze Leopold and Loeb. Freud, however, declined the offer.²⁴⁸

In his legendary summation, Darrow declared:

I suppose civilization will survive if your honor hangs them. But it will be a terrible blow that you shall deal. Your honor will be turning back over the long, long road we have traveled. You will be turning back from the protection of youth and infancy. You honor would be turning back from the treatment of children. . . . You would be dealing a staggering blow to all that has been done in the city of Chicago in the last twenty years for the protection of infancy and childhood and youth.²⁴⁹

Darrow not only evoked Chicago's historic role in establishing child-saving institutions, such as the juvenile court, but also asked what kind of precedent the judge would set if he sentenced these boys to death. He prophesized:

Your honor, if in this court a boy of eighteen and a boy of nineteen should be hanged on a plea of guilty, in violation of every precedent of the past, in violation of the policy of the law to take care of the young, in violation of all the progress that has been made and of the humanity that has been shown in the care of the young; in violation of the law that places boys in reformatories instead of prison—if your honor in violation of all that and in the face of all the past should stand here in Chicago alone to hang a boy on a plea of guilty, then we are turning our faces backward toward the barbarism which once possessed the world. If your honor can hang a boy eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Some day, if there is any such thing as progress in the world, if there is any spirit of humanity that is working in the hearts of men, some day men would look back upon this as a barbarous

²⁴⁷ MCKERNAN, *supra* note 246, at 162. There were at least a few cases in which the state executed minors who did not plead guilty. See, e.g., Chicago Homicide Database, *supra* note 28, Case No. 806, Feb. 27, 1888 ("Gaughan, Maggie, killed by Zeph Davis, a colored boy, who was arrested, tried, and executed."). For an excellent analysis of this case, especially how the city's newspapers used the case to structure narratives about the criminal justice system, see DALE, *supra* note 31.

²⁴⁸ PETER GAY, *FREUD: A LIFE FOR OUR TIME* 453–54 (1988).

²⁴⁹ MCKERNAN, *supra* note 246, at 186–187.

age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act.²⁵⁰

Although Judge Caverly rejected the psychological testimony, he decided against imposing the death penalty. He explained,

[I]n choosing imprisonment instead of death, the court is moved chiefly by the consideration of the age of the defendants, boys of eighteen and nineteen years. It is not for the court to say that he will not, in any case, enforce capital punishment as an alternative, but the court believes it is within his province to decline to impose the sentence of death on persons who are not of full age.

²⁵¹ He added, “This determination appears to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity.”²⁵² The judge spared the lives of Leopold and Loeb, but he recommended that department of public welfare never “admit these defendants to parole.”²⁵³ Thus, it was likely but not definite that the “boy-murderers” would spend the rest of their lives in prison.

As it turned out, Richard Loeb was murdered in prison in 1936, but Nathan Leopold, after spending thirty-three years in prison was paroled. More significantly, Leopold both in prison and afterwards led a productive life. In 1933, for instance, Leopold and Loeb founded and ran the Stateville Correspondence School for prisoners. While in prison, Leopold also learned twelve languages, reclassified the prison library, gathered statistics on parole, became an X-ray technician, registered inmates for the draft for WWII, volunteered for a medical project designed to find a cure for malaria, and wrote his autobiography *Life Plus 99 Years*. After being paroled, Leopold worked in a hospital, married, attended graduate school, taught at the University of Puerto Rico, researched leprosy, and authored *The Birds of Puerto Rico*. On the tenth anniversary of his release from

²⁵⁰ *Id.* at 231.

²⁵¹ *Id.* at 298. In his autobiography, Leopold noted:

If Judge Caverly meant literally what he said in his opinion, the whole elaborate psychiatric defense presented in our behalf and the Herculean efforts of our brilliant counsel were of no avail. The only thing that influenced him to choose imprisonment instead of death was our youth; we need only have introduced our birth certificates in evidence!

NATHAN LEOPOLD, *LIFE PLUS 99 YEARS* 82 (1958).

²⁵² MCKERNAN, *supra* note 246, at 298.

²⁵³ *Id.*

prison, Leopold wrote some friends and evaluated his post-prison existence. He noted, "Negatively, at least I have not committed another felony nor otherwise got into trouble. From the point of view of the statistics of parole violation, I qualify as a 'success.' But honestly, I think it has gone a bit farther than just that. I've done a few things that I think needed doing in the professional field." He added, "My reputation, locally, is good; people here, in general, not only tolerate me but positively like me! In a word, even if it sounds very immodest, I believe that society has not been the loser in granting me, at long last, my liberty."²⁵⁴ When Leopold died on August 30, 1971, he also gave back to society. He willed his body to the University of Puerto Rico and his eyes to the university's eye bank. The day after his death, an elderly widow received one of his corneas; the other went to a man.²⁵⁵

We believe that the life of Nathan Leopold reveals why the legal response to juvenile homicide should not include either life in prison without the possibility of parole or the death penalty. Such sentences of despair are cruel and unusual punishments, which should not remain part of our nation's justice system.

²⁵⁴ HIGDON *supra* note 245, at 333.

²⁵⁵ *Id.* at 340.