Notre Dame Journal of Law, Ethics & Public Policy

Volume 5
Issue 2 *Symposium on Serious Juvenile Crime*

Article 3

1-1-2012

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TRANSFER OF JUVENILES TO CRIMINAL COURT: A CASE STUDY AND ANALYSIS OF PROSECUTORIAL WAIVER†

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I. INTRODUCTION

The development of a separate justice system for juveniles owes much to the view that juvenile offenders are less culpable than adult offenders and more amenable to change.[1] As an important corollary, retributive, incapacitative, and deterrent themes — the central philosophical bases supporting punishment in the criminal justice system — have largely been absent from the justifications offered for intervention with juvenile offenders.[2] Instead, rehabilitative treatment and protective supervision traditionally have been the preferred responses to juvenile misbehavior.[3]

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† This article revises material presented previously in 35 CRIM. & DELINQ. 179 (1989). All information is used with permission of both authors and the publisher.

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1. See generally Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Hazard, *The Jurisprudence of Juvenile Deviance*, in PURSUING JUSTICE FOR THE CHILD 4 (M. Rosenheim ed. 1976); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Platt, *The Triumph of Benevolence: The Origins of the Juvenile Justice System in the United States*, in CRIMINAL JUSTICE IN AMERICA 356 (R. Quinney ed. 1974); A. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY (2d Ed. 1977).

2. See *generally* A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1968); R. EMERSON, JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT (1969); Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative for Asking Unanswered Questions*, 62 MINN. L. REV. 515 (1978); L. EMPEY, AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION (1982); M. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE (1982).

3. See Fox, *supra* note 1; Hazard, *supra* note 1.

Many question whether the juvenile justice system either utilizes therapeutic techniques or accomplishes therapeutic ends. With regard to the former, it can be said that while the philosophical justification for intervention with young offenders is based on a rehabilitative ideal (See, e.g., F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964)), the operational difference between treatment and punishment is frequently blurred in practice. With regard to the latter, commentators on the achievements of the

Notwithstanding the juvenile justice system's nominal orientation toward rehabilitation, from the beginning provisions were made to exclude some youthful offenders from the protections of the juvenile court.[4] For example, it is difficult to support continued efforts to treat chronic offenders who have been unresponsive to efforts to rehabilitate them. Similarly, it is difficult to justify a rehabilitative posture toward youths—even first offenders—who have committed serious violent crimes that provoke strong societal indignation and fear for public safety. These concerns were not and are not easily assuaged within the range of dispositional alternatives traditionally available to the juvenile court. It is not surprising, then, to find that even early on in the history of juvenile justice, juvenile codes were amended to permit the transfer of some youths to criminal courts for prosecution and punishment. Today all states have provisions to accept from the juvenile justice system young offenders who are so intractable or dangerous as to warrant adult prosecution.[5]

In the last two decades, the transfer of juvenile offenders to criminal courts has become increasingly controversial.[6] Dramatic increases in juvenile crime in the 1970s generated public outrage and loss of confidence in the juvenile justice system. Highly publicized negative appraisals of treatment programs[7] undermined support for rehabilitation—and, concomitantly, for the juvenile court—and provoked strong pleas for the adoption of punishment-oriented policies and practices.[8] Transfer rates rose, reflecting growing disillusionment with what were perceived to be lenient, therapeutic responses of the juvenile court.[9] For example, over the period 1971-81, trans-

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juvenile justice system have been almost uniformly negative in their appraisals of rehabilitative programs (See Wright and Dixon, *Community Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 14 J. OF RES. IN CRIME & DELINQ. 35 (1977)).

4. D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).

5. Feld, *supra* note 2.

6. See, e.g., Harris, *Is the Juvenile Justice System "Lenient"?*, 18 CRIMINAL JUSTICE ABSTRACTS 104 (1986).

7. Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22 (1974); D. LIPTON, R. MARTINSON, AND J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975); see also Wright and Dixon, *supra* note 3.

8. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); see also I. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD (1988).

9. There are numerous other signs of disillusionment with the rehabilitative/treatment orientation of the juvenile court. For example,

fers to criminal court increased nationally from less than one percent, to more than five percent, of juvenile arrests.[10]

The transformation from juvenile to adult status has serious consequences. The status of "juvenile" carries with it a shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults, and a guarantee that confinement will not extend beyond the age of majority. In addition, it provides protection against loss of civil rights, against disqualification for public employment, and against the personal status degradation and restriction of legitimate opportunities that often follow a criminal conviction. Feld has summarized nicely what is at stake with his observation that, compared to youths processed in the juvenile justice system, youths treated as adults have a greatly reduced probability of surviving adolescence with their life chances intact.[11]

Historically, the transfer of juveniles to criminal court has been accomplished most commonly by judicial waiver. This method of transfer was reviewed by the Supreme Court in the 1966 case of *Kent v. United States*.[12] There the Court characterized the waiver decision as "critically important" and mandated a number of procedural safeguards to protect the interest of the child in having jurisdiction retained by the juvenile court. These include the right to a hearing, representation by counsel,

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several states have recently redefined the purposes of their juvenile justice systems to include punishment (e.g., California, Florida, Indiana, Minnesota, Texas, Virginia), while some have introduced desert-based sentencing in the juvenile court (e.g., New Jersey, Texas, Washington). Several state legislatures have recently enacted statutes excluding certain categories of offenders from juvenile court jurisdiction (e.g., New York, Illinois), and some have moved to lower the age of criminal court jurisdiction (e.g., Vermont). For further discussion of the movement toward a more punishment oriented approach, see Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U.L. REV. (1988); P. GREENWOOD, INTERVENTION STRATEGIES FOR CHRONIC JUVENILE OFFENDERS: SOME NEW PERSPECTIVES (1986).

10. Krisberg, Schwartz, Litsky, and Austin, *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5 (1986); D. HAMPARIAN, L. ESTEP, S. MUNTEAN, R. PRIESTINO, R. SWISHER, P. WALLACE, & J. WHITE, MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS (1982) [hereinafter HAMPARIAN]. See also, Champion, *Teenage Felons and Waiver Hearings: Some Recent Trends, 1980-1988*, 35 CRIME & DELINQ. 577 (1989); Miller, *Changing Legal Paradigms in Juvenile Justice*, in INTERVENTION STRATEGIES FOR CHRONIC JUVENILE OFFENDERS: SOME NEW PERSPECTIVES (P. Greenwood, ed. 1986).

11. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 275 (1984).

12. 383 U.S. 541 (1966).

access to information considered in reaching the decision to waive jurisdiction, and a statement of reasons for the waiver. Although *Kent* was decided on procedural grounds, the Court, in an appendix to its decision also enumerated several substantive criteria[13] to guide judges in making transfer decisions.[14] These standards reduce the dangers of arbitrary, capricious, and discriminatory dispositions inherent in unstructured decision-making, and ensure some degree of equitability to the transfer process.[15] When a state seeks to transfer a youth to criminal court viz judicial waiver, it bears the substantial burden of marshalling evidence sufficient to convince a presumably treatment-oriented juvenile court judge that a youth is not amenable to treatment within the juvenile justice system and that he poses a serious danger to the community.[16]

In keeping with today's increasingly punitive orientation, many jurisdictions recently have moved to facilitate the prosecution of youths in criminal courts.[17] Toward that end, three streamlined methods of transfer are now in use that expedite transfer by by-passing the risks and inconveniences associated with the juvenile waiver hearing. Some states have enacted legislation excluding certain categories of offense—most often, capital offenses and major felonies—from juvenile court jurisdiction.[18] Some provide for grand jury indictment of juveniles charged with certain major felonies.[19] Under either of these alternatives, youths charged with any of the enumerated offenses are automatically tried as adults.

The third and most controversial transfer mechanism consists of prosecutorial waiver or "direct file." Under this

13. These include the seriousness of the offense (and particularly whether the offense was a felony against persons in which injury resulted), prosecutive merit, the sophistication and maturity of the child, the child's prior offense record, indications of responsiveness to prior rehabilitative efforts, and the ability of dispositional alternatives available to the juvenile court to rehabilitate the child or effectively protect the public.

14. Many states have incorporated these criteria into their juvenile codes either *verbatim* or with minor modifications.

15. To be sure, interpretation of the standards remains subjective and there is opportunity for selective emphasis upon individual criteria, but the exercise of discretion is nonetheless guided to a significant degree.

16. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative for Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978); Feld, *Juvenile Court Reform and the Serious Young Offender: Dismantling the 'Rehabilitative' Ideal*, 65 MINN. L. REV. 167 (1981).

17. *See generally*, Hamparian, *supra* note 10.

18. *E.g.*, Illinois, Indiana, Oklahoma, Louisiana.

19. *E.g.*, Florida.

method, which has been adopted in at least thirteen states,[20] concurrent jurisdiction is given to the juvenile and criminal courts: It is the prosecutor's charging decision that determines in which forum the case will be heard. Ordinarily, the prosecutor's decision to file charges in criminal court is nonappealable.[21] Moreover, while some prosecutorial waiver statutes include clear and restrictive criteria to guide their application, others provide only vague guidelines.[22]

Not surprisingly, prosecutorial waiver statutes have been the object of sharp criticism.[23] Some commentators fear that provisions allowing quick and easy transfer invite careless application, or worse, deliberate misapplication and abuse.[24] Additionally, there is concern that youths who might respond to therapeutic interventions or simply "mature out" of juvenile misconduct may be prosecuted in criminal courts and confined with adults under circumstances that may have decidedly negative effects.[25] Finally, because prosecutorial waiver statutes greatly expand the power of prosecutors—who historically have been more concerned with retribution than with rehabilitation—widespread use of prosecutorial waiver seems to signal a fundamental shift in delinquency policy away from the *parens patriae* philosophy that is the cornerstone of the juvenile court and toward a punitive orientation characteristic of criminal courts. In a real sense, then, prosecutorial waiver threatens the very existence of a separate juvenile justice system.[26]

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20. *E.g.*, Arkansas, Florida, Nebraska, Wyoming.

21. Except in those few jurisdictions that have established reverse certification procedures, prosecutorial waiver decisions are virtually unreviewable and irreversible.

22. Florida's prosecutorial waiver statute is a case in point. After setting forth broad age and offense criteria for transfer, it directs the prosecutor to transfer a youth to criminal court "when in his judgment and discretion, the public interest requires that adult sanctions be considered or imposed." FLA. STAT. ANN. § 39.04(2)(e)(4)(West 1988). See *infra*.

23. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972) (Wright, J., dissenting), *cert. denied*, 412 U.S. 909 (1973); Mylniec, *Juvenile Delinquent or Adult Convict: The Prosecutor's Choice*, 14 AMER. CRIM. L. REV. 29 (1976); see also, INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO TRANSFER BETWEEN COURTS, Standards 1.1.B, 1.1.C, 2.2.A.1, and 2.2.C. (1980).

24. Mylniec, *supra* note 23, at 36-37.

25. *See*, R. SARRI, UNDER LOCK AND KEY: JUVENILE IN JAILS AND DETENTION (1974); BROUGHT TO JUSTICE? JUVENILES, THE COURTS, AND THE LAW (R. Sarri and Y. Hasenfeld eds. 1976); CHILDREN'S DEFENSE FUND, CHILDREN IN ADULT JAILS (1976); Soler, *Litigation on Behalf of Children in Adult Jails*, 34 CRIME AND DELINQUENCY 190 (1988).

26. *See*, for example, C. THOMAS & C. FRAZIER, AN EVALUATION REPORT ON FLORIDA'S SERIOUS OFFENDER PROGRAM 8 (1984).

This paper examines the philosophy and practice of prosecutorial waiver in Florida.[27] Our study is divided into several parts. In the first section, we examine the provisions of Florida law relating to prosecutorial waiver. Next, we briefly review records of juveniles transferred to criminal court statewide for the period 1979-87. These data, which span a time frame during which prosecutors' transfer powers were expanded, permit us to explore the impact of legal change on trends in transfer rates and practices. Third, we report the results of interviews conducted with prosecutors in the juvenile divisions of each of the state's judicial circuits. These interviews allowed us to gain firsthand information from practicing prosecutors on their views and practices relating to Florida's transfer provisions. Fourth, we examine individual-level case data from two urban counties on characteristics of youths transferred and the dispositions they received. Finally, drawing upon the findings of our empirical analyses, we discuss the problems inherent in applying a broad prosecutorial waiver statute and offer some recommendations regarding ways to achieve the aims of the statute in more consistent and equitable ways.

II. FLORIDA'S TRANSFER PROVISIONS

Florida law offers three methods for transferring youths from juvenile to criminal court jurisdiction. The oldest of these is judicial waiver, which applies to youths fourteen years of age or older. In 1975 the state legislature incorporated *Kent* criteria into the Florida Juvenile Justice Act.[28] Consequently, the juvenile judge's waiver decision is made only after assessing the youth's dangerousness and amenability to treatment, as indicated by such considerations as the current offense, the prior record, prior treatment interventions, the youth's sophistication and maturity, and the prognosis for further treatment, as reflected in clinical evaluations.[29] Although some commen-

27. For an expanded discussion of the study and its findings, see Bishop, Frazier, & Henretta, *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQ. 179 (1989).

28. FLA. STAT. ANN. § 39.09(2)(West 1988).

29. The judge is assisted in the waiver determination by a report which details the child's social and offense history. This report is submitted prior to the waiver hearing, and the child, his parents or guardians, and both defense counsel and state's attorney have the right to examine it and to question the parties who conducted the inquiry. Further, if the decision to transfer is made, the judge must submit specific findings of fact supporting the transfer decision with respect to each of the *Kent* criteria.

tators criticize the *Kent* criteria for being too broad to provide objective indicators to guide discretion,[30] there is no doubt that they represent a vast improvement over the standards to be discussed below with respect to prosecutorial waiver.

Florida law also provides a variation on "legislative waiver," that is, the exclusion from juvenile court jurisdiction of youths charged with certain specified offenses. Specifically, the law provides that the prosecutor *shall* seek indictment of any child, regardless of age, who is charged with a capital or life felony.[31] Prosecutorial discretion is exercised in the selection of charges. However, once the decision is made to charge one of the enumerated felonies, transfer is virtually automatic, insuring some equitability in application.

The final mechanism for removing offenders from the juvenile system is prosecutorial waiver. The Florida legislature enacted limited prosecutorial waiver legislation in 1979 and amended it in 1981 to grant prosecutors almost unlimited discretion with respect to the transfer of sixteen and seventeen year olds. As amended, the Florida Juvenile Justice Act permits the prosecutor to file a bill of information in criminal court on any child fourteen years of age or older who has previously been adjudicated delinquent for one of several violent felonies and who is currently charged with a subsequent such offense, and on any sixteen- or seventeen-year-old charged with *any* violation of Florida law "when in his judgment and discretion, the public interest requires that adult sanctions be considered or imposed."[32]

In sum, prosecutors have rather limited powers over the transfer of youths under the ages of sixteen and seventeen. They may transfer any sixteen- or seventeen-year-old charged with any felony. Any sixteen- or seventeen-year-old charged with a misdemeanor or even a local ordinance violation may also be charged as an adult if he has had two prior adjudications of delinquency, one of which involved a felony. This discretionary power is carried out without a hearing, without any statement of reasons, without counsel, and without any show-

30. *See, e.g.*, for example, Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 1 (1990).

31. FLA. STAT. ANN. § 39.02(5)(c) (West 1988).

32. FLA. STAT. ANN. § 39.04(2)(e)(4) (West 1988). Remand from criminal court to juvenile court is possible upon request of the child only if the child is presently charged with a misdemeanor and does not have two prior delinquency adjudications, one of which involved a felony.

ing that the youth is either dangerous or nonamenable to treatment in the juvenile justice system.

III. Transfers in Florida, 1979-1987

Statewide transfer data for 1979-87 are presented in Table 1.

TABLE 1 Juvenile Transfers in Florida, 1979-87

Year	Total Deliquency Filings	Percent Transferred	Percent Direct Filed
1979	66,504	1.29	48
1980	42,797	2.80	54
1981	48,105	2.83	61
1982	41,088	8.85	68
1983	38,398	7.99	77
1984	41,492	5.32	78
1985	46,599	5.61	85
1986	50,289	6.41	88
1987	57,298	7.35	88

From the table it can be seen that prior to the 1981 change in the law, only a very small proportion (1-3%) of delinquency filings were disposed of through transfer to criminal court. After the change in the law, there was a dramatic shift. In 1982, nearly 9% of the juvenile court's caseload was channeled away from the juvenile justice system and into the criminal court. Since that time, smaller but nonetheless substantial proportions of delinquency filings have been transferred.

Most of the rise in the transfer rate clearly is attributable to the broadening of provisions governing prosecutorial waiver. Prior to the change in the law, approximately half of all transfers were prosecutorial waivers. Following the change in the law, prosecutorial waivers constituted an increasingly greater proportion of transfer cases, up to almost 90% in 1986 and 1987. Similar declines in both indictment and judicial waiver occurred at the same time, with the decline in judicial waiver being most striking (down to 12% in 1987).

IV. Interviews with Prosecutors

While aggregate data such as those reported above are both necessary and helpful, they leave several very important issues unaddressed. For example, it is important to consider

how prosecutors reacted to their expanded powers, both in terms of their philosophical views regarding the transfer of juveniles to criminal court, and in terms of the policies and procedures they established to apply the law. We are concerned with how prosecutors' personal orientations toward juvenile justice influenced their perceptions of the utility and appropriateness of transfer; with whether the change in the law had any impact on their perceived ability to achieve valid and desirable goals; and with how the change in the law affected practice throughout the state.

We were able to gain some insight into these issues through telephone interviews with juvenile prosecutors in each of the state's twenty judicial circuits.[33] The individuals interviewed were either the chiefs of juvenile divisions or they were in substantial ways responsible for developing or implementing prosecutorial policy relating to juvenile transfer.[34]

Prosecutors generally reported that they were pleased with the 1981 change in the law, primarily because it expanded their discretionary authority over a practice upon which they look favorably. While virtually all respondents indicated that they were pleased with their increased transfer powers, half indicated that they wished the change had been even more far-reaching. Most of this latter group wished that the law had made it easier to transfer juveniles under sixteen years of age. Several felt that sixteen- and seventeen-year-old misdemeanants lacking prior felony adjudications should also have been made eligible for prosecutorial waiver. One expressed the view that prosecutorial waiver decisions should not be encumbered by any age or offense restrictions whatsoever.

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33. To conduct the telephone interviews, we set up appointments with the key prosecutor in charge of transfer policy and administration in each circuit. All prospective interviewees agreed to participate. Prosecutors were asked to set aside approximately 45 minutes for the interview. The interview schedule was five pages in length and included both fixed response and open-ended questions. The time required to complete the interview varied from a low of 35 minutes to a high of more than 2 hours. The average interview lasted approximately 1 hour. The interviewers took notes on all open-ended responses, attempting to record them as near to verbatim as possible. As a check on the accuracy of these recorded statements, the interviewers repeated summarizations of their notes, giving respondents an opportunity to confirm or correct them.

34. In a number of cases, the researchers were already acquainted with the interviewees or other prosecutors in the circuits. In a few instances, the researchers and prosecutors had previously discussed in face to face interviews many issues relating to juvenile transfer.

Equally interesting were the views of those who did not feel that further expansions of the law were desirable. These respondents expressed concern that provisions of the current law have considerable potential for abuse. They worried that persons less ethical than themselves—or those who were sometimes overzealous in seeking harsh punishments for juvenile offenders—would transfer inappropriate cases. Such concerns seemed to be tied to the perception that prosecutors decide which cases to transfer without any standards to guide them. Indeed, our interviews indicated that this fear was not without foundation.

Most prosecutors had not, in fact, established any formal policies. With one clear exception,[35] at best they reported having established informal policies that called for them to review transfers initiated by attorneys under their supervision. Generally these division chiefs believed such a review process to be adequate to ensure that staff initiated prosecutorial waiver only in appropriate cases. However, several expressed considerable doubt that their counterparts in other circuits were as careful as they were in overseeing staff decisions.[36]

Our interviews also provided a basis for examining the relationship between prosecutors' personal philosophies of or orientations toward juvenile justice and their views regarding transfer. Prosecutors' philosophies of juvenile justice varied widely. Not too surprisingly, however, their orientations tended to resemble models that are currently the source of considerable national debate among policymakers. The philosophies may be categorized as falling under a "pure" just deserts model, a "modified" just deserts model (i.e., one that ties together just deserts with some utilitarian goal such as deterrence), and a traditional rehabilitative model of juvenile justice.[37]

Prosecutors holding the pure just deserts viewpoint argued that some punishment is called for in virtually all juve-

35. The exception is Dade County. For a discussion of developments that took place there, see Gelber (1984).

36. Not only was it a common perception among prosecutors that operations in other circuits were not managed as well as their own, but it was also common for prosecutors to suggest that levels of care and standards used by others in the exercise of discretion were too low. There is reason to believe that prosecutors' reservations about practices outside their own jurisdictions were not unfounded: Prosecutors in the state have fairly frequent exchanges and develop a broad familiarity with each others' operations.

37. For a brief but succinct discussion, see L. EMPEY, AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION (1982).

nile cases and that transfer, at the very least, ensures the achievement of this goal. They believed that traditional juvenile justice responses, as routinely applied, had no beneficial effects. In fact, they tended to believe that juveniles were made worse by the juvenile justice system's tendency toward leniency. In their view, "soft" responses deprecate the seriousness of crime and do a disservice to victims. Nonetheless, this group did not expect punishment to produce much, if anything, in the way of reform. For them, the appeal of transfer was that it balanced the scales of justice by providing punishment that was due. Transfer allowed prosecutors to move juveniles from a system where real punishment was not possible to a system that had punishment as a primary goal.

The second group of desert-oriented prosecutors held just as strongly as the first to the view that punishment was essential. Unlike the first group, however, these prosecutors saw punishment as a means of protecting the community and preventing future crimes. Interestingly, some deterrent value was attributed to transfer even in cases that ultimately did not result in conviction. The filing of an information in criminal court virtually assured pretrial detention in adult jails for the vast majority of transfers. Further, if youths were ultimately convicted, transfer opened the possibility of further incarceration in jails and prisons. This group expressed the hope that punishment of young offenders might "turn them around" by exposing them to the very serious punishments that they risk in the adult system.

Both the pure and the modified just deserts types accepted viewpoints that are completely antithetical to the basic precepts traditionally associated with juvenile justice. Indeed, many of these prosecutors expressed contempt for the juvenile justice system, most especially for the social service personnel who staff the majority of juvenile justice positions (e.g., intake workers, detention staff, probation officers, training school personnel). These punishment-oriented prosecutors, who make up nearly half of our respondents and who are charged with representing the state's interests in delinquency cases, constitute a continuing challenge to those who defend the traditional juvenile system.

The third philosophy, one held by a slight majority of respondents, endorsed the traditional principles of juvenile justice. It was this group's view that prosecutorial waiver should be a last resort—reserved for those rare offenders who have already failed to benefit and who cannot now benefit from the programs available in the juvenile justice system. Once

prosecutors in this group defined transfer as necessary, they hoped that rehabilitation might occur in the adult system, but most expressed concern that simple punishment and incapacitation were all that the criminal justice system could provide.

Policymakers would like to believe that prosecutors' opinions about juvenile crime and about transfer of jurisdiction would provide some basis for predicting their behavior. However, we found that prosecutors' stated philosophies and their perceptions of their own practices were almost totally unrelated. As might be expected, prosecutors endorsing a desert-based philosophy indicated that they used the direct file option often. In fact, however, if we use their own estimates of the proportion of eligible cases in which they initiated waiver, they generally were no more inclined to transfer youths than were those who adhered to a rehabilitative orientation. Even though half the respondents believed that juveniles should be transferred only as a last resort, many of them transferred as high a proportion of cases as those prosecutors reporting a more punitive stance. Virtually every prosecutor, regardless of orientation toward juvenile justice, reported having increased the transfer of juveniles to criminal court following the 1981 change in the law.

While it may seem paradoxical that the "last resort" prosecutors transferred as many juvenile offenders as more punitive types, this result makes sense when one understands that many rehabilitation-oriented prosecutors believed that they were forced to transfer youths sooner than they would prefer. They pointed out that some liberal juvenile justice reforms—for example, de-institutionalization—have had the unintended consequence of reducing the rehabilitative options available to the juvenile court, thus making transfer more likely.[38] They feared that increased use of transfer might be mistakenly interpreted as rejection of a rehabilitative philosophy: They were keenly aware that Florida's expanded prosecutorial waiver provisions had shifted the spotlight away from those who adhere to traditional precepts of juvenile justice and toward those with more punitive orientations. Several "last resort" types lamented the fact that it was necessary to transfer youths because the state had failed to invest sufficiently in juvenile treatment programs. They indicated that they would use the transfer option much less frequently were treatment programs

38. Like many other states, Florida recently has closed several training schools and, as a result, many prosecutors observed that there is a real need for alternative residential programs for juvenile offenders.

available, especially residential programs in secure facilities that would satisfy concerns for public safety.

V. TRANSFER PRACTICES IN TWO COUNTIES

We gathered data in two counties regarding all cases in which transfer to criminal court was initiated over the period January 1, 1981 to December 31, 1984. (N=583) Information was drawn from prosecutors' and clerks' files, as well as from records of the Florida Department of Health and Rehabilitative Services.[39] The two counties include a midsized urban area in the mid-Atlantic region and a large urban area in the center of the state. These sites were selected in part because the juvenile division chiefs in each area had held their positions since the first prosecutorial waiver legislation was passed and had maintained careful desk logs containing information on all cases in which transfer to criminal court had been initiated.[40]

Our initial concern is whether cases in which transfer was sought by the juvenile division were indeed adjudicated in criminal court. Criminal prosecutors may evaluate cases very differently than juvenile division prosecutors.[41] For example, criminal division attorneys may view cases involving juveniles as relatively minor, either because they involved "first offend-

39. In each county, we began with prosecutors' records of cases in which a transfer to criminal court was initiated by the juvenile division. We then checked clerks' records for case processing information. From prosecutors' and clerks' files, we obtained information regarding sociodemographic characteristics of juveniles transferred, charges cited by the prosecutor's juvenile division, disposition of the case by the prosecutor's criminal division, charges filed in criminal court, criminal court adjudication, and sentence. From DHRS' statewide computerized database, we obtained information on the offense histories of juveniles transferred. These data included information on previous offenses for which each youth had been referred to the intake division of the juvenile justice system as well as the dispositions of each of these prior referrals.

40. Although we anticipated that practices and outcomes in the two counties might be sufficiently different to warrant separate presentation of findings, they were so similar that, for most purposes we have combined the data to simplify the presentation. Of our total sample of 583, 198 cases were from the smaller county, 385 from the larger.

41. *See, e.g.*, Roysher and Edelman, *Treating Juveniles as Adults in New York: What Does It Mean and How Is It Working?*, in MAJOR ISSUES IN JUVENILE JUSTICE TRAINING AND INFORMATION: READINGS IN PUBLIC POLICY 265-93 (J. Hall, D. Hamparian, J. Pettibone, and J. White eds. 1981); Fagan, Rudman, and Hartstone, *System Processing of Violent Juvenile Offenders: An Empirical Assessment*, in AN ANTHOLOGY ON VIOLENT JUVENILE OFFENDERS 117-36 (R. MATHIAS, P. DEMURO, AND R. ALLINSON eds. 1984); *but see* P. GREENWOOD, A. ABRAHAMSE & F. ZIMRING, FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS (1984).

ers" to the adult system or because their offenses are less serious than those of the adult offenders whose cases they routinely review. As a result, substantial numbers of transfer cases may "fall through the cracks," acted upon in neither juvenile nor criminal court.

In the smaller of the two counties, almost a third (32%) of the cases in which transfer was initiated were not prosecuted in criminal court. In half of these, no action was taken in the criminal division after the case was forwarded by the juvenile division. In the remainder, a criminal division prosecutor initially filed a bill of information but later terminated processing through a *nolle prosequi*. While some of these cases may have come back to the juvenile division for filing at a later date, our interview data suggest that the vast majority of these cases were not prosecuted in either court.[42]

In contrast, in the larger county only 14% of the cases transferred by the juvenile division were not prosecuted in criminal court. This level of case attrition is quite low, especially when one considers the variety of factors that may affect decisions not to prosecute (e.g., insufficiency of the evidence, lack of victim cooperation, inability to locate witnesses, exchange of immunity from prosecution in return for testimony in cases involving co-defendants).

Importantly, it seems that the difference in the criminal court handling of juveniles in the two counties is largely attributable to differences in bureaucratic practices, rather than to differences in the seriousness or perceived prosecutorial merit of cases. In the smaller county, juvenile division prosecutors screened cases for transfer and forwarded them to the criminal division with a recommendation for criminal prosecution. Criminal division attorneys then decided whether to accept the juvenile division's recommendation. In many instances, crimi-

42. Juvenile division prosecutors indicated that if the criminal division did not believe a case had prosecutorial merit, they would not take action in juvenile court. In addition, legal restrictions made it almost impossible to file cases in juvenile court after review by the criminal division. Florida law contains a provision requiring that petitions be filed in juvenile court no later than 45 days after the initial referral to the juvenile system's intake division. Our interviews with prosecutors indicated that this time constraint made it extremely difficult for most cases not acted upon by the criminal division to return to the juvenile division for filing, given the time required for review by the juvenile division in making the initial decision to transfer and the time required by the criminal division did not give priority to juvenile transfer cases, and, not bound by a 45-day rule applicable to adult defendants, routinely took considerably longer than the juvenile division to process referrals received.

nal division attorneys failed to act in a timely fashion and cases were lost for violation of speedy trial rules. By contrast, in the larger county the juvenile division chief personally filed bills of information in criminal court. The transfer took place unless a criminal division attorney intervened to stop it. Thus, juvenile offenders in the two counties were at different levels of risk for criminal prosecution largely because of idiosyncracies in the organization of the prosecutors' offices. These findings represent a clear illustration of what Feld has called "justice by geography."[43]

We turn next to an examination of characteristics of cases filed in criminal court.[44] The most common rationale surrounding transfer of juveniles presupposes that prosecutors carefully select youths for remand to criminal court who are a particularly intractable group of dangerous offenders who cannot benefit from further juvenile justice intervention.[45] Indeed, in both counties studied, the chief prosecutors assured us that this was the case. However, the reality of the situation differed considerably from this expectation. If we accept as a criterion of dangerousness the commission of a felony against persons, we find that only 29% of transfers met this standard. Most (55%) were charged with property felonies. Half of these involved unarmed burglaries. A small proportion (11%) involved felony drug charges, and a few youths (5%) were charged with misdemeanors.

Moreover, the trend has been toward transfer of greater proportions of nonviolent felons and misdemeanants.[46] For example, in 1981, 9% of transferred youths were charged with felony drug offenses and misdemeanors. By 1984, this group constituted 22% of all prosecutorial waivers. While the proportions of felony property offenders remained fairly stable, the proportions of felony person offenders declined substantially. In 1981, 32% of transferred youths were charged with felony person crimes, compared to 20% in 1984. Based on the offense charged, few of the juveniles transferred by prosecutors

43. Feld, *supra* note 30.

44. Nearly all (93%) of the transferred youths were male, and a majority (63%) were white, somewhat less than the proportion white in the juvenile population in the two counties. A majority (60%) of the youths transferred were 17 at the time of their offenses, and many were nearing their 18th birthdays. A smaller number (37%) were 16; only 3% were 15.

45. See, for example, Breathwaite and Shore, *Treatment Rhetoric Versus Waiver Decisions*, 72 J. CRIM. L. AND CRIMINOLOGY CRIME & DELINQ. 53 (1986).

46. For similar findings with respect to waiver in four states, see Champion, *supra* note 10.

to criminal court would seem to be the kinds of dangerous offenders for whom transfer is most easily justified.

To explore the issue of whether transferred youths are nonamenable to treatment, we asked whether juvenile justice system resources had been exhausted prior to prosecutorial waiver. We also examined youths' prior records to look for evidence of chronic offending. We found that only 35% of the youths previously had been committed to a juvenile residential program. Most (58%) had previously served terms of probation or received court-ordered sanctions such as restitution or community work service. In 23% of the cases, transferred youths were first offenders who had had no opportunity to benefit from any juvenile justice programming. In the vast majority of cases, then, the full range of dispositional alternatives available to the juvenile court had not been exhausted prior to transfer.

With regard to records of offending, as we have already noted, nearly one quarter of youths transferred were first offenders. Slightly more than a third (34%) had one or two prior referrals. Less than half (41%) had three or more priors.

While there has been a shift in recent years toward transferring youths charged with less serious offenses, there has also been a trend toward transferring youths with longer records.[47] As a group, youths transferred in 1984 were more frequent but less serious offenders than youths transferred in earlier years.

Overall, these findings suggest that youths transferred via prosecutorial waiver were not unequivocally dangerous. While most were charged with felonies, only a small proportion were charged with offenses against persons. In addition, there is little evidence that they were intractable: nearly one-fourth had no prior record and very few had multiple prior offenses.

Finally, we turn to the dispositions of the cases transferred to criminal court. A high proportion (96%) of transferred youths were convicted. Nevertheless, the vast majority did not incur severe sanctions. While some postconviction incarceration was ordered in 61% of the cases, nearly half received jail sentences of short duration.[48] Prison sentences were ordered in 31% of the cases. Of those receiving prison terms, 54% were sentenced to three years or less, 31% to four to six years, and 15% to seven or more years. It should be noted that Florida has very generous gain time provisions. Once these are

47. For example, in 1981, 27% of transferred youths had three or more priors, compared to 60% in 1984.

48. Many were sentenced to "time served."

applied, sentences served average only about one-third of the original sentence.

Moreover, as might be expected from the earlier discussion of transfer trends, rates of incarceration have declined in successive years as youths have been transferred for less serious offenses. While 81% of those convicted in 1981 received sentences of incarceration, this was true for only 51% of transfers sentenced in 1984.

VI. Discussion and Recommendations

The prosecutorial waiver provisions of Florida law afford prosecutors extraordinary discretion to transfer juveniles to criminal court. The law provides no guidance in selecting cases appropriate for transfer other than to direct prosecutors to transfer cases "when the public interest requires it."

At the general level, our analyses indicate two important points for discussion. First, in light of the scope of the authority that they are given, prosecutors seem to have exercised considerable restraint in the application of the direct file statute. Despite the fact that Florida law makes the majority of sixteen- and seventeen-year-old offenders eligible for transfer, prosecutors transfer only a small proportion of eligibles. Second, and somewhat paradoxically given this apparent moderation, few of the youths that are transferred seem appropriate for transfer. Our analyses indicate that youths transferred via prosecutorial waiver are seldom the serious and chronic offenders for whom prosecution and punishment in criminal court are arguably justified.

Our interviews uncovered several factors that seem to have persuaded prosecutors to exercise restraint in applying the direct file option. For example, sharp increases in juvenile transfers in the days and weeks immediately after the 1981 change in the law were met with opposition by prominent and vocal members of the Florida judiciary. These officials were successful in bringing statewide attention to the issue. Several agencies—both public and private—identified direct file as a critical issue and organized lobbying efforts aimed at revising the law to reduce prosecutorial discretion. These efforts continue.

In some regions, intraorganizational pressures also played a part in inducing prosecutors to select modest numbers of cases for transfer. In many jurisdictions the initial reaction of juvenile division prosecutors to the expanded transfer provisions greatly increased the workloads of criminal division attor-

neys.[49] This resource strain prompted pressure on juvenile division attorneys to retain more cases in the juvenile justice system.

The establishment of sentencing guidelines in Florida in 1983 also seems to have influenced transfer rates and practices. The guidelines made it unlikely that offenders without extensive prior records would receive sentences of incarceration. Consequently, prosecutors began to delay transfer to accumulate points in juvenile court that could be applied for criminal sentencing purposes.[50] Waiting for offenders to accrue convictions in juvenile court is a fairly common practice, referred to by one prosecutor as "giving them enough rope to hang themselves."

Restraint in the exercise of prosecutorial waiver is no doubt attributable as well to the fact that a small majority of prosecutors held firmly to the traditional philosophy underlying the juvenile justice system. It is interesting that so many juvenile division prosecutors accepted so completely precepts of juvenile justice favoring rehabilitation, especially when one considers that there is little institutional support for such viewpoints among prosecutorial workgroups.[51]

That these "last resort" types felt compelled nonetheless to transfer a substantial number of cases to criminal court is a reflection not of the weakness of their philosophical positions but of the practical realities of juvenile justice in Florida. The closing of juvenile training schools and other residential facilities—originally given impetus by the liberal de-institutionalization movement, later sustained by fiscal conservatism—has meant that there are few opportunities for rehabilitation remaining in the juvenile system. Few beds are available in residential programs and lengths of stay have been cut sharply in an effort on the part of juvenile justice officials to accommodate the demand. In the face of these constraints—which are not unique to Florida—the trend toward transfer of greater numbers of youths to criminal court is likely to continue unabated. Prosecutors believe that the legislature should support the

49. There was nothing in the Juvenile Justice Act that anticipated substantial shifts in caseload pressures, so staff resources in criminal divisions tended to remain stable.

50. Juvenile convictions are weighted as heavily as adult convictions under Florida's sentencing guidelines.

51. Several rehabilitation-oriented prosecutors told us they were viewed in pejorative terms by their associates (i.e., as the "soft on crime, social worker types"). A few even indicated that they believed their prospects for promotion and enhancement in the office were impaired by their views.

development within the juvenile justice system of a variety of community-based and residential treatment options, equipped with sufficient staff and programmatic resources to provide realistic prospects for rehabilitation.

The second major finding of this study is that many prosecutorial waivers are inappropriate when evaluated in terms of the justifications traditionally offered for transfer of jurisdiction. The lack of statutory guidelines to direct prosecutorial decision-making has resulted in inconsistent and varying "policies" that fail to target the most serious and chronic juvenile offenders. In the two counties studied, fewer than 20% of youths transferred were charged with felonies against persons. Moreover, of those charged with other felonies, the trend was toward transfer of youths charged with lesser felonies and misdemeanors. We did find a trend *toward* transfer of youths with extensive prior records. However, in the most recent year studied, a substantial proportion of transfers had fewer than three priors and less than half had been previously committed to residential programs.

Many seventeen-year-olds were transferred who had neither committed serious felonies nor accrued lengthy prior records. The chief reason appeared to be that they were nearing their eighteenth birthdays. In these cases, prosecutors were clearly exploiting the lack of guidelines governing prosecutorial waiver, in effect rewriting the law that sets the upper age limits of juvenile court jurisdiction.

Troubling questions about the even-handed administration of justice arise when we consider the fact that bureaucratic arrangements in the two counties we examined accounted for wide variations in the risk of transfer to criminal court. That such vagaries impact on transfers is not surprising, however. The state legislature's failure to delineate clear procedures and specific criteria to govern waiver decisions made it almost inevitable that arbitrary and inconsistent decision-making would result. Our interviews revealed much descensus across state attorney's offices regarding policy orientations toward juvenile justice in general, and waiver in particular. Under such conditions, the potential for differential treatment of similarly situated youths is great.

The lack of guidelines both for selecting youths for transfer and for implementing transfer decisions are not the only reasons that prosecutorial waiver decisions in Florida seem to be arbitrary and largely inappropriate. A number of other factors contribute as well.

As discussed above, Florida law mandates that juveniles charged with capital and life felonies be transferred to criminal court via grand jury indictment. Consequently, in selecting cases for prosecutorial waiver, prosecutors of necessity choose from a pool of eligibles from which the most dangerous and violent offenders have already been excluded.

Moreover, when the law was changed in 1981, some prosecutors felt they had been given a mandate by the legislature, responding to public demand, to transfer greater numbers of delinquency cases to criminal court. Prior to 1981, prosecutorial discretion over the transfer of sixteen- and seventeen-year-olds was carefully circumscribed by offense and prior record restrictions. The removal of these restrictions may have led many prosecutors to conclude that the legislature encouraged the transfer of less serious offenders.

Finally, the ease with which prosecutorial waiver is accomplished contributes to its use. Interview data attest to this point, as indicated by the many respondents who expressed uneasiness about the ways that the direct file provisions were being applied. Both the lack of statutory criteria to aid in selecting cases for direct file and prosecutors' ability to bypass judicial or public oversight of their decisions encourage less care and thoughtfulness than is desirable in the administration of justice.

We believe that the optimal solution is the abolition of prosecutorial waiver, in favor of relying on both legislative exclusion and judicial waiver. Prosecutorial waiver is fraught with dangers of misapplication and abuse primarily because it involves the unreviewable and largely hidden exercise of discretion. When this discretion is exercised, as in the present case, without objective, substantive guidelines, it is almost inevitable that highly unpredictable and indefensible outcomes will result.

One way of introducing greater equity and predictability to the transfer process would be to look to the legislature to bring more offenses (or offense/prior record combinations) within the ambit of the legislative exclusion statute. As Feld[52] has observed, legislative exclusion offers a rational, easily administered method of deciding which youths should be prosecuted as adults. While this method does not eliminate discretion, it reduces it considerably by confining it to the charging decision.

Alternatively, with the abolition of prosecutorial waiver, judicial waiver might be relied upon more heavily. While this

52. Feld, *supra* note 30, at 96.

alternative has the advantage of being more structured than prosecutorial waiver, the criteria that are to guide judicial decision-making are by no means unambiguous. Criteria such as "dangerous" and "non-amenable to treatment" involve very subjective assessments that give judges broad discretion in making transfer decisions. Here also we would look to the state legislature to impose a number of substantive restrictions and clear criteria that must be satisfied before a juvenile can be waived. We are optimistic that carefully drafted statutes can eliminate much of the risk of inconsistent and arbitrary application. Even evaluation of such vague standards as "nonamenability to treatment" can be made with considerable precision (e.g., "to be adjudged nonamenable to treatment the record must reveal at least three prior adjudications of delinquency and at least one prior commitment to a residential treatment program").

An advantage of retaining and relying increasingly on judicial waiver is that it permits judges to "individualize" justice within a framework in which the exercise of discretion can be carefully circumscribed and open to review. We are also persuaded by the recent observations of the District Court for the Eastern District of Washington, which expressed little confidence that prosecutors have the experience and qualifications necessary to make wise dispositional decisions.[53] The court characterized assistant U.S. Attorneys as "persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset."[54] These comments apply with even greater force to assistant state attorneys, and especially those assigned to juvenile divisions. All too frequently juvenile divisions are places of first assignment for newly hired assistant state attorneys who eventually move on to the more prestigious criminal divisions.

We recommend that waiver decisions be made in accord with modified and refined *Kent* criteria, at hearings that provide full due process protections. These decisions are best left to judges, experienced members of the bar who have demonstrated their qualifications to the satisfaction of the peers who nominate them and the public who elect them and retain them in office.

If prosecutorial waiver is to be retained, clear statutory standards must be provided for its application. Statutes should include unequivocal descriptions of the target population

53. United States v. Boshell, 728 F. Supp. 632, 637 (E.D. Wash. 1990).
54. *Id.*

appropriate for this type of transfer, and should require that standardized measures be used in determining which juveniles fit. For example, "prior record" must be defined (preferably in terms of prior adjudications, rather than referrals or arrests), and terms like "chronic," "habitual," "serious," and "intractable" should either not be used at all or, if used, be precisely defined, with reference to standardized indicators.

Additionally, there should be clear guidelines for implementing the statutory standards. That is, we recommend the use of something akin to a case assessment scoring sheet that indicates what is required to meet each standard and what total score is necessary to make a youth eligible for waiver. This guidelines sheet should be fully disclosed to the defense, and there should be some provision for a hearing to contest unfounded assertions and inaccuracies prior to transfer. Finally, procedures for the transfer of youths from juvenile to criminal court jurisdiction should be standardized throughout the state in an effort to minimize the effects of idiosyncrasies of bureaucratic organization on the administration of justice.