Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court

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Recent headlines reminiscent of a video store horror movie suggest a nation filled with murderous children. Despite extensive media coverage of "schoolhouse shooting sprees," including five shootings on school grounds between February 1997 and June 1998, and the April 1999 Littleton, Colorado shootings, the actual amount of violent juvenile offending remains small. However, this small amount of juvenile offending remains small.

* See infra notes 15, 61.
nile-initiated violence combined with a great amount of public attention has recently yielded more severe punishments for young offenders.5

Public perceptions of increasing violent crime rates6 have resulted in a flurry of federal and state legislative activity in the last decade.7 Punitive trends in the criminal justice system have significantly altered the structure of adult sentencing.8 These changes include the adoption of sentencing guidelines, mandatory minimum sentences, and sentence enhancement provisions.9

Changes to laws affecting juvenile offenders reflect these punitive sentencing approaches.10 Recent legislation has increased the number of offenses for which youths may be transferred to criminal court for trial, reduced the maximum age of juvenile court jurisdiction, incorporated adult sentencing approaches into the juvenile justice system, and introduced blended sentencing and other extended jurisdiction schemes.11

5 See infra Part II, notes 54–143 and accompanying text.
11 See Jeffrey Fagan, Separating the Men from the Boys: The Comparative Advantage of Juvenile
As a result of these legislative changes, juveniles today face more severe sanctions than at any time since the inception of the juvenile justice system nearly a century ago. The current emphasis on punishment and accountability diminishes the rehabilitative goals of the juvenile justice system and brings it closer in function to that of the adult criminal justice system. Consequently, justification for a separate juvenile system begins to crumble.

Members of the juvenile justice system and the public cannot permit this disintegration of the juvenile court because it is essential to the vast majority of young offenders, who are capable of rehabilitation. Public perceptions of violent juvenile crime have resulted in the

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12 See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997) [hereinafter Feld, *Abolish the Juvenile Court*]; Fritsch & Hemmens, *supra* note 11, at 566-69. The enactment of the Juvenile Court Act of 1899 created the first juvenile court in Cook County, Illinois, and founded the American juvenile justice system. See **Michael, J. D. A. E. A. L. E. T. A., REPRESENTING THE CHILD CLIENT** 5.01 [4], (5-7) (1998); Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 **UCLA L. REV.** 913, 919-20 (1997); Beth Wilbourn, Note, **Waiver of Juvenile Court Jurisdiction: National Trends and the Inadequacy of the Texas Response**, 25 **AM. J. CRIM. L.** 633, 635 (1996); see also Mills, *supra* note 7, at 905. The purpose of the juvenile court was to separate young offenders from adult criminals with the intent to treat or "cure" the youths of their delinquency. See **Dale**, supra at (5-8); Feld, *Abolish the Juvenile Court*, supra at 71-72; Wilbourn, supra at 635. Adopting the role of a parent, the juvenile court sought to correct the behavior of its children through a rehabilitative approach. See id.; Hollister, supra at 919-20; see also Kent v. United States, 383 U.S. 541, 554-55 (1966). In the following 25 years, states across the country created similar juvenile justice systems. See **Dale**, supra at (5-8); Hollister, supra at 920; Wilbourn, supra at 635.

13 See **Feld**, *A Case of Reform*, supra note 7, at 966; **Del Carlo**, supra note 7, at 1227, 1249; Mills, supra note 7, at 935; Passarelli, supra note 10, at 596; Adam Pertman, *States Racing to Prosecute Young Offenders as Adults*, **BOSTON GLOBE**, Apr. 11, 1996, at A1; see also Doris Sue Wong, **Harsher Juvenile Justice Wins Day; Senate Chief's Bid for Flexibility Fails**, **BOSTON GLOBE**, June 13, 1996, at B29 (reporting that William Leahy, head of the Massachusetts Committee for Public Counsel Services, believes that punitive Massachusetts legislation demonstrates a dramatic departure from the traditional principle that youths are more likely to be rehabilitated than are adults).

14 See **Lisa A. Cintron, Comment, Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court**, 90 NW. U. L. REV. 1254, 1275-74 (1996); Pertman, supra note 13. "By enacting legislation permitting youths to be tried as adults, they [politicians in every state] are scrapping a century-old principle of US jurisprudence—that juveniles are so moldable that all but the rare exception can be rehabilitated—and replacing it with a system emphasizing punishment and public safety." See Pertman, supra note 13; see also **REAL WAR ON CRIME**, supra note 6, at 132. "[B]ecause gang killings, drive-by shootings, and high school arms buildups have
adoption of punitive sentencing approaches that effect an overly broad group of youths. As Jim Miller of the Indiana Juvenile Justice Task Force cautions, “[l]et’s not throw the baby out with the wash.”

This Note recommends that state juvenile justice systems provide rehabilitative opportunities to youths rather than eject young offenders from the juvenile justice system because of their age or offense. Part I of this Note describes punitive sentencing legislation in the criminal justice system, focusing on mandatory minimum sentences, sentence enhancement provisions, and sentencing guidelines. Part II examines three sentencing schemes now prevalent in the juvenile justice system. Part III analyzes the problematic structural differences and inconsistent goals of the criminal justice and juvenile justice system sentencing schemes. Part IV discusses the future effect this sentencing legislation will have on the juvenile justice system and juvenile offenders. Finally, Part V proposes a model juvenile court structure which uses a blended sentencing scheme to retain the rehabilitative goals of the juvenile justice system while recognizing the need to protect public safety.

I. CURRENT PUNITIVE TRENDS IN CRIMINAL JUSTICE SENTENCING LEGISLATION: MANDATORY MINIMUM SENTENCING, SENTENCE ENHANCEMENT, AND SENTENCING GUIDELINE LEGISLATION

State and federal legislation enacted in the last few decades reflects the nation’s increasingly punitive approach toward adult criminal offenders. The trend began in the 1970s, upon the release of the
results of a national treatment program evaluation study. The researcher conducting the study concluded that rehabilitation is ineffective at reducing offender recidivism rates. When the study's findings received widespread publicity, the public and its elected representatives concluded that rehabilitation was no longer an appropriate sentencing goal. Subsequently, a trend of imposing more punitive sentences on adult offenders emerged. Current sentencing schemes focus less on rehabilitation than on retribution, incapacitation, and general deterrence.

A. Mandatory Minimum Sentencing

Mandatory minimum sentences match a legislatively required, predetermined minimum sentence with a particular offense. The minimum sentence is often severe, involving a lengthy period of incarceration for the offender. The predetermined sentence is imposed

17 See Robert Martinson, What Works? Questions and Answers About Prison Reform, 36 PUB. INTEREST 22, 25 (1974). "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Id.; see also Robert Martinson, New Findings, New Views, A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243, 253-54 (1979) [hereinafter Martinson, New Findings, New Views].

18 See Martinson, New Findings, New Views, supra note 17, at 253-54.

19 See Fagan, supra note 11, at 242. United States Senator Orrin Hatch reports that Congress scrutinized the criminal justice system for nearly 10 years before concluding in 1984 that a criminal justice system based on the rehabilitation model of punishment was outmoded. See Hatch, supra note 9, at 187; see also Lowenthal, supra note 8, at 104. To inspire public confidence and deter crime, Congress responded with the enactment of the Sentencing Reform Act of 1984. See Hatch, supra note 9, at 187-88.

20 See Hatch, supra note 9, at 188.

21 See id. Retribution serves to punish offenders in proportion to their moral culpability or blameworthiness for the harm they cause. See Heglin, supra note 7, at 217; Sheffer, supra note 11, at 487. Incapacitation intends to protect the public by removing offenders from society and holding them in prison. See Heglin, supra note 7, at 218; Sheffer, supra note 11, at 486 n.28. The goal of general deterrence is to cause other potential offenders to fear the punishment so that they will not commit the offense. See id. In contrast, rehabilitation can be viewed as placing some of the blame for the offense on society and this method aims to change the offender's behavior so that he/she may return to society unlikely to commit another offense. See Michael Moore, Law and Psychiatry, 234 (1984); Sheffer, supra note 11, at 482. For further discussion on the concepts underlying retribution, deterrence, incapacitation, and rehabilitation see Heglin, supra note 7, at 217-19; Sheffer, supra note 11, at 481-87.

22 See Philip Oliss, Comment, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. CIN. L. REV. 1851, 1851 (1995); Hatch, supra note 9, at 192-93.

23 See Hatch, supra note 9, at 193-94; Lowenthal, supra note 8, at 62, 64, 86; Mathew Brelis,
regardless of any mitigating circumstances or offender characteristics (e.g., age, family relationships, employment status) which a judge might typically consider to reduce the severity of a sentence. Judges may sometimes sentence a convicted offender more severely than the legislation demands, but may not give a sentence below that which is required.

As with other current sentencing schemes, two primary goals underlie mandatory minimum sentencing legislation. The first goal is to deter others from committing delineated offenses by levying certain and severe punishment on those committing the offenses. The second goal is to incapacitate offenders for a societally acceptable period of time.

The allure of these two goals has made mandatory minimum sentencing prevalent in both the state and federal sentencing schemes. By 1990, forty-six states had enacted mandatory minimum or sentence enhancement legislation. By 1993, over one hundred mandatory minimum sentence provisions appeared in sixty federal criminal statutes.

Mandatory minimum sentencing has been especially popular among legislatures attempting to reduce drug-related crime. In the 1980s, as drug use and distribution increased, particularly with the popularity, accessibility, and low cost of crack cocaine, the federal government and many states responded with the creation of mandatory minimum sentences for drug offenses. For example, in Massachusetts, during the early and mid-1990s, a conviction for selling 200
grams of cocaine resulted in a mandatory minimum sentence of fifteen years in prison.\textsuperscript{32} A conviction for selling one-half an ounce of marijuana required imposition of a mandatory two year prison term.\textsuperscript{33} These sentences were imposed without regard to mitigating factors.\textsuperscript{34} Furthermore, the statute provided no opportunity for parole or early release.\textsuperscript{35}

The Massachusetts Legislature adopted these mandatory minimum sentences because they were viewed as effective deterrents and appropriate incapacitative sentences.\textsuperscript{36} As such, the Massachusetts mandatory minimum sentencing scheme for drug offenses is illustrative of the legislative trend to get tough on offenders.\textsuperscript{37}

\section*{B. Sentence Enhancements}

The twin goals of general deterrence and incapacitation also drive sentence enhancement legislation.\textsuperscript{38} Generally, enhancements add years to the length of a prison term by attaching an additional penalty to a prescribed sentence if particular circumstances are present.\textsuperscript{39}

For example, enhancement penalties often attach for possession or use of a gun in the commission of an offense, or for possessing guns or drugs in a specified area, such as a school zone.\textsuperscript{40} As frequent gun possession and use during the commission of crimes gained notoriety in the late 1980s, a public desire to increase the severity of punishment

\begin{footnotesize}
\begin{enumerate}
\item See id.; Butterfield, \textit{A Judgment on Sentences, supra} note 31.
\item See Butterfield & Lehr, \textit{supra} note 33.
\item See Brelis, \textit{supra} note 23.
\item See Lowenthal, \textit{supra} note 8, at 67-68 & 67 n.26.
\item See id.
\item See Lowenthal, \textit{supra} note 8, at 70-71 & 70-71 nn.37, 39; Timothy J. Moroney, \textit{Crimes; Gun-Free School Zone Act}, 27 PAC. L.J. 555, 555-56 (1996). Other common legislative provisions include enhancement for repeat felony offenders, offenses committed against vulnerable victims, possession of specified large amounts of prohibited drugs, and offenses committed while released from custody awaiting trial for other offenses. See Lowenthal, \textit{supra} note 8, at 70-71 nn.38, 40-41.
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for perpetrators of crimes involving handguns also emerged. In response, the federal government imposed sentence enhancements for use of a firearm during the commission of an offense.41 Another such enhancement is the Violent Crime Control and Law Enforcement Act of 1994 which created the new federal crime of possession of a handgun by a juvenile.42

Similarly, in an attempt to stop drug dealing and violence in schools, state legislatures, largely influenced by the increase in the number of young gang members during the late 1980s, passed school zone statutes.43 These statutes generally require a fixed additional penalty for possession of a gun or drugs within 1000 feet of a school.44 These sentence enhancement provisions ensure a more lengthy period of confinement for any offender whose act fits within the statutory requirements.45

C. Sentencing Guidelines

Sentencing guidelines dictate mandatory sentences for all enumerated criminal offenses based on the characteristics of the crime and limited offender characteristics.46 Judges, except in very unusual

42 See Mark Soler, Juvenile Justice in the Next Century: Programs or Politics, 10 CRIM. JUST. 27, 27 (1996).
44 See, e.g., 705 ILL. COMP. STAT. ANN. 405/5–4 (6)(a), (7)(a) (West 1992 & Supp. 1998); Moroney, supra note 40, at 555–56. In Massachusetts, violation of the state school zone statute adds two years of additional time as a sentence enhancement to the underlying drug offense sentence. See Goldberg, supra note 30; Butterfield, A Judgment on Sentences, supra note 31.
45 See Goldberg, supra note 30; Butterfield, A Judgment on Sentences, supra note 31.
46 See Alschuler, supra note 9, at 907–08; Mills, supra note 7, at 923. Under the federal sentencing guidelines, judges are discouraged or explicitly forbidden from considering many offender characteristics in sentencing. See Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 NW. U. L. REV. 1441, 1464 (1997). As Reitz notes, some of these characteristics include: defendant's age (including youth), education and vocational skills, mental and emotional conditions, physical condition or appearance (including physique), employment record, family ties and responsibilities, community ties, as well as military, civic, charitable, and public service, and other prior good works[,] . . . the defendant's drug or alcohol dependence or abuse . . . , the defendant's "lack of guidance as a youth," and other "similar circumstances indicating a disadvantaged upbringing."
circumstances, cannot impose a sentence more lenient or more severe than the narrowly specified sentence range outlined in the guidelines.47

Similar to the increasingly common adoption of mandatory minimum and sentence enhancement legislation, many state legislatures have adopted sentencing guidelines.48 While no state had sentencing guidelines in 1972, more than twenty state legislatures had enacted or were considering enacting sentencing guidelines by 1997.49

In 1987, federal sentencing guidelines promulgated by the United States Sentencing Commission took effect.50 The federal sentencing guidelines structure consists of a 258 box grid which provides a narrow range within which a judge must sentence an offender based on the offender's offense and criminal history background.51 The maximum sentence for each range is, at most, six months or twenty-five percent greater than the minimum sentence.52 A judge may consider some aggravating and mitigating circumstances to shift the sentencing range up or down.53

Therefore, sentencing guidelines reflect general punitive sentencing trends by ensuring similar sentences for all offenders based almost exclusively on present offense and criminal history, without permitting consideration of offender personal characteristics which traditionally served to reduce sentence severity. As a result, offenders often serve lengthy prison terms, thus serving the legislation's general deterrence and incapacitation goals.

Id. (quoting the federal sentencing guidelines). Judges previously considered many of these characteristics and qualities as mitigating factors when determining the appropriate sentence for a convicted offender. See id.

47 See Alschuler, supra note 9, at 908. Only in the unlikely event a judge finds an aggravating or mitigating circumstance not adequately considered by the guidelines may he/she sentence above or below the specified sentencing range. See id.

48 See Reitz, supra note 46, at 1442–43, 1447. Several states have used sentencing guidelines for many years. See id. at 1442–43. For example, Minnesota has had sentencing guidelines for eighteen years, Pennsylvania has had sentencing guidelines for sixteen years, Florida for fifteen years, Washington for fourteen years, and Oregon for nine years. See id.; see also Lowenthal, supra note 8, at 61–62.

49 See Reitz, supra note 46, at 1447.

50 See Hatch, supra note 9, at 190; Mills, supra note 7, at 922. The Sentencing Reform Act of 1984 abolished parole and created the United States Sentencing Commission, empowering it to create sentencing guidelines that Congress made compulsory. See Hatch, supra note 9, at 188–89.

51 See Alschuler, supra note 9, at 907–08; Hatch, supra note 9, at 189.

52 See Alschuler, supra note 9, at 908; Hatch, supra note 9, at 189. The judge may increase the sentence severity up to six months or 25% more than the minimum required sentence, whichever yields the greatest increase in punishment. See Alschuler, supra note 9, at 908.

53 See Alschuler, supra note 9, at 907.
Each of these three types of sentencing legislation is based on the public belief that rehabilitation is an ineffective response to crime and that a more punitive approach is necessary. All three sentencing schemes embody general deterrence and incapacitation punishment justifications. All three have increased the sentences of convicted adult offenders.

II. CURRENT PUNITIVE TRENDS IN SENTENCING YOUNG OFFENDERS

In this national punitive atmosphere, the public, politicians, state legislatures, and Congress have sought harsher penalties for juvenile offenders. Legislative purpose has shifted away from the rehabilitative "best interests of the child" standard, which bases sentencing on the offender's needs, to punishment and "accountability." Juvenile sentences are now dictated according to the perceived need for the protection of public safety. Making policy decisions based on worst-case

54 See Dale et al., supra note 12, ¶ 5.01 [5], (5–10), ¶ 5.03 [12], (5–54) (1997) (reporting that nearly all states have taken legislative or executive action to respond to reported increases in juvenile arrests for violent offenses and discussing the public belief of a violent juvenile crime wave); see also Feld, Abolish the Juvenile Court, supra note 12, at 79 & n.22; Coordinating Council on Juvenile Justice and Delinquency Prevention, Combating Violence and Delinquency: The National Juvenile Justice Action Plan (visited Mar. 19, 1997) <http://www.ncjrs.org/txtfiles/jjplanfr.txt> [hereinafter Coordinating Council]; Robert B. Acton, Note, Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform, 5 J.L. & POL’Y 277, 278–80 (1996); Mills, supra note 7, at 911; Case Comment, Eighth Amendment—Juvenile Sentencing—Ninth Circuit Upholds Life Sentence Without Possibility of Parole of Fifteen-Year-Old Murderer.—Harris v. Wright, 93 F.3d 581 (9th Cir. 1996), 110 HARV. L. REV. 1185, 1185 (1997) [hereinafter Harvard Law Review Case Comment].

55 See Kent v. United States, 383 U.S. 541, 554 (1966); Feld, A Case of Reform, supra note 7, at 1083–84; Edmund V. Ludwig, Young in Years, Mature in Crime: A New System for Handling Violent Youthful Offenders in Pennsylvania, 17 PA. LAW. 16, 17–18 (1995); Alan J. Tompkins et al., Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations, 29 CREIGHTON L. REV. 1619, 1629 (1996). Under this standard, youths are not punished through a sentence of a set length in a locked facility; rather, they receive services aimed to correct problematic behavior. See Feld, A Case of Reform, supra note 7, at 1083–84. For example, these services often include remedial education, anger management, vocational training, and therapeutic counseling. See Jodie English, The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense, 40 HASTINGS L.J. 1, 25 (1988); Eric K. Klein, Note, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer of Criminal Court in Juvenile Justice, 35 AM. CRIM. L. REV. 371, 403–04 (1998); Jennifer M. O’Connor & Lucinda K. Treat, Note, Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform, 33 AM. CRIM. L. REV. 1299, 1319 (1996); Sheffer, supra note 11, at 507.


57 See Acton, supra note 54, at 330–32. In his survey of state political initiatives, Robert B.
scenarios,\textsuperscript{58} the frightening predictions of a few criminologists,\textsuperscript{59} media-induced fear,\textsuperscript{60} and some evidence of increased juvenile violence.\textsuperscript{61}

Acton observes that many governors have recommended changing the titles of state oversight departments and juvenile codes to reflect the recent legislative shifts in the focus of the states' juvenile justice systems. \textit{See id.} at 330–31. Texas Governor George W. Bush changed the name of the state law “Delinquent Children & Children in Need of Supervision” to “Juvenile Justice Code.” \textit{See id.} at 330. Virginia’s Governor’s Commission recommends changing the primary goal of its juvenile justice legislation from “welfare of the child” to protection of public safety and juvenile accountability. \textit{See id.} at 330–31. Similarly, in legislation which took effect on October 1, 1996, Massachusetts created “an emergency law . . . for immediate preservation of public safety,” defining its purpose as “an improved system of juvenile justice” and “an act to provide for the prosecution of violent juvenile offenders in the criminal courts of the Commonwealth.” \textit{See} Youthful Offender Act, ch. 200, 1996 Mass. Legisl. Serv. 1, 1 (West).

\textsuperscript{58} See Franklin E. Zimring, \textit{The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver}, 5 Notre Dame J.L. Ethics & Pub. Pol’y 267, 274 (1991) [hereinafter Zimring, \textit{Defense of Discretionary Waiver}] (stating that legislative decisions to expand juveniles’ exposure to criminal court sentences are deliberately overbroad because the standards are created to provide for the worst case juvenile offenders in every category of offense); Reitz, \textit{supra} note 46, at 1445 n.19 (observing that legislatures consider the worst possible scenarios when creating statutory sentencing structures).


\textsuperscript{60} See \textit{Real War on Crime}, \textit{supra} note 6, at 64–65, 67, 69–73.

\textsuperscript{61} See Blegen, \textit{supra} note 11, at 46 (reporting a Justice Department study finding a 68% increase in juvenile court cases involving serious offenses including murder and aggravated assault between 1988 and 1992); Barry C. Feld, \textit{Violent Youth and Public Policy: Minnesota Juvenile Justice Task Force and 1994 Legislative Reform}, Hennepin Law., Sept.-Oct. 1994, at 20, 20 [hereinafter Feld, \textit{Task Force}] (reporting that juveniles committed a disproportionate amount of violent crime between 1980 and 1991); Acton, \textit{supra} note 54, at 278–79 (reporting that the number of murders committed by youths 14 to 17 years of age increased 172% between 1985 and 1994); Mills, \textit{supra} note 7, at 931–32 (reporting a 217% increase in arrests of youths 15 to 17 years of age on homicide charges from 1985 to 1991). But see Laureen D’Ambra, \textit{A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea}, 2 Roger Williams U. L. Rev. 277, 277 (1997) [hereinafter D’Ambra, \textit{Why Waiver is Not a Panacea}] (reporting that violent juvenile crime decreased in 1995); Soler, \textit{supra} note 42, at 931–32 (reporting that juvenile crime levels are at or below levels of 20 years ago). However, very few youths commit violent crimes. \textit{See} \textit{Real War on Crime}, \textit{supra} note 6, at 132 (reporting that rape and murder account for less than one-half of one percent of juvenile arrests and only six out of 100 juvenile arrests are for violent crimes whereas 13 out of 100 adult arrests are for violent crimes); Brooks et al., \textit{supra} note 10,
state legislatures have created and amended legislation to expand sentencing possibilities for all young offenders. Recent punitive state legislative changes to the juvenile justice system appear in three principal forms. First, by amending their laws to place a larger number of young offenders within the jurisdiction of adult criminal courts, many states have reduced the scope of the types of cases which the juvenile court may handle. Second, other states have expanded the sentencing power of the juvenile court, and permit juvenile court judges to use criminal justice system sanctions in sentencing young offenders. Finally, some states have altered the sentencing structure of the juvenile court so as to provide juvenile court judges with the

at 1 (reporting that "only about one-half of one percent (1\%) [sic] of juveniles in the United States commit violent offenses"); Neal, supra note 15 (reporting that only two of the 114 homicides in Indianapolis in 1994 were committed by juveniles under 16). The National Criminal Justice Commission observes that in 1992, U.S. juvenile courts handled more than one million "criminal" cases but only 2,500 of these involved a youth charged with homicide. See REAL WAR ON CRIME, supra note 6, at 137. When the cases dismissed for lack of evidence are subtracted from this number, less than 1,000 youths nationwide were convicted of killing someone in 1992. See id. Furthermore, whether violent juvenile crime has increased varies dramatically depending on the baseline from which it is measured. See Feld, A Case of Reform, supra note 7, at 974. For example, comparing the present violent juvenile crime rate to rates in 1980 is likely to reveal only a moderate change, whereas comparing the present rate to the low 1985 violent juvenile crime rate will likely yield a dramatic increase. See id.

62 See Coordinating Council, supra note 54 (reporting that 41 states have enacted legislation expanding the use of transfer mechanisms since 1978 and 13 states created or expanded statutory legislative transfer provisions in 1994); Robert E. Shepherd, Jr., Juvenile Justice, 12 CRIM. JUST. 45, 45 (1997) (reporting that all but 10 states have expanded their ability to try youths as adults since 1992, many reducing the age at which transfer can occur); Soler, supra note 42, at 27 (reporting that approximately half of the states in 1995 and 1996 made possible an increase in the number of youths tried as adults by: (1) lowering the age of transfer, (2) increasing the number of offenses for which youths may be transferred, (3) providing that for certain offenses there is a rebuttable presumption that the youths will be prosecuted in adult court (reverse waiver), or increasingly, (4) by simply giving prosecutors discretion to decide which youths to prosecute in adult court"). See generally Dale Parent et al., Key Legislative Issues in Criminal Justice: Transferring Serious Juvenile Offenders to Adult Courts (visited Mar. 19, 1997) <http://www.ncjrs.org/txtfiles/trans.txt>; Acton, supra note 54, at 287-90.

63 See Feld, Task Force, supra note 61, at 22-23; Acton, supra note 54, at 287-98. A fourth approach, exhibited by legislation creating a third system of justice separate from the juvenile and criminal justice systems, is beyond the scope of this Note. States, such as California, which have implemented this approach, separate young offenders considered serious or violent from both adult and juvenile offender populations. See Feld, A Case of Reform, supra note 7, at 1089; Ludwig, supra note 55, at 18. Often offenders up to the age of 25 can fall into this classification. See Feld, A Case of Reform, supra note 7, at 1039.


ability to impose suspended or conditional adult sentences on some youths.66

A. Legislation Placing a Larger Number of Youths Within Adult Criminal Court Jurisdiction

Many states recently have reduced the scope of the juvenile court in two ways. First, most states have increased the number of offenses for which youths may be transferred to criminal court for trial.67 Second, several states have reduced the maximum age of juvenile court jurisdiction.68 Both types of changes have limited the number and type of cases the juvenile court may hear.

1. Expansion of Transfer Provisions

Transfer69 is the legislative mechanism which removes a youth from juvenile court jurisdiction, and shifts him/her to adult criminal court jurisdiction for trial and sentencing.70 Transfer represents a decision that the more punitive sentences the adult criminal justice system offers are necessary for the particular juvenile offender.71

Community demands for public safety protection from violent juvenile offenders, coupled with a belief that the juvenile justice system

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67 See Fagan, supra note 11, at 239, 243; OJJDP, supra note 64. Between 1992 and 1996, 24 of the 36 states with legislative transfer provisions added offenses to be excluded from juvenile court jurisdiction. See OJJDP, supra note 64. In 1987, only 17 states and the District of Columbia had enacted legislative transfer provisions excluding from juvenile court jurisdiction youths charged with particular offenses or who had prior delinquency adjudications or convictions. See Barry C. Feld, The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes, 78 J. Crim. L. & Criminology 471, 512–13 (1987) [hereinafter Feld, Principle of the Offense]. Fourteen of these states excluded specific offenses (most commonly serious felonies). See id. at 515.
68 See Fagan, supra note 11, at 239, 243; OJJDP, supra note 64; see also Coordinating Council, supra note 54.
69 Transfer is also called “waiver,” “certification,” and “remand” in some state legislation. See, e.g., Blegen, supra note 11, at 47–48; Laureen Q. D’Ambra, A Legal Response to Juvenile Crime: Waiver and Certification Statutes in Rhode Island, 45 R.I. B. J. 5, 29 (1997) [hereinafter D’Ambra, Waiver Statutes in Rhode Island]; Feld, A Case of Reform, supra note 7, at 1006; Fritsch & Hemmens, supra note 11, at 570; Del Carlo, supra note 7, at 1224, 1229, Mills, supra note 7, at 912.
70 See Feld, Principle of the Offense, supra note 67, at 487–99; Fritsch & Hemmens, supra note 11, at 570; Cintron, supra note 14, at 1261, 1267–68.
cannot control these youths, is the primary motivation for expanding transfer legislation.\textsuperscript{72} Proponents argue that adult sanctions will keep young offenders locked up longer and will deter other youths from committing similar offenses for fear of receiving the same sentences.\textsuperscript{73}

All states allow some form of transfer.\textsuperscript{74} Indicative of current punitive trends, between 1992 and 1996, all but ten states created or altered statutes to enable more juveniles to be tried in adult criminal courts.\textsuperscript{75} Recent changes in transfer statutes primarily expand the list of offenses subjecting youths to transfer,\textsuperscript{76} and reduce the age at which a youth is subject to transfer.\textsuperscript{77} Many states have adopted acts requiring automatic transfer for enumerated offenses, especially those involving guns and drugs.\textsuperscript{78}

\textsuperscript{72} See Roberts & Stalans, supra note 10, at 271; Real War on Crime, supra note 6, at 135–36; Coordinating Council, supra note 54; Feld, Principle of the Offense, supra note 67, at 495, 498; Fritsch & Hemmens, supra note 11, at 570; Parent et al., supra note 62; Acton, supra note 54, at 331. An additional reason commonly provided as justification for transferring youths to criminal court jurisdiction is community vengeance. See Smith, A., supra note 16, at 1005–06; Holden, supra note 71, at 858 & n.145.

\textsuperscript{73} See Fagan, supra note 11, at 238; Victor L. Streib, The Efficacy of Harsh Punishments for Teenage Violence, 31 Val. U. L. Rev. 427, 432 (1997); O'Connor & Treat, supra note 55, at 1315–14; cf. Sheffer, supra note 11, at 500–01 (arguing that although adult sanctions are likely to incapacitate young offenders for longer periods than juvenile court sanctions, it is not certain that they deter other youths).

\textsuperscript{74} See Randy Hertz et al., Trial Manual for Defense Attorneys in Juvenile Court § 13.01 (1991); OJDJP, supra note 64, at 14.

\textsuperscript{75} See OJDJP, supra note 64.

\textsuperscript{76} For example, in its 1996 legislative session, California extended its list of transfer eligible offense charges from a total of 25 to 29 offenses. See Cal. Welf. & Inst. Code § 707 (b) (West Supp. 1999); see also Acton, supra note 54, at 287–89; Soler, supra note 42, at 27.

\textsuperscript{77} See Acton, supra note 54, at 285 n.30 (reporting that nine states currently permit transfer for youths aged 16 and older, five permit transfer at the age of 15, twenty states at the age of 14, six states at the age of 13, one at the age of 12, and two states permit transfer at the age of 10). See also Soler, supra note 42, at 27; Harvard Law Review Case Comment, supra note 54, at 1185 & n.1.

For example, Illinois has enacted a school and public housing zone legislative transfer statute. This statute provides that the juvenile court has no jurisdiction over a youth aged fifteen or older who is charged with first degree murder, aggravated criminal sexual assault, armed robbery with a firearm, or possession of a weapon on school grounds. In addition, a youth aged fifteen or older who commits a violation of the Illinois Controlled Substance Act on school grounds, in a school vehicle, on public housing property, or on a public way within one thousand feet of a school or public housing property, is automatically transferred to adult criminal court jurisdiction.

2. Reduction of the Maximum Age Limit for Juvenile Court Jurisdiction

Related to automatic transfer, a second state legislative punitive trend has been to reduce the maximum age of juvenile court jurisdiction. In effect, this labels youths as adults for criminal prosecution and sentencing purposes. This legislation is motivated by the belief that offenders between the ages of sixteen and eighteen (the age at which juvenile court jurisdiction traditionally ended) are less childlike now than they were at the turn of the century when the juvenile court was created. There is an assumption that youths of these ages "possess the cognitive and reasoning abilities that make them substantially equivalent to adult criminal defendants." Thus, the argument follows, these youths should receive the same sentences as adults.


81 720 ILL. COMP. STAT. ANN. 570 (West 1993 & Supp. 1998). This criminal statute provides that it is unlawful to manufacture, deliver, or possess with intent to manufacture or deliver any controlled substance or look-alike controlled substance. See id. Furthermore, it is unlawful to be part of a calculated criminal drug conspiracy. See id.


83 See Fagan, supra note 11, at 239; OJJDP, supra note 64. Between 1992 and 1996, six states lowered the maximum age of juvenile court jurisdiction. See id; see also Coordinating Council, supra note 54.

84 See Fagan, supra note 11, at 239; OJJDP, supra note 64.

85 See Smith, A., supra note 16, at 953 n.2; Frisch & Hemmens, supra note 11, at 598.


87 See Baldi, supra note 56, at 592.
In 1996, both Wisconsin and New Hampshire lowered the upper age of juvenile court jurisdiction to the age of sixteen.\textsuperscript{88} In both the 1993 and 1995 legislative sessions, Texas legislators introduced three bills attempting to lower the maximum age of juvenile court jurisdiction even lower, from sixteen to fourteen years of age.\textsuperscript{89}

B. Legislation Expanding the Sentencing Power of the Juvenile Court

Legislation which permits juvenile court judges to treat some young offenders like adults is similarly intended to dispense punishment harsh enough to deter and incapacitate serious young offenders. Some states narrowly construe the adult sanctioning power granted to juvenile court judges.\textsuperscript{90} They permit incorporation of only a few, specific adult criminal justice system sanctions into the juvenile justice system for use with a narrowly defined class of young offenders.\textsuperscript{91} Other states have provided juvenile court judges with a broad array of adult sanctions.\textsuperscript{92} These states permit juvenile court judges to impose on some young offenders any adult sanction available to a criminal court judge.\textsuperscript{93}

1. Specific Authorization to Use Particular Criminal Justice System Sanctions

A few state legislatures have explicitly provided that juvenile court judges, at their discretion, may impose certain adult court sanctions.

\textsuperscript{88} See Coordinating Council, \textit{supra} note 54; OFFICE OF JUVENILES JUSTICE POLICY, \textit{supra} note 64. New York and Texas also have a maximum age of 16 for juvenile court jurisdiction. See N.Y. PENAL LAW § 30.00(1) (McKinney 1998); TEX. FAM. CODE ANN. § 51.02(2)(a) (West 1996).

\textsuperscript{89} See Fritsch & Hemmens, \textit{supra} note 11, at 599. Interestingly, another punitive trend exhibited by the Texas legislature during these two legislative sessions was an attempt to lower the minimum age of juvenile court jurisdiction and thus expose younger children to juvenile court sentences. See id. at 597–98. Seven bills proposing to lower the minimum age from ten to eight years of age were introduced and two other bills proposed to lower the age minimum to seven years of age. See id. at 598. Even more extreme, one Texas state representative recently introduced a bill lowering the age of death penalty eligibility from 17 to 11. See Roger Cossack, \textit{Should We be Tougher on Kids Who Kill?}, USA WEEKEND, Jun. 28, 1998, at 16; \textit{As Youth Violence Grows, Many Pondering: When is a Killer Too Young to Die?}, SALT LAKE TRIB., Apr. 25, 1998, at A3 (quoting the vengeful legislator introducing the bill, “There are 11-year-olds out there that would be capable of premeditated murder.”).


\textsuperscript{91} See id.

\textsuperscript{92} See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 58(a) (West Supp. 1998); see also Fagan, \textit{supra} note 11, at 243 (reporting that Texas and New Jersey permit juvenile court judges to impose lengthy prison terms for some offenses).

\textsuperscript{93} See id.
on certain young offenders. Judges may impose these sanctions only on youths for whom the length of juvenile court jurisdiction has been extended beyond the traditional maximum age of jurisdiction, typically an extension to the age of twenty-one. These youths have generally committed serious offenses or have extensive offense histories.

For example, the Kansas 1996 Juvenile Justice Reform Act permits juvenile court judges to commit young offenders to a sanctions house for up to seven days. The commitment is renewable up to a maximum twenty-eight day period. Furthermore, the Act permits juvenile court judges, at their discretion, to commit young offenders aged eighteen to twenty-three, who are in violation of their probation, to the county jail for up to seven days.

2. Complete Criminal Justice System Sanctioning Power

In contrast to states granting narrow, specifically delineated adult sanctioning power to juvenile courts, a few states have recently enacted legislation granting broad, discretionary adult sanctioning power to juvenile courts. These states permit juvenile court judges to impose any criminal court sentence on certain classifications of young offenders. These statutes generally apply to older youths charged with a felony who have previously been adjudicated delinquent on other felony charges, or who were previously committed to a supervising state youth agency by a juvenile court.

For example, the Massachusetts 1996 Youthful Offender Act grants juvenile court judges the authority to sentence some classes of

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96 See, e.g., id.
97 See Kan. Stat. Ann. § 38-1663(6) (Supp. 1997); Smith, R., supra note 90, at 35. A sanctions house is separate from an adult jail but is not necessarily a juvenile detention center. See Kan. Stat. Ann. § 38-1602(n) (Supp. 1997). It is defined as a locked facility with locked rooms and physical restraints such as fences surrounding those held inside the facility. See id.
youths to any sanction available to a criminal court judge sentencing an adult convicted of the same offense.\textsuperscript{104} "Youthful Offenders"\textsuperscript{105} who pose a present and long-term public safety threat are eligible for these sentences.\textsuperscript{106} In October, 1997 Boston Juvenile Court Judge Paul Lewis used the authority granted to him by this law for the first time.\textsuperscript{107} He sentenced a sixteen-year-old youth to a term of four to six years in prison after he pled guilty to charges of repeatedly stabbing a man.\textsuperscript{108}

C. Extended Jurisdiction Legislation

Several states have recently enacted extended jurisdiction, or "last chance" legislation, which both increases the length of juvenile court jurisdiction over a young offender, and exposes the offender to a suspended adult correctional sentence (including incarceration in jail or prison).\textsuperscript{109} Extended jurisdiction statutes typically lengthen juvenile court jurisdiction to the age of twenty-one.\textsuperscript{110} When the sentenced youth reaches the maximum age of juvenile court jurisdiction, the youth may be transferred to an adult prison, placed on adult probation with the suspended sentence hinging on successful completion of probation, or released from the remainder of the sentence.\textsuperscript{111} In some states, after a shorter period of commitment, the state youth agency


\textsuperscript{105} Massachusetts defines "Youthful Offenders" as youths between the ages of 14 and 17 who:
1. have committed an offense punishable by imprisonment if the offender were an adult, and
2. meet one of three additional elements. See Mass. Gen. Laws Ann. ch. 119, § 52 (West Supp. 1998). These elements include: (1) the youth was previously committed to the custody of the state youth authority, (2) the youth committed an offense involving infliction or threat of serious bodily harm, or (3) the youth possessed or distributed an unlawful firearm. See id.


\textsuperscript{108} See id.


The increased length and potentially more severe nature of the sentence reflects a desire to increase offender accountability with retribution for the offender’s acts.\footnote{113}{See Del Carlo, supra note 7, at 1247.} However, this legislation is called “last chance” legislation in recognition of the conditional opportunity it affords young offenders to rehabilitate themselves and avoid a criminal justice system sanction.\footnote{114}{See id. at 1246; see also Feld, A Case of Reform, supra note 7, at 1038; Feld, Task Force, supra note 61, at 22.} Thus, it does not represent as complete a departure from rehabilitation as transfer and other punitive sentencing schemes.

Two prevalent types of extended jurisdiction legislation are blended sentencing and determinate sentencing.

1. Blended Sentencing

Blended sentencing legislation\footnote{115}{This type of legislation also is called “dual sentencing” and “combination sentencing.” See Adkins, supra note 109, at 25; Reform Proposals to Arizona’s Juvenile Justice System, Ariz. Att’y, Feb. 1996, 35, 35 [hereinafter Reform Proposals]; Blegen, supra note 11, at 48; Smith, R., supra note 90, at 35; Del Carlo, supra note 7, at 1246.} allows juvenile court judges to sentence certain young offenders as juveniles or use a combination of juvenile and adult sentencing possibilities.\footnote{116}{See Reform Proposals, supra note 115, at 35; Feld, Task Force, supra note 61, at 22.} The length of juvenile court jurisdiction is extended to ensure an adequate period of confinement for youths who remain in the juvenile justice system.\footnote{117}{See Feld, Task Force, supra note 61, at 22–23 (reporting that Minnesota’s blended sentencing statute extends juvenile court jurisdiction for youths designated “Extended Jurisdiction Juveniles” to the age of 21); see also Mass. Gen. Laws Ann. ch. 119, § 58 (West Supp. 1998) (extending juvenile court jurisdiction for youths designated “Youthful Offenders” to the age of 21).} Like legislation providing juvenile court judges with criminal court sanctions, blended sentencing statutes typically apply to youths between the ages of fourteen and seventeen who have been charged with a felony.\footnote{118}{See, e.g., Mass. Gen. Laws Ann. ch. 119, § 52 (West Supp. 1998); Feld, Task Force, supra note 61, at 23.} Generally, these youths must also have a previous delinquency adjudication on other felony charges, or must have a previous commitment to a supervising state youth agency by a juvenile court.\footnote{119}{See, e.g., Mass. Gen. Laws Ann. ch. 119, § 52 (West Supp. 1998).}
For example, under Minnesota’s blended sentencing statute, a youth may be transferred to criminal court or classified as an “Extended Jurisdiction Juvenile” following a juvenile court hearing which assesses whether the youth poses a public safety threat. Youths eligible for the Extended Jurisdiction Juvenile classification are between the ages of fourteen and seventeen and charged with a felony. A juvenile court judge finding that the Extended Jurisdiction Juvenile committed the charged offense sentences the youth to the custody of the state youth agency with a suspended adult criminal court sentence. For Extended Jurisdiction Juveniles, juvenile court jurisdiction is extended to the age of twenty-one.

2. Determinate Sentencing

Another aspect of extended jurisdiction is determinate sentencing. Determine sentencing empowers juvenile court judges with

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120 See Minn. Stat. Ann. § 260.126(1)–(2) (West 1998); Feld, A Case of Reform, supra note 7, at 1043–45; Feld, Task Force, supra note 61, at 22. The 1996 Massachusetts Youthful Offender Act provides similar blended sentencing provisions. See Mass. Gen. Laws Ann. ch. 119, § 52 et seq. (West Supp. 1998). A “Youthful Offender” is a youth between the ages of 14 and 17 who has committed an offense punishable by imprisonment, were the youth an adult, and who meets one of three conditions. See Mass. Gen. Laws Ann. ch. 119, § 52 (West Supp. 1998). Such an adolescent is a Youthful Offender if: 1) he/she has a previous commitment to the Department of Youth Services (DYS), 2) his/her offense involved the infliction or threat of serious bodily harm, or 3) his/her offense involved possession of an unlicensed firearm, unlicensed shotgun, machine gun, or sawed-off shotgun, or their offense involved the sale or distribution of a firearm or shotgun. See id. Juvenile court judges may sentence Youthful Offenders who pose a present and long-term threat to public safety to one of three general sentencing options, including extended jurisdiction. See Mass. Gen. Laws Ann. ch. 119, § 58 (West Supp. 1998). Similar to Minnesota judges, a Massachusetts juvenile court judge can impose a sentence of commitment to DYS until the age of 21 with an additional suspended adult prison sentence. See Mass. Gen. Laws Ann. ch. 119, § 58 (b) (West Supp. 1998). Youths successfully completing the DYS commitment and juvenile probation are released from the suspended sentence at the age of 21. See id.

121 See Minn. Stat. Ann. § 260.126(1) (West 1998); Feld, A Case of Reform, supra note 7, at 1045; Feld, Task Force, supra note 61, at 23.

122 See id. at 1047; Feld, Task Force, supra note 61, at 23.

123 See Feld, A Case of Reform, supra note 7, at 1042, 1048–49. The rationale underlying the legislature’s decision not to require imposition of the suspended sentence for violation of a condition is that the legislature did not want a large number of youths to receive adult sanctions through summary probation revocation hearings. See id. at 1050.

124 See Fagan, supra note 11, at 243–44; Frisch & Hemmens, supra note 11, at 587–95. Related to the adoption of determinate sentencing in the juvenile court is the enactment of juvenile court
the authority to impose a specific period of locked confinement on a young offender. Generally, part of the sentence is served in state youth agency facilities. The remainder is served in prison if, after a review of the case when the youth reaches the age of majority, a court decides the additional adult sanction is necessary. Many states extend the maximum age of juvenile court jurisdiction to afford sentenced youths the opportunity to rehabilitate themselves while in youth agency facilities before a decision is reached regarding the need for the youth to serve additional time in prison. Unlike mandatory minimum sentencing, which establishes a statutory floor beneath which a judge may not sentence, determinate sentencing establishes a statutory ceiling, permitting a judge to sentence a youth anywhere beneath a statutorily enunciated maximum sentence.

In 1987, Texas adopted determinate sentencing legislation which enables juvenile court judges to impose sentences of up to thirty years for six serious felony offenses. The statute applies to youths of any age, and requires that youths receiving determinate sentences remain

sentencing guidelines. See Baldi, supra note 56, at 589. Washington was the first state to take such a punitive approach toward young offenders through its adoption of sentencing guidelines which partially augment and partially replace the traditional rehabilitative goals of the juvenile court. See Wash. Rev. Code Ann. § 13.40.010(2)(d) (West 1993 & Supp. 1998); Baldi, supra note 56, at 589–90. The Washington Juvenile Justice Act of 1977 provides statutory sentencing guidelines under which juvenile court judges match the offense of the youth to a pre-determined sentence. See Fagan, supra note 11, at 244; Baldi, supra note 56, at 589. The Act explicitly prohibits a judge from considering a youth’s background, need for treatment, or rehabilitative potential. See id. Sentences are determined based on the youth’s age, present offense, and offense history. See id.

126 See Fritsch & Hemmens, supra note 11, at 589; Feld, A Case of Reform, supra note 7, at 1039 & n.313; Del Carlo, supra note 7, at 1247–48. “Locked confinement” includes juvenile detention centers, juvenile training centers, and adult prisons. See id.

127 See Fritsch & Hemmens, supra note 11, at 589; Feld, A Case of Reform, supra note 7, at 1039; Del Carlo, supra note 7, at 1247.

128 See id.

129 See Feld, A Case of Reform, supra note 7, at 1039 n.313; Del Carlo, supra note 7, at 1247–48.

130 See Del Carlo, supra note 7, at 1231.

131 See id.; Fritsch & Hemmens, supra note 11, at 589.

132 See Tex. Fam. Code Ann. § 54.04(d)(3) (West 1996 & Supp. 1999); Fritsch & Hemmens, supra note 11, at 588–89. The list of offenses includes: capital murder, attempted capital murder, murder, aggravated sexual assault, aggravated kidnapping, and deadly assault on a law enforcement officer, corrections officer, court participant, or on probation personnel. See Fritsch & Hemmens, supra note 11, at 589; Dawson, supra note 7, at 946. Similarly, the Virginia Legislature has enacted a statute permitting both juvenile court and criminal court judges to sentence juvenile “Serious Offenders” to a determinate period of up to seven years. See Va. Code Ann. § 16.1–285.1(C) (Mitchie 1996); Cullen D. Seltzer, Criminal Law and Procedure, 30 U. Rich. L. Rev. 1281, 1308 (1996). Unlike the Texas statute, however, Virginia’s juvenile court determinate sentences may not extend beyond the age of juvenile court jurisdiction, which is the age of 21 in Virginia. See id.
under juvenile court jurisdiction until the age of eighteen. 133 Following
the youth’s eighteenth birthday, the court conducts a hearing to decide
whether the youth should remain in a Texas Youth Commission facility
or whether the youth should complete the remainder of the original
determinate sentence in a Texas prison. 134 If the judge decides to
return the youth to the Texas Youth Commission facility, the youth’s
sentence ends with the expiration of juvenile court jurisdiction, which
occurs when the youth attains the age of twenty-one. 135

In 1995, the Texas Legislature amended the statute by adding
fifteen additional felonies to the list and modifying the determinate
sentencing structure. 136 Youths committing one of the twenty-one listed
offenses can now receive sentences of up to forty years for a capital or
first degree felony, twenty years for a second degree felony, and ten
years for a third degree felony. 137

Similar to criminal justice sentencing legislation, juvenile justice
sentencing legislation aims to protect the public from violent offend­ing
by altering the sentence imposed on offenders. 138 In some states
this is accomplished by taking power away from the juvenile court by
narrowing the scope of offenders who may appear before it and of­
fenses it may address. 139 This type of legislation has the effect of placing
more young offenders in the criminal courts. 140 Other states have
elected to afford criminal court sanctioning power to juvenile court
judges so that they may impose more severe sentences on young of­
fenders. 141 States falling in the middle of this power continuum give
juvenile court judges discretion to impose conditional adult sanctions

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133 See Dawson, supra note 7, at 946-47; Ellis, supra note 102, at 27; Fritsch & Hemmens, supra note 11, at 589.
134 See Tex. Fam. Code Ann. §§ 54.04(d)(3), 54.11 (West 1986 & Supp. 1995); Dawson, supra note 7, at 947; Ellis, supra note 102, at 27; Fritsch & Hemmens, supra note 11, at 589; Del Carlo, supra note 7, at 1247.
135 See id.
136 See Tex. Fam. Code Ann. § 54.04(d)(3) (West 1996 & Supp. 1999); Fritsch & Hemmens, supra note 11, at 594-95. The additional felonies include: aggravated robbery, attempted aggra­
vated robbery, attempted aggravated sexual assault, attempted aggravated kidnapping, attempted
murder, sexual assault, aggravated assault, felonious injury to a child, elderly person, or disabled
person, felony deadly conduct involving the discharge of a firearm, aggravated drug offenses,
criminal solicitation, criminal solicitation of a minor, indecency with a child, attempted indecency
with a child, and habitual felony conduct (i.e., commission of a felony by a youth with two prior
felony adjudications). See Fritsch & Hemmens, supra note 11, at 594.
137 See Fritsch & Hemmens, supra note 11, at 589, 594-95.
138 See supra Part II Introduction, notes 54-66 and accompanying text.
139 See supra Part II.A, notes 67-89 and accompanying text.
140 See supra Part II.A, notes 67-89 and accompanying text.
141 See supra Part II.B, notes 90-108 and accompanying text.
on young offenders.142 This legislation provides the opportunity for rehabilitation with a conditional punitive sentence attached.143 Unfortunately, the impact of these types of sentencing legislation on young offenders can be overly punitive and does not satisfy the stated goal of protecting public safety.

III. PROBLEMS MANIFEST WITH THE APPLICATION OF PUNITIVE CRIMINAL JUSTICE AND JUVENILE JUSTICE SENTENCING LEGISLATION ON YOUNG OFFENDERS

In the hurried search for a response to juvenile crime,144 states did not adequately consider the faults that these punitive sentencing approaches have when applied to young offenders.


Criminal justice system mandatory minimum sentencing, sentence enhancements, and sentencing guidelines impact young offenders in several ways. The first portion of this section discusses how the federal, and many state, sentencing guidelines use juvenile adjudications to enhance adult offender sentences, thus inappropriately penalizing, and penalizing in an inconsistent manner, offenders for past juvenile court involvement.145 Specifically, the first subsection examines the manner by which sentencing guidelines discourage youths from seeking services, cause disparity in sentences among adult offenders with juvenile adjudications, and disadvantage adult offenders with juvenile adjudications due to the lower procedural safeguards available in juvenile court.146 The second subsection reveals the manner in which transfer and legislation reducing the maximum age of juvenile court jurisdiction expose many youths to punitive criminal justice legislation.

142 See supra Part II.C, notes 109–37 and accompanying text.
143 See supra Part II.C, notes 109–37 and accompanying text.
144 See, e.g., Youthful Offender Act, ch. 200, § 1 et seq., § 52 et seq., 1996 Mass. Legis. Serv. 1, 1 (West). In its preamble, the Massachusetts Youthful Offender Act announces its hurried nature: “The deferred operation of this act would tend to defeat its purpose, which is to immediately provide for an improved system of juvenile justice for the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.” (emphasis added). See id.
145 See infra Part III.A.1, notes 150–96 and accompanying text.
146 See infra Part III.A.1, notes 150–96 and accompanying text.
while they are minors.147 Finally, the last subsection discusses the pressure placed on youths to plea bargain with prosecutors to avoid criminal justice sanctions.148 As applied, criminal justice legislation yields inconsistent results between young offenders, overpenalizes young offenders, disadvantages young offenders as compared to adult offenders, and provides unchecked power to prosecutors.149

1. Sentencing Guidelines “Criminalize” Juvenile Offender Adjudications

Section 4A1.2(d) of the federal sentencing guidelines and similar state legislation provisions require judges sentencing a convicted adult to use the offender’s past juvenile offense record to increase his/her sentence.150 This is particularly problematic for young offenders because the differing goals of the juvenile and criminal justice systems result in sentences of a different nature.151

Juvenile court sentences traditionally focus on treating and rehabilitating youths based on a judge’s discretionary assessment of a

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147 See infra Part III.A.2, notes 197–221 and accompanying text.  
148 See infra Part III.A.3, notes 222–34 and accompanying text.  
149 See infra Part III.A.1–3, notes 150–234 and accompanying text.  
150 See 18 U.S.C.A. U.S.S.G. § 4A1.2(d) (1998); Laurel M. Cohn, Annotation, Consideration of Offenses Committed While a Juvenile in the Computation of Criminal History Under United States Sentencing Guidelines (18 U.S.C.A. Appx § 4A1.2), 135 A.L.R. Fed. 619, 627 (1996); Mills, supra note 7, at 923 & n.183. The United States Sentencing Guidelines require judges to give sentence enhancement points for prior sentences received by juveniles adjudicated delinquent or convicted of criminal charges. See id. Each conviction for which a youth received more than one year and one month of imprisonment adds three criminal history enhancement points! See § 4A1.2(d)(1); Mills, supra note 7, at 923 n.183; Cohn, supra, at 627. Each juvenile or adult sentence of confinement for more than 60 days adds two criminal history points provided that the confinement ended within five years of the current adult criminal charge. See § 4A1.2(d)(2)(A); Mills, supra note 7, at 923 n.183; Cohn, supra, at 627. Similarly, one criminal history point is added for each adult or juvenile sentence received within the five year period prior to the current adult criminal charge. See § 4A1.2(d)(2)(B); Mills, supra note 7, at 923 n.183; Cohn, supra, at 627. These points are added to the points assessed for the particular offense to attain a total score which the judge uses to determine the sentence required by the federal sentencing guidelines. See § 4A1.2; Mills, supra note 7, at 923 n.183; Cohn, supra, at 627. Some states’ sentencing guidelines also use past juvenile records to enhance adult sentences. See, e.g., Minn. Stat. Ann. § 609.11(9) (West 1987 & Supp. 1998). The proposed Massachusetts sentencing guidelines currently tabled in the legislature also employ juvenile records to enhance adult sentences. See Eric T. Berkman, Do Juvenile Adjudications Constitute Prior Crimes? Attorneys: Uncertain Area Requires Caution, Mass. Law. Wkly., June 16, 1997, at Section A.

151 See David Dormont, Note, For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences, 75 Minn. L. Rev. 1769, 1770, 1776–77, 1797 (1991); see also Robert E. Shepherd, Jr., Trying juveniles in Federal Court, 9 Crim. Just., Fall 1994, at 45, 46; Holden, supra, note 71, at 848.
youth's individual characteristics, needs, and history.\textsuperscript{152} Sentences often last an indefinite period of time, until the state agency supervising the offender decides to release him/her.\textsuperscript{153} During this period, young offenders receive counseling, education, training, and other services to rehabilitate them and reintroduce them into the law-abiding community.\textsuperscript{154}

In contrast, criminal court sentences determined by sentencing guidelines intend to punish the offender based on a statutory assessment of the severity of the offense and the offender's past criminal history.\textsuperscript{155} Sentences are finite and predetermined by statute.\textsuperscript{156} Offenders are not ensured of any rehabilitative services and there is no emphasis on rehabilitating the offender to fit back into a law-abiding society.\textsuperscript{157}

Sentencing guidelines which use juvenile records to increase sentence severity convert a rehabilitative process into a punitive process by "criminalizing" juvenile adjudications.\textsuperscript{158} The juvenile court's rehabilitative-centered sentence is treated as the functional equivalent of a punitive-centered criminal justice sentence for purposes of sentencing an adult offender.\textsuperscript{159} Thus, young offenders who subsequently commit crimes as adults are penalized for their past contact with the juvenile court.\textsuperscript{160}

Penalizing youths who later commit crimes as adults by using their delinquency adjudications as the equivalent of criminal convictions to increase sentence length is an unfair detriment with disparate results for three principal reasons. First, it discourages youths from seeking rehabilitation or other treatment assistance services from juvenile court. Second, the discretion central to the juvenile court causes disparity in adult offender sentences under sentencing guidelines. Third,


\textsuperscript{153} See Ellis, supra note 102, at 26; United States v. Pinto, 875 F.2d 56, 145 (7th Cir. 1989).

\textsuperscript{154} See Ludwig, supra note 55, at 18; Stepp, supra note 152; see also other sources cited in note 55.

\textsuperscript{155} See Alschuler, supra note 9, at 907–08; Reitz, supra note 46, at 1464.

\textsuperscript{156} See Alschuler, supra note 9, at 907–08; Hatch, supra note 9, at 188–89.

\textsuperscript{157} See Elizabeth S. Scott & Thomas Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY 137, 186 (1997); Cintron, supra note 14, at 1282; Klein, supra note 55, at 405–04; see also English, supra note 55, at 25.

\textsuperscript{158} See Dormont, supra note 151, at 1770, 1797.

\textsuperscript{159} See id. at 1770, 1798.

\textsuperscript{160} See id.
the lower procedural safeguards available to young offenders in juvenile court create a greater likelihood that a young offender will be adjudicated delinquent.

a. Youths Are Discouraged from Seeking Juvenile Court Rehabilitation Services

Sentencing guidelines' juvenile record enhancement provisions may discourage youths from admitting to their offenses because criminal courts can later penalize them for any delinquency adjudication.161 As a result, youths may become trained, and are likely to be counseled by their attorneys, to deny all involvement in any offense with which they are charged.162 It is unlikely that a youth who continually denies committing the offense with which he/she is charged, and takes no responsibility for the harm caused, will benefit from rehabilitative services, because rehabilitation hinges on the youth's recognition of and willingness to change his/her problematic behavior.163 Discouraging youths from seeking treatment and rehabilitative assistance from juvenile court thus undermines the purpose for which the court was created.164 In effect, the juvenile court then becomes a criminal court for young persons.165

b. Juvenile Court Use of Discretion Causes Disparity

Furthermore, the discretion central to the juvenile justice system translates into disparity when juvenile records are used to increase adult sentences. This inequitable sentence disparity is due to variations in juvenile court sentence length based on type of offense and consideration of individual offender characteristics.

161 See id. at 1797–98 (asserting that therapeutic assumptions generally held by attorneys and judges are out of sync with the punitive sentencing guidelines and stating the need for juveniles, their attorneys, and judges to recognize that "therapeutic incarceration for the child's good works to the adult's detriment.").
162 See id. at 1797–98.
163 See id. at 1797–98; Sheffer, supra note 11, at 482.
164 See Dormont, supra note 151, at 1770, 1798 & 1797 n.146.
165 See id. at 1798; Cintron, supra note 14, at 1275.
i. Differences in Number of Sentencing Guidelines' Criminal History Points Available Due to Length of Juvenile Adjudication Sentence

Under the federal sentencing guidelines, two criminal history enhancement points are assigned to a young offender sentenced by the juvenile court to confinement of at least sixty days.\textsuperscript{166} In addition, one point is available for each additional, less severe sentence imposed.\textsuperscript{167} There is no limit to the maximum number of enhancement points, provided that all sentences were within five years of the present offense.\textsuperscript{168} The criminal history enhancement points accumulated for past juvenile and adult offenses are combined to increase the severity of the sentenced imposed.\textsuperscript{169}

The disparity caused by the number of points accumulated is apparent when comparing a youth adjudicated delinquent on a charge of aggravated rape with a youth adjudicated delinquent on several occasions for shoplifting. The youth who commits aggravated rape might remain in the locked facilities of the state youth authority during the majority of his adolescence.\textsuperscript{170} This youth spends little time in the community, thus he/she has had scarcely any opportunity to re-offend.\textsuperscript{171} If this is the only offense committed as a youth, he/she can only receive a maximum of two criminal history points for his/her juvenile record, if the offender is later convicted as an adult.\textsuperscript{172}

\textsuperscript{166} See Dormont, \textit{supra} note 151, at 1769 n.4; Mills, \textit{supra} note 7, at 923 n.183. Section 4A1.2(d) (2)(A) of the federal sentencing guidelines provides that a convicted offender can receive two criminal history points for each juvenile sentence of confinement of at least sixty days if released from confinement within five years of his or her present offense. See Dormont, \textit{supra} note 151, at 1769 n.4; Mills, \textit{supra} note 7, at 923 n.183, 923–24. Criminal history points are added to points given for the offender’s adult offense record to determine the sentencing range category into which the offender fits. See Mills, \textit{supra} note 7, at 923–24; Cohn, \textit{supra} note 150, at 627. The greater the number of criminal history points, the more severe the sentencing range. See Dormont, \textit{supra} note 151, at 1773–74.

\textsuperscript{167} See Dormont, \textit{supra} note 151, at 1769 n.4; Mills, \textit{supra} note 7, at 923 n.183; Cohn, \textit{supra} note 150, at 627. Section 4A1.2(d)(2)(B) provides that a convicted offender can receive one point for each juvenile sentence imposed within five years of his or her present offense. See id.

\textsuperscript{168} See Dormont, \textit{supra} note 151, at 1773–74; Mills, \textit{supra} note 7, at 924. The United States Sentencing Guidelines do not cap the number of criminal history points available from a juvenile record. See id. Some states do limit the number of criminal history points for juvenile sentences. \textit{See, e.g.}, MINN. STAT. ANN. § 244 APP. (II)(B)(4)(e) (West 1992 & Supp. 1998).

\textsuperscript{169} See Dormont, \textit{supra} note 151, at 1773; Mills, \textit{supra} note 7, at 923–24.

\textsuperscript{170} See Dormont, \textit{supra} note 151, at 1802.

\textsuperscript{171} See id.

\textsuperscript{172} See id.
In contrast, the youth who commits numerous shoplifting offenses can receive one criminal history point for each offense with nearly no maximum on the total number.\textsuperscript{173} Thus, under the federal sentencing guidelines, if the two commit the same or similar offenses as adults, the offender with a violent juvenile offense record can receive a shorter, less severe sentence than the offender with a nonviolent juvenile offense record.\textsuperscript{174}

\section*{ii. Differences in Number of Sentencing Guidelines' Criminal History Points Available Due to Individualized Juvenile Court Sentencing}

Furthermore, the discretionary nature of the juvenile justice system encourages juvenile court judges to consider individual factors to create individualized sentences for young offenders.\textsuperscript{175} This leads to different sentences for the same offense.\textsuperscript{176}

For example, a juvenile court judge might divert a youth committing motor vehicle theft to a community service program because the youth regularly attends school and has a supportive family.\textsuperscript{177} The same judge might sentence another youth committing motor vehicle theft to a period of locked confinement because the youth is believed to be an active gang member and lives in an unstable family environment.\textsuperscript{178} Under the federal sentencing guidelines, the first youth cannot receive any criminal history enhancement points for his/her adjudication whereas the second youth can receive one or two points (depending on the length of locked confinement, if any).\textsuperscript{179} Thus, for purposes of criminal court sentencing, one offender has a juvenile record requiring criminal history enhancement points and one does not.\textsuperscript{180} As an

\textsuperscript{173} See id. at 1802, 1769 n.4, 1773-74; Mills, supra note 7, at 923 n.183, 924. The only limitation is that all offenses for which points are received must have been committed, or their locked confinement sentences completed, within the last five years. See Dormont, supra note 151, at 1769 n.4; Mills, supra note 7, at 923 n.183.

\textsuperscript{174} See Dormont, supra note 151, at 1801-02; supra notes 166-73 and accompanying text.


\textsuperscript{176} See Feld, Principle of the Offense, supra note 67, at 477; Dormont, supra note 151, at 1801; Kamenstein, supra note 175, at 2124.

\textsuperscript{177} See Dormont, supra note 151, at 1801.

\textsuperscript{178} See id.

\textsuperscript{179} See id. at 1769 n.4; Mills, supra note 7, at 923 n.183.

\textsuperscript{180} See Dormont, supra note 151, at 1801-02 & 1802 n.178.
adult, the offender with the criminal history enhancement points is likely to receive a longer sentence.\textsuperscript{181}

c. The Lack of Procedural Safeguards Available to Young Offenders in Juvenile Court Harms Convicted Adult Offenders with Juvenile Records

Using juvenile records to enhance sentences under sentencing guidelines also disadvantages youths because the juvenile justice system does not employ the same procedural safeguards available in adult courts.\textsuperscript{182} These lower procedural safeguards create a greater likelihood that a young offender will be adjudicated delinquent than an adult offender, who is entitled to more rigorous procedural safeguards, will be found guilty.\textsuperscript{183} First, unlike adults, youths are not constitutionally entitled to a jury trial.\textsuperscript{184} The option to have a jury trial gives adult offenders bargaining power to discuss a plea agreement with prosecutors who may not have sufficient amounts of time to try all their scheduled jury trials, may wish to conserve resources for particular cases, may not be certain they have a strong case, or may fear a "merciful jury" in the case.\textsuperscript{185} It may also be more difficult to obtain the unanimous guilty verdict necessary for a jury to convict an offender than to convince a single judge of an offender's guilt.\textsuperscript{186}

Second, a diminished Fourth Amendment search and seizure standard is applicable to searches of youths and their property in school.\textsuperscript{187} As a result, youths can be charged with offenses such as drug or weapon possession more easily than adults because it is constitutional to search them with a lesser degree of suspicion than required for a constitutional search of an adult.\textsuperscript{188} Moreover, unlike adults, juveniles may be stopped and searched if they are suspected of committing a

\textsuperscript{181} See id. at 1773; Mills, supra note 7, at 923–24.

\textsuperscript{182} See Dormont, supra note 151, at 1792, 1798–99.

\textsuperscript{183} See id. at 1799.

\textsuperscript{184} See McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

\textsuperscript{185} See Lowenthal, supra note 8, at 107.


\textsuperscript{188} See id.
status offense.  Again, these searches subsequent to a stop for a status offense may yield illegal objects such as drugs, alcohol, or weapons which result in offense charges in circumstances under which an adult could not be searched. Thus, young offenders can be adjudicated delinquent on offense charges resulting from search and seizure procedures that would, in the adult context, produce inadmissible evidence.

Finally, although sentencing guidelines do not permit sentence increases for juvenile status offenses, juvenile court judges can hold a status offender in contempt of court for violating a court order and sentence the offender to a short period of locked confinement. This period of locked confinement can add one or two criminal history sentence enhancement points if the youth is subsequently convicted of an offense as an adult. In contrast, an adult, by definition, cannot commit a status offense and therefore can never receive criminal history points for violation of a status offense order.

Thus, it is apparent that the less rigorous procedural safeguards employed in juvenile court proceedings are more likely to yield sentences for which sentencing guideline criminal history points must be given. As a result of the juvenile court discretion exercised in sentencing young offenders, the severity of sentencing guidelines is likely to be disproportionate and disparate for adult offenders with juvenile delinquency adjudications.

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189 See id. at 341-45. A status offense is conduct which would be legal if committed by an adult. See Mills, supra note 7, at 912; Cohn, supra note 150, at 628. Common status offense charges include: truancy, running away, curfew violation, ungovernability, and liquor law infringements. See Randall G. Shelden et al., Do Status Offenders Get Worse? Some Clarifications on the Question of Escalation, 35 CRIME & DELINQUENCY 202, 204 (1989).

190 See T.L.O., 469 U.S. at 341-45.

191 See id. at 341, 348 (Powell, J., concurring).

192 See Juvenile Justice Delinquency & Prevention Act 42 U.S.C.A. § 5633(a)(12)(A) (1995); Dormont, supra note 151, at 1802 n.177. For example, in some states, a juvenile court judge may hold a truant in contempt of court if the judge ordered the status offender to attend school and he/she failed to do so. See Dormont, supra note 151, at 1802 n.177. Furthermore, a juvenile court judge deciding the disposition of a young offender’s case may determine that the offender’s past status offenses necessitate the need for a sentence including locked confinement. See id. A criminal court judge may not use the status offenses to increase a criminal conviction sentence. See id.; Cohn, supra note 150, at 629, 639-40. However, in effect, the criminal court judge is indirectly using status offenses as enhancement because the juvenile court disposition, including locked confinement, was based on past status offenses.

193 See Dormont, supra note 151, at 1769 n.4; Mills, supra note 7, at 929 n.183.

194 See Cohn, supra note 150, at 628; Mills, supra note 7, at 912.

195 See Dormont, supra note 151, at 1799.

196 See supra Part III.A.1, notes 150-95 and accompanying text.
2. Dual Enhancement

Legislatures creating and amending juvenile justice statutes to effect a more punitive approach often impose extraordinarily harsh penalties on young offenders.\(^\text{197}\) When the scope of the juvenile justice legislation intersects with that of criminal justice sentencing statutes, many young offenders face a dual enhancement.\(^\text{198}\)

Dual enhancement results from a combination of legislation which subjects a young offender to two penalties. First, juvenile justice legislation places some young offenders in criminal court with its attendant exposure to adult sanctions.\(^\text{199}\) Second, punitive criminal justice sentencing legislation imposes severe sentences on these youths through mandatory minimum sentences, sentence enhancements, and sentencing guidelines.\(^\text{200}\)

Dual enhancement is most apparent in the cases of young offenders subjected to automatic transfer legislation.\(^\text{201}\) Youths charged with statutorily enumerated offenses are first transferred to the criminal court system where they are exposed to adult criminal sanctions.\(^\text{202}\) Criminal sanctions for serious offenses are based on retribution, incapacitation, and general deterrence punishment justifications.\(^\text{203}\) Criminal sanctions are intended to be more severe than juvenile court sanctions, which are traditionally based on a rehabilitative, treatment approach.\(^\text{204}\)

\(^\text{197}\) See Emanuel Margolis, Connecticut’s War on Drugs: A Peace Proposal, 70 CONN. B. J. 572, 381 (1996); Del Carlo, supra note 7, at 1231.

\(^\text{198}\) See Del Carlo, supra note 7, at 1231.

\(^\text{199}\) See OJJDP, supra note 64.

\(^\text{200}\) See supra Part I, notes 17–53 and accompanying text.

\(^\text{201}\) Juvenile justice legislation reducing the maximum age of juvenile court jurisdiction and other types of transfer legislation have the same effect. See supra Part II.A, notes 67–89 and accompanying text.

\(^\text{202}\) See OJJDP, supra note 64. Criminal court sanctions include a term in jail or state prison, life imprisonment, and death. Prior to the adoption of blended sentencing schemes by some states, none of these sanctions were available to juvenile court judges. Unlike a criminal court judge, most juvenile court judges—those in jurisdictions without criminal justice sanctioning power vested in the juvenile court—have no authority to sentence a youth to a term of years in prison. See Minnesota Supreme Court Advisory Force on the Juvenile Justice System: Final Report, 20 WM. MITCHELL L. REV. 595, 635 (1994); Judge Michael Foellger et al., Transfer Issues: Rehabilitation or Punishment?, 4 FALL KY. CHILDREN’S RTS. J. 1, 1 (1995).

\(^\text{203}\) See Heglin, supra note 7, at 217–19.

\(^\text{204}\) See REAL WAR ON CRIME, supra note 6, at 130; Cintron, supra note 14, at 1258–59; Dormont, supra note 151, at 1770, 1776–77.
Once transferred to criminal court, these youths face the second punitive measure of mandatory sentences, sentence enhancements, and sentencing guidelines in the criminal justice system. Thus, in effect, these transferred youths are subjected to two punitive measures—a dual enhancement.

For example, with the passage of Ballot Measure 11 in November 1994, Oregon imposed mandatory prison sentences on youths, ages fifteen and older, convicted of certain felonies. The mandatory minimum sentences are exceptionally punitive—the lowest mandatory minimum sentence is five years and ten months. Furthermore, youths sentenced under the mandatory minimum provisions are not eligible for parole. These provisions do not distinguish between sentences imposed on youths and adults.

In addition, Ballot Measure 11 imposes stricter sentences on the transferred youth than the state sentencing guidelines would impose on an adult convicted of the same offense. For example, while the Ballot Measure 11 statute imposes a sentence of five years and ten months imprisonment for a second degree robbery offense, the Oregon sentencing guidelines set a minimum sentence of two years and six months imprisonment. Similarly, Ballot Measure 11 imposes a six year and three month sentence for second degree manslaughter, but the sentencing guidelines only require a sentence ranging from one year and four months to three years and nine months of imprisonment.

Dual enhancement is especially problematic for youths transferred for strict liability offenses, such as school zone legislation, in which the offender’s intent is irrelevant. In most school zone statutes,
mere possession of a weapon is sufficient for conviction regardless of the youth's purpose in carrying the gun.215

School zone legislation, created to reduce violence in schools, is aimed at gangs because they demonstrate a willingness to use force.216 However, the statutes are not limited to possession of weapons by gang members;217 any youth possessing a weapon is subject to the same penalties under the statute.218 Many youths carry a gun, knife, or other weapon to protect themselves from the victimization they fear at school, not to aggress against or threaten others.219 As a director of safety and security for a Massachusetts public school system observed,

Good kids have guns . . . . From a district attorney's perspective, a good kid would never carry a gun, but the DAs don't live in the projects. There's so much fear. Good kids who want

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218 See id.
219 See Bogos, supra note 78, 362–63; Peter Applebome, Perspective: Youth and Violence // Fear Forcing Changes in Behavior, Hopes of Teen Generation, ORANGE COUNTY REG. (Cal.), Jan. 12, 1996, at A3. In his article on the Michigan school zone statute, Paul M. Bogos reports that a United States Department of Justice survey estimates that nine percent of public school students have experienced one or more violent crimes while attending school. See Bogos, supra note 78, at 362. Bogos also reports that the National Education Association asserts that 2,000 students are attacked at school every hour and 100,000 students carry guns to school each day. See id. The United States Department of Justice has found that 91.6% of public and private high school seniors report worrying about crime and violence. See id. at 363; Applebome, supra. A poll of 2,000 teenagers, financed by the Department of Justice, revealed that one of eight youths (nearly two of five in high-crime areas) said they carried a weapon for protection from violence. See Applebome, supra. In addition, one of nine youths (more than one of three in high-crime areas) stated they had missed school on occasion because they were afraid to attend. See id. Furthermore, a recent National Criminal Justice Commission survey of inner-city high schools revealed that nearly one in four students said that they possessed a firearm at some point in their lives. See REAL WAR ON CRIME, supra note 6, at 136. Commentator T. Marcus Funk finds that economically disadvantaged persons are more often victims of crime; police do not offer as much protection to lower income communities as they afford more affluent, less crime-ridden neighborhoods; and the police force cannot provide adequate individual protection. See T. Marcus Funk, Comment, Gun Control and Economic Discrimination, 85 J. CRIM. L. & CRIMINOLOGY, 764, 800–801 (1995). As a result, economically disadvantaged persons often purchase a gun for personal protection. See id. at 801. Funk advocates harsher penalties for the use of a gun in the commission of a violent offense and for the possession of stolen guns, but he argues that the law should not penalize persons possessing a gun to protect themselves. See id. at 804.
to go to school and do the right thing—they're afraid of gangs and the drug dealers; they want to protect themselves and their families. Good kids, bad kids—the categories don't apply anymore.\textsuperscript{220}

Thus, if charged with possession of a weapon in a school zone, these youths, like gang members who carry weapons with the intent to use them, are subjected to the dual enhancement of transfer and criminal justice sentencing legislation.\textsuperscript{221}

3. Pressure to Plea Bargain

Criminal justice system sentencing guidelines, mandatory minimum, and sentence enhancement legislation all pressure transferred youths to plea bargain to avoid the severe sanctions the criminal justice system imposes.\textsuperscript{222} In courts bound by any of this sentencing legislation, a transferred youth often faces a severe sentence that the judge may not reduce regardless of mitigating factors such as age, personal characteristics, or other circumstances.\textsuperscript{223} A prosecutor, however, may charge a youth with a sentence enhancement provision even when mitigating circumstances suggest that the enhancement provision should not be enforced.\textsuperscript{224} Thus, the prosecutor can increase the risks facing a youth who elects to go to trial therefore encouraging the youth to plea bargain.\textsuperscript{225}

The percentage of cases proceeding to trial after the 1978 enactment of sentence enhancement legislation in Arizona demonstrates the pressure to plea bargain.\textsuperscript{226} One provision of this statute requires sentence enhancement for offenders convicted of “dangerous” offenses, which are defined as felonies in which the offender inflicts serious physical injury or uses a weapon.\textsuperscript{227} Another legislative provision requires sentence enhancement for convicted “repetitive” felony offenders, which is a label for offenders who continue to commit felonies after an initial felony conviction.\textsuperscript{228} The percentage of Ari-

\textsuperscript{220} Smith, A., supra note 16, at 959 (quoting John Silva).
\textsuperscript{222} See Hatch, supra note 9, at 191; Lowenthal, supra note 8, at 77–78.
\textsuperscript{223} See Alschuler, supra note 9, at 908; Lowenthal, supra note 8, at 104, 121–22.
\textsuperscript{224} See Lowenthal, supra note 8, at 78.
\textsuperscript{225} See id. at 78–79.
\textsuperscript{226} See id. at 79–85.
\textsuperscript{227} See id. at 81.
\textsuperscript{228} See id.
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zona's criminal cases proceeding to trial following adoption of the 1978 sentencing provisions dropped dramatically.\textsuperscript{229} In the two years prior to the 1978 legislation, 8.74\% of cases in the Phoenix area proceeded to trial.\textsuperscript{230} In the three years following the adoption of the 1978 legislation, the percentage of cases proceeding to trial sharply decreased to 5.73\%.\textsuperscript{231}

Furthermore, research suggests that Arizona prosecutors use these legislative provisions to pressure offenders to plea bargain by charging the offenders with sentence enhancement offenses but later dropping these charges.\textsuperscript{232} In a twelve month period during 1989 and 1990, prosecutors dismissed repetitive offender charges in 76\% of the cases in which they were brought.\textsuperscript{233} Prosecutors dropped dangerous felony charges in 77\% of such cases.\textsuperscript{234}

B. As Applied, Juvenile Justice System Punitive Sentencing Legislation Does Not Meet Its Stated Goal

The purpose of subjecting young offenders to more punitive sentences is three-fold: to deter other youths from committing offenses, to prevent young offenders from re-offending, and to keep young offenders locked up for long periods of time.\textsuperscript{235} The over-arching goal is to protect the public from juvenile offending.\textsuperscript{236} However, shifting youths into criminal court jurisdiction\textsuperscript{237} does not necessarily deter crime, prevent recidivism, or incapacitate offenders for longer periods of time than juvenile court sentences.\textsuperscript{238} Thus, punitive sentencing measures are ineffective at protecting public safety.\textsuperscript{239}

\textsuperscript{229} See Lowenthal, \textit{supra} note 8, at 79-80, 88.
\textsuperscript{230} See id.
\textsuperscript{231} See id.
\textsuperscript{232} See id. at 82.
\textsuperscript{233} See id.
\textsuperscript{234} See Lowenthal, \textit{supra} note 8, at 82. Similarly, in 1991, the United States Sentencing Commission concluded that plea bargaining to avoid conviction on a more serious charge occurred in 17\% of federal criminal cases. See Hatch, \textit{supra} note 9, at 191.
\textsuperscript{235} See Fagan, \textit{supra} note 11, at 242-43; Streib, \textit{supra} note 73, at 429, 432.
\textsuperscript{236} See Streib, \textit{supra} note 75, at 432.
\textsuperscript{237} Most commonly this is accomplished through juvenile transfer and legislation reducing the maximum age of young offenders eligible for juvenile court jurisdiction. See \textit{supra} Part II.A, notes 67-89 and accompanying text.
\textsuperscript{238} See Fagan, \textit{supra} note 11, at 238-99; D'Ambra, \textit{Waiver Statutes in Rhode Island}, \textit{supra} note 69, at 29; Cintron, \textit{supra} note 14, at 1274; Sheffer, \textit{supra} note 11, at 500-01.
\textsuperscript{239} See D'Ambra, \textit{Waiver Statutes in Rhode Island}, \textit{supra} note 69, at 29; Cintron, \textit{supra} note 14, at 1274.
First, there is little evidence that transferring young offenders to criminal court for trial and sentencing deters other youths from offending.\textsuperscript{240} This is because youths tend to act impulsively and do not plan their actions like adults.\textsuperscript{241} As Ohio Northern University College of Law Dean Victor L. Streib wryly comments,

A fundamental premise [of general deterrence theory] . . . is that young teenagers prone to employing violence in their interpersonal relationships will engage in an informed cost/benefit analysis before acting. If, instead, such young teenagers typically are unaware of reports on the six o’clock news and tend to act impulsively and without thinking, then this general deterrence theory would not apply to them.\textsuperscript{242}

Thus, a punitive legislative response to juvenile offending is unlikely to stop other youths from offending.\textsuperscript{243}

Furthermore, there is no noticeable reduction of repeat offending. In contrast, research indicates that transferred young offenders sentenced in criminal court are more likely to re-offend than young offenders retained and adjudicated in juvenile court.\textsuperscript{244} A 1991 U.S. Department of Justice study found that youths sentenced by New York and New Jersey criminal courts were more frequently re-arrested than youths adjudicated in New York and New Jersey juvenile courts.\textsuperscript{245} Moreover, they were re-arrested sooner following their criminal court convictions than youths appearing in juvenile court who were re-arrested following their juvenile court adjudications.\textsuperscript{246}

Recent research conducted in Florida yielded similar results.\textsuperscript{247} Researchers compared recidivism outcomes of youths transferred to criminal court and sentenced to adult incarceration with youths re-

\textsuperscript{240} See, e.g., Del Carlo, supra, note 7, at 1242.
\textsuperscript{242} Streib, supra note 73, at 432 n.22.
\textsuperscript{244} See Blegen, supra note 11, at 50; Donna M. Bishop et al., \textit{The Transfer of Juveniles to Criminal Court: Does it Make a Difference?}, 42 CRIME & DELINQUENCY 171, 182–83 (1996); Stepp, supra note 152; Smith, A., supra note 16, at 1008–09; Crackdown on Crime Could Backfire on States, USA TODAY, July 11, 1996, at 10A.
\textsuperscript{245} See Blegen, supra note 11, at 50; Stepp, supra note 152.
\textsuperscript{246} See id.
\textsuperscript{247} See Bishop et al., supra note 244, at 171, 182–83.
tained in the juvenile justice system and held in juvenile facilities.\textsuperscript{248} The study matched youths in the transferred group with youths in the non-transferred group on seven variables.\textsuperscript{249} These variables included: age, race, gender, offense for which the youth was transferred, number of counts of the charges on which the youth was transferred, number of prior referrals to the juvenile justice system, and the most serious prior offense.\textsuperscript{250}

Results of the Florida research revealed that transferred youths commit more offenses upon release from incarceration than juveniles not transferred.\textsuperscript{251} Upon release from prison, 30\% of the transferred youths studied were re-arrested; 93\% of these arrests were for felonies.\textsuperscript{252} In contrast, upon release from juvenile facilities, only 19\% of the non-transferred youths in the study were re-arrested.\textsuperscript{253} Of the 19\%, 85\% of the youths were re-arrested on felony charges.\textsuperscript{254} These results suggest that incarcerated transferred youths may pose a greater threat to society than young offenders not transferred because they are more likely to re-offend upon release and more likely to commit more violent offenses than non-transferred youths.\textsuperscript{255}

Finally, stricter sentencing does not necessarily provide for longer periods of incapacitation. Results vary regarding length of sentence imposed on young offenders by juvenile and criminal court judges.\textsuperscript{256} Some studies find that criminal courts impose longer sentences on young offenders than juvenile courts.\textsuperscript{257} Other studies have found the opposite result.\textsuperscript{258}

\textsuperscript{248} See id. at 183.  
\textsuperscript{249} See id. at 176.  
\textsuperscript{250} See id.  
\textsuperscript{251} See id. at 182–83.  
\textsuperscript{252} See Bishop et al., \textit{supra} note 244, at 182.  
\textsuperscript{253} See id.  
\textsuperscript{254} See id. at 182–83.  
\textsuperscript{255} See id. at 183–84. The authors of the study suggest that this result may reflect the idea that transfer to criminal court indicates to transferred youths that they are societal outcasts. See id. at 184. A second explanation the authors provide is based on other research which suggests that if an offender believes a sanctioning agent, or the community it represents, unjustly treated the offender, he/she is more likely to re-offend out of anger and defiance. See id. at 185. In either scenario, the released transferred offender is likely to eschew societal norms and re-offend again. See id. at 184–85.  
\textsuperscript{256} See id. at 183; Blegen, \textit{supra} note 11, at 50; O’Connor & Treat, \textit{supra} note 55; at 1310–11; Stepp, \textit{supra} note 152.  
\textsuperscript{257} See Bishop et al., \textit{supra} note 244, at 183; O’Connor & Treat, \textit{supra} note 55, at 1310–11.  
\textsuperscript{258} See Blegen, \textit{supra} note 11, at 50; O’Connor & Treat, \textit{supra} note 55, at 1311; Stepp, \textit{supra} note 152.
One reason for this discrepancy is that, unlike criminal court judges, juvenile court judges have repeated exposure to re-offending young offenders. They may be inclined to increase the penalty imposed on a youth each time the youth reappears before them in the juvenile court. In contrast, criminal court judges who have limited—if any—exposure to young offenders are more likely to impose a lenient sentence in deference to the youth’s lack of maturity and age.

Another reason for the discrepancy in sentencing is that prosecutors may often plea bargain in criminal court cases to a sentence including less time in locked confinement than the young offender would receive in juvenile court. They may even dismiss the charges against a youth altogether. A common underlying rationale for such lenient treatment by prosecutors is a choice by the prosecutor to preserve resources in order to seek convictions for dangerous adult offenders with long criminal records.

Thus, it is apparent that current punitive sentencing legislation is both overly harsh on young offenders and ineffective in meeting its intended goals. There is evidence that the latest juvenile justice sentencing statutes do not deter other youths from criminal activity, do not curb or prevent recidivism, and do not necessarily incapacitate young offenders for longer periods of time than older rehabilitation-based sentencing legislation.

IV. IMPLICATIONS FOR THE FUTURE OF THE JUVENILE JUSTICE SYSTEM

Young offenders have challenged the constitutionality of these punitive criminal justice and juvenile justice system sentencing statutes without success. However, in light of current punitive attitudes to-


260 See id.

261 See O’Connor & Treat, supra note 55, at 1314–15. To impose a more lenient sentence on a young offender, the criminal court judge must not preside over cases in a jurisdiction with sentencing legislation which dictates mandatory sentences. See Lowenthal, supra note 8, at 121–22; Oliss, supra note 22, at 1854.

262 See O’Connor & Treat, supra note 55, at 1314.

263 See id. at 1315; Neal, supra note 15.

264 See O’Connor & Treat, supra note 55, at 1315.

265 See supra Part III.A, notes 150–234 and accompanying text.

266 See supra Part III.B, notes 235–64 and accompanying text.

267 See infra Part IV.A, notes 270–99 and accompanying text.
ward young offenders, these laws are unlikely to change soon. The future of the juvenile court is in jeopardy, and, if current trends continue, a rehabilitative system for youths may cease to exist.

A. Failed Constitutional Challenges to Punitive Sentencing Legislation

Young offenders cannot avoid the problematic sentencing legislation of the criminal and juvenile justice systems. Given today's widely advocated "get tough on crime" rhetoric, it is highly unlikely that legislatures will amend or repeal these statutes. Courts reviewing the cases of young offenders sentenced under punitive sentencing legislation have demonstrated an unwillingness to restrict the use of these sentencing statutes.

Appeals challenging the use of transfer legislation have not met with success. Fourteenth Amendment equal protection and due process arguments against school and public housing zone legislative transfer provisions have been unsuccessful. For example, in People v. M.A., a youth charged with unlawful use of a weapon on school grounds challenged the constitutionality of his transfer to criminal court under an Illinois school zone legislative transfer provision.

The Illinois Supreme Court rejected his equal protection argument that the weapon offense should remain within juvenile court jurisdiction. The court reasoned that juveniles are not a suspect class, and, therefore, the court was not required to apply a strict scrutiny test to the statute. Applying the less stringent rational basis standard, the court found that the legislature's statutory intent to deter youths from carrying weapons on school grounds was reasonable. The court found it irrelevant that the charged offense was similar to other offenses within the scope of the juvenile court.

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268 See infra Part IV.B, notes 300–46 and accompanying text.
269 See Cintron, supra note 14, at 1275.
270 See generally Acton, supra note 54; see also Real War on Crime, supra note 6, at 79–81, 132–35.
271 See, e.g., Harris v. Wright, 93 F.3d 581 (9th Cir. 1996); United States v. Johnson, 28 F.3d 151 (D.C. Cir. 1994); United States v. Williams, 891 F.2d 212 (9th Cir. 1989); People v. R.L., 634 N.E.2d 733 (Ill. 1994); People v. M.A., 529 N.E.2d 492 (Ill. 1989), cert. denied 115 S.Ct. 296 (1994).
272 See R.L., 634 N.E.2d at 738; M.A., 529 N.E.2d at 492.
273 529 N.E.2d at 492–93.
274 See id. at 493–94. The trial court, finding no rational basis for the statutory provision, had held that the school zone transfer provision violated the youths' equal protection rights. See id. at 493.
275 See id. at 494.
276 See id. at 497.
277 See id. at 493–94.
The court also rejected M.A.'s violation of due process argument. The court held that the legislature's approach to achieving its goal of reducing violence in schools was rational. Thus, the court reasoned, depriving a youth of his liberty for a longer period than that of a youth sentenced in juvenile court is not a violation of due process.

Similarly, the Illinois Supreme Court found no violation of equal protection in People v. R.L. In R.L., two youths were transferred to criminal court under a legislative provision requiring the transfer of fifteen and sixteen-year-old youths charged with committing a drug offense within one thousand feet of a public housing structure. The court again refused to apply the strict scrutiny standard and found a rational basis for the creation of the transfer legislation. According to the Illinois Supreme Court, punishing fifteen and sixteen-year-olds is a reasonable means to deter narcotic activity in an area where the impact of narcotics has been severe.

Eighth Amendment proportionality challenges to severe sentences imposed on transferred juveniles have also proven unsuccessful. The United States Supreme Court has employed the Eighth Amendment proportionality test to assess whether states may sentence youths to the death penalty. However, it has never granted certiorari to a noncapital young offender case in which the role of the proportionality test could be determined. Upholding a mandatory life imprisonment without possibility of parole sentence, the Ninth Circuit has held that youth has no bearing on the proportionality analysis of sentences for juveniles convicted of noncapital crimes. Thus, this court has held

278 See M.A., 529 N.E.2d at 496–97.
279 See id.
280 See id.
281 634 N.E.2d at 739. The trial court had held that the legislative public housing zone provision denied equal protection of the law because it had a disparate effect. See id. at 736.
282 See id. at 735.
283 See id. at 737, 739.
284 See id. at 739.
285 See, e.g., Harmelin v. Michigan, 501 U.S. 957, 997–1001 (1991); Harris v. Wright, 93 F.3d 581 (9th Cir. 1996); People v. Laundisurry (CA178536; 6/25/96) (cited in Department Michigan Opinion Notes, 75 Mich. B. J. 1334, 1335 (1996)). The proportionality test requires courts to undertake a higher level of scrutiny to ensure that punishment is not " grossly disproportionate " to the crime it serves to punish. See Harmelin, 501 U.S. at 997–98, 1001.
288 See Harris, 93 F.3d at 585. Fifteen-year-old Harris and another juvenile committed a
that the Eighth Amendment does not limit the length of incarceration which may be imposed on a youth of any age. The Ninth Circuit restricted the "special mitigating force of youth," recognized by the United States Supreme Court in Thompson v. Oklahoma, to capital punishment cases.

Fifth Amendment due process challenges to the federal sentencing guidelines provisions that enhance sentences based on juvenile adjudication records have also failed. In United States v. Williams, the Ninth Circuit held that a United States District Court judge properly used two prior juvenile delinquency adjudications to increase an adult offender's sentence by one year.

Williams contended that the United States Supreme Court's holding in McKeiver v. Pennsylvania, which denied juveniles the right to a jury trial, applies exclusively to proceedings with treatment, not punishment, dispositions. With this foundation, he argued that using treatment-based juvenile court sentences, decided without the benefit of a jury, for purposes of punitive enhancement violates the Fifth Amendment due process clause. Williams asserted that the federal sentencing guidelines impermissively interpret juvenile court sentences as indications of a need for an increased punitive response.

The Ninth Circuit rejected Williams' interpretation of McKeiver, reasoning that the McKeiver Court intended no such limitation on its denial of a constitutional right to a jury trial for youths. The court noted that McKeiver requires "fundamental fairness" for youths and that the procedural safeguards Williams received, including counsel and the right to cross-examine, ensured that any deprivation of liberty

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289 See Harris, 93 F.3d at 585.
290 Thompson, 487 U.S. at 834.
291 See Harris, 93 F.3d at 584-85.
292 891 F.2d at 215-16. Williams' two prior juvenile delinquency adjudications increased his criminal history score and the length of his sentence. See id. at 213. For other cases rejecting due process arguments on a rationale equating juvenile and criminal court proceedings see United States v. Booten, 914 F.2d 1352, 1354-55 (9th Cir. 1990), and United States v. Rangel-Navarro, 907 F.2d 109, 110 (9th Cir. 1990).
293 See 403 U.S. at 545, 551 (holding that juveniles are not constitutionally entitled to jury trials in juvenile court proceedings).
294 See Williams, 891 F.2d at 214.
295 See id.
296 See id.
297 See id. at 215.
ensuing from the adjudication was fundamentally fair and constitutional. The court further reasoned that if it is not unconstitutional to deprive a youth of liberty without a jury trial, then it is not unconstitutional to use that sentence to lengthen the offender’s deprivation of liberty as an adult.

These failed constitutional claims demonstrate that the courts are unable or unwilling to limit the harsh effects of recent punitive sentencing legislation on young offenders. The implication of these decisions is that the juvenile justice system is rapidly becoming a system parallel in its punitive goals to that of the criminal justice system.

B. Future Implications of Punitive Sentencing Trends

Legislatures’ aim to replicate the punitive trends of the criminal justice system in the juvenile court, despite the known flaws associated with these trends, has led to the ill-conceived, gradual chipping away of the juvenile justice system structure and purpose. These sentencing trends effectively convert the juvenile court’s rehabilitative function into a punitive punishment function parallel to that of criminal courts. If such trends continue to impose punitive sentencing schemes on the juvenile court and remove young offenders from juvenile court jurisdiction, it is foreseeable that a rehabilitative court system for youths will cease to exist. Some elected officials have already advocated dismantling the juvenile justice system entirely. State legislation adopting this general shift in approach toward young offenders lacks a vision of the most appropriate response to juvenile crime and has negative ramifications for the safety of the general public.

298 See id.; Dormont, supra note 151, at 1788–89; Mills, supra note 7, at 925.
299 See Williams, 891 F.2d at 215; Dormont, supra note 151, at 1788–89 & 1789 n.100.
300 See D’Ambra, Why Waiver is Not a Panacea, supra note 61, at 278; Fritsch & Hemmens, supra note 11, at 609; Cintron, supra note 14, at 1275.
301 See Baldi, supra note 56, at 592; Tompkins et al., supra note 55, at 1628, Mills, supra note 7, at 935.
302 See Cintron, supra note 14, at 1275; Kamenstein, supra note 175, at 2150.
303 For example, Los Angeles County District Attorney Gil Garcetti reportedly commented, “[w]e need to throw away our entire juvenile justice system.” See Richard Lacayo, When Kids Go Bad; America’s Juvenile-Justice System is Antiquated, Inadequate and No Longer Able to Cope with the Violence Wrought by Children that No One Would Call Innocents, TIME, Sept. 19, 1994, at 60; see also Fritsch & Hemmens, supra note 11, at 609 (reporting that Texas Governor George W. Bush relied heavily on “get tough with young offenders” rhetoric in his 1994 gubernatorial campaign).
1. Punitive Sentencing Legislation Prohibits Young Offenders from Receiving Rehabilitative Services Necessary to Change Inappropriate Behavior and Thinking

Current punitive sentencing legislation denies access to rehabilitative services to large classes of youths based on the belief that the juvenile court is unable to effectively redress and reduce juvenile crime.\(^{304}\) Rejecting the rehabilitative juvenile justice system as a means of addressing juvenile crime, in exchange for a punitive adult criminal justice system uneducated to developmental differences between youth and adults, is unwise.\(^{305}\) Rhode Island State Child Advocate Laureen D’Ambra argues,

Abandoning the rehabilitative model for a punitive model is a weak attempt to abate the complex problem [of violent juvenile crime]. Youths are labeled adults and turned over to the adult system “not because the juveniles have reached a level of maturity consonant with adulthood but rather because society has given up on them.”\(^{306}\)

Abbe Smith, Deputy Director and Clinical Instructor of Harvard Law School’s Criminal Justice Institute agrees.\(^{307}\) She writes, “[w]e call kids adults or criminals in order to throw them away.”\(^{308}\)

A separate juvenile system distinguishes youths from adults based on their cognitive developmental differences and, thus, the youths’ amenability to rehabilitation. American criminal law jurisprudence dictates that the severity of punishment imposed correspond not only to the degree of harm inflicted, but also to the offender’s blameworthiness.\(^{309}\) Blameworthiness is assessed by cognitive development differences including the maturity of the offender and his/her mental and emotional state at the time of the offense.\(^{310}\) As a result, cognitive

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\(^{304}\) See Dale, supra note 101, at 204; D’Ambra, Why Waiver is Not a Panacea, supra note 61, at 278–79; Smith, A., supra note 16, at 992–93.

\(^{305}\) See D’Ambra, Waiver Statutes in Rhode Island, supra note 69, at 29; Smith, A., supra note 16, at 964.

\(^{306}\) D’Ambra, Why Waiver is Not a Panacea, supra note 61, at 279 (quoting Catherine R. Guttman, Note, Listen to the Children: The Decision to Transfer Juveniles to Adult Court, 30 HARV. C.R.-C.L. L. REV. 507, 509 (1995)).

\(^{307}\) See Smith, A., supra note 16, at 993.

\(^{308}\) Id.

\(^{309}\) See Feld, Principle of the Offense, supra note 67, at 483; Streib, supra note 73, at 431.

\(^{310}\) See Streib, supra note 73, at 431.
developmental differences distinguishing young offenders from their adult counterparts make youths less blameworthy for their offenses.\textsuperscript{311}

For example, youths are not as capable as adults at making good decisions and moral choices, which are learned behaviors.\textsuperscript{312} They exhibit less self-discipline and are more impulsive than adults.\textsuperscript{313} They are less able to appreciate the consequences of their acts than are adults.\textsuperscript{314} Furthermore, they are more easily coerced by peers and more susceptible to group process dynamics than adults.\textsuperscript{315}

The United States Supreme Court has recognized that cognitive differences between adults and youths necessitate a different legal response. In its decision prohibiting execution of youths under the age of sixteen, the majority in \textit{Thompson v. Oklahoma} reasoned that youths are less blameworthy than adults for their acts.\textsuperscript{316} The Court cited the cognitive differences of inexperience, less education, limited ability to evaluate the consequences of one’s own conduct, and peer pressure as reasons a juvenile should not suffer the same penalty as an adult committing the same offense.\textsuperscript{317} Similarly, in \textit{Bellotti v. Baird}, the Supreme Court recognized that states may limit the rights of juveniles because, unlike adults, youths lack the ability to make mature decisions.\textsuperscript{318}

The juvenile justice system, in recognition of the cognitive developmental differences of youths, has traditionally treated young offenders differently than adults are treated in criminal court.\textsuperscript{319} Criminal courts are most concerned with dispensing punishment in proportion to severity of offense.\textsuperscript{320} The juvenile court was created to focus less on punishing and more on rehabilitating youths to address and correct

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\textsuperscript{311} See Dale \textit{et al.}, \textit{supra} note 12, ¶ 9.04 [3], at (9-26), (9-38); Feld, \textit{Principle of the Offense}, \textit{supra} note 67, at 524-26; see also Zimring, \textit{Kids, Groups and Crime}, \textit{supra} note 241, at 883-84.
\textsuperscript{312} See Dale \textit{et al.}, \textit{supra} note 12, ¶ 9.04 [3], at (9-26) to (9-27); Feld, \textit{Principle of the Offense}, \textit{supra} note 67, at 524-25; Smith, A. \textit{supra} note 16, at 977.
\textsuperscript{313} See Feld, \textit{Principle of the Offense}, \textit{supra} note 67, at 525.
\textsuperscript{314} See Dale \textit{et al.}, \textit{supra} note 12, ¶ 9.04 [3], at (9-26) to (9-27); Feld, \textit{Principle of the Offense}, \textit{supra} note 67, at 524-26.
\textsuperscript{316} See 487 U.S. at 834-35, 838.
\textsuperscript{317} See id. at 835.
\textsuperscript{318} See 443 U.S. 622, 635-36 (1979). “[M]inors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” \textit{Id.} at 635.
\textsuperscript{319} See id. at 635; Dale \textit{et al.}, \textit{supra} note 12, ¶ 5.01 [4], at (5-7) to (5-8); Holden, \textit{supra} note 71, at 844-45, 848, 853.
\textsuperscript{320} See Feld, \textit{Principle of the Offense}, \textit{supra} note 67, at 484.
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their inappropriate conduct.\textsuperscript{321} Juvenile and criminal courts therefore traditionally focus on different concerns when determining an appropriate sentence for an offender.\textsuperscript{322}

As state statutes increasingly treat youths as adults, important cognitive developmental distinctions between the two groups of offenders are obscured. This modern construction of youth assumes that the maturity and cognitive reasoning abilities of young offenders are equivalent to those of adult offenders.\textsuperscript{323} Judicial discretion to create individualized rehabilitative dispositions for each youth is diminished, and punitive sentences based on presumed culpability are imposed according to an objective assessment of the severity of the offense.\textsuperscript{324} As a result, young offenders are denied the rehabilitative opportunities necessary to learn how to change their inappropriate behaviors and methods of thinking.\textsuperscript{325}


In direct opposition to its intent, punitive sentencing legislation actually poses a threat to public safety. As discussed in Part III, Section B of this Note, research has demonstrated that young offenders sentenced under punitive criminal justice statutes are more likely to re-

\textsuperscript{321} See Dale et al., supra note 12, ¶ 5.01 [4], at (5-7) to (5-8) (stating that the intention of the juvenile justice system founders was to rehabilitate children before they became "career criminals"); Feld, Principle of the Offense, supra note 67, at 483–84 (reporting that the object of the juvenile court is to correct a condition through treatment of the youth); Holden, supra note 71, at 848 (indicating that few juvenile court sanctions actually reflect the seriousness of the crimes committed).

\textsuperscript{322} See Dale et al., supra note 12, ¶ 5.01 [4], at (5-7) to (5-8); Feld, Principle of the Offense, supra note 67, at 483–84; Holden, supra note 71, at 848. Juvenile court judges use extensive discretion to determine the appropriate individualized disposition for each young offender based on the offender’s needs and history. See Dale et al., supra note 12, ¶ 5.01 [4], at (5-8); Feld, Principle of the Offense, supra note 67, at 484–85; Holden, supra note 71, at 848. Unlike criminal court sentences, juvenile court sentences most often include curfews, treatment and educational programs, and/or a short period of confinement in a locked juvenile facility providing education and treatment to offenders. See Susan L. Freitas, Note, After Midnight: The Constitutional Status of Juvenile Curfew Ordinances in California, 24 Hastings Const. L.Q. 219, 244 (1996); Kara E. Nelson, Comment, The Release of Juvenile Records Under Wisconsin’s Juvenile Justice Code: A New System of False Promises, 81 Marq. L. Rev. 1101, 1118–19 (1998); O’Connor & Treat, supra note 55, at 1319. Furthermore, juvenile court proceedings are confidential to avoid stigmatizing the young offender which would hamper his or her opportunities to become a productive member of society. See generally Holden, supra note 71, at 844–45, 848; Nelson, supra, at 1118–19.

\textsuperscript{323} See Baldi, supra note 56, at 592.

\textsuperscript{324} See Feld, Principle of the Offense, supra note 67, at 472, 487, 519, 522.

\textsuperscript{325} See O’Connor & Treat, supra note 55, at 1316–17.
cidivate than young offenders adjudicated delinquent in juvenile court. The reasons underlying this finding are that criminal court sentences do not provide rehabilitative services to offenders, stigmatize youths with the pejorative label "criminal," and increase levels of juvenile violence.

Young offenders receiving criminal court sentences in adult correctional facilities are generally not provided with rehabilitative services. The primary purpose of adult correctional facilities is retribution and incapacitation, not rehabilitation. Youths serving criminal court sentences are not afforded the counseling, educational, vocational, or other services that juvenile court jurisdiction provides to young offenders adjudicated delinquent.

In his Roberts v. State concurring opinion to remand the case of a convicted transferred youth to the trial court on procedural grounds, Florida Appellate Judge Winifred Sharp commented on the trial court's view of the juvenile justice system. The trial court stated that adult sanctions are necessary for young offenders because the juvenile justice system is "bankrupt, broke, and [ ] doesn't work." Judge Sharp challenged the trial court's complaint regarding the inefficiency of the juvenile justice system, stating:

Query whether the inadequacy of the juvenile justice system is an appropriate reason to impose adult sanctions on a fourteen-year-old, and query whether society will be made safer by having Roberts locked up in an adult prison, only to be released, untreated and uncounseled, but older and wiser, in less than (probably) four years.

Judge Sharp's comments suggest that, despite frustration with the juvenile justice system, more thought should be devoted to deciding the most appropriate response to juvenile offending. Denying rehabilitative opportunities to young offenders decreases the likelihood

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326 See Bishop et al., supra note 244, at 182–83; O'Connor & Treat, supra note 55, at 1316–17.
327 See Bishop et al., supra note 244, at 184–85; O'Connor & Treat, supra note 55, at 1316.
328 See Cintron, supra note 14, at 1260; O'Connor & Treat, supra note 55, at 1316–17.
329 See id.; Sheffer, supra note 11, at 502.
330 See O'Connor & Treat, supra note 55, at 1316.
331 See 677 So. 2d 1, 2–3 (Fla. Dist. Ct. App. 1996) (Sharp, J., concurring); Dale, supra note 101, at 203–04.
332 See Roberts, 677 So. 2d at 2 (Sharp, J. concurring, quoting the trial court); see also Dale, supra note 101, at 204.
333 Roberts, 677 So. 2d at 3; Dale, supra note 101, at 204.
of successful reintegration into a law-abiding community and, thus, increases the likelihood of re-offending.\textsuperscript{334} 

Furthermore, by stigmatizing a youth with the pejorative label of "criminal," criminal court sentences condemn young offenders to the lack of societal opportunities a conviction offers.\textsuperscript{335} This label invokes condemnation from families, neighborhoods, and workplaces.\textsuperscript{336} Their distrustful, shaming attitude rejects convicted young offenders and excludes them from their communities.\textsuperscript{337} 

Florida juvenile justice system researchers Donna Bishop, Charles Frazier, Lonn Lanza-Kaduce, and Lawrence Winner suggest, "[f]
aced with that prospect [i.e., status transformation from 'redeemable youth' to 'unsalvageable adult'],\textsuperscript{338} youths may surrender self-restraint, accept the negative attributions of the culture that has excluded them, and seek out the companionship of others who tolerate or support continued deviation from societal norms."\textsuperscript{339} In other words, young offenders labeled as criminals are likely to be rejected by law-abiding communities and accepted by other socially outcast offenders.\textsuperscript{340} In these circumstances, it is likely that they will continue to offend.\textsuperscript{341} 

Finally, victimization of young offenders and their exposure to violence in adult correctional facilities increases the likelihood young offenders will re-offend in the community.\textsuperscript{342} It is well-established that a child's exposure to violence is highly correlated to his/her likelihood to later engage in violent conduct.\textsuperscript{343} In a 1989 study, approximately 46% of youths in adult correctional facilities reported experiencing physical or sexual assault, more than half of the reported assaults involved a weapon.\textsuperscript{344} In comparison, 37% of youths in locked juvenile facilities reported experiencing physical or sexual assault, less than 10% of these assaults involved a weapon.\textsuperscript{345} In addition, the study revealed that sexual assault was five times less likely in juvenile than

\textsuperscript{334} See Cintron, supra note 14, at 1275; O'Connor & Treat, supra note 55, at 1316; Sheffer, supra note 11, at 508. 
\textsuperscript{335} See Bishop et al., supra note 244, at 184. 
\textsuperscript{336} See id. 
\textsuperscript{337} See id. 
\textsuperscript{338} Id. 
\textsuperscript{339} Id. at 184–85. 
\textsuperscript{340} See Bishop et al., supra note 244, at 184–85. 
\textsuperscript{341} See id. 
\textsuperscript{342} See O'Connor & Treat, supra note 55, at 1316; Del Carlo, supra note 7, at 1244. 
\textsuperscript{343} See Smith, A., supra note 16, at 985; Del Carlo, supra note 7, at 1244. 
\textsuperscript{344} See O'Connor & Treat, supra note 55, at 1315; Del Carlo, supra note 7, at 1244. 
\textsuperscript{345} See id.
adult facilities, and staff members were less likely to beat youths in juvenile facilities.\textsuperscript{346} Thus, to best protect public safety from repeated juvenile offending, young offenders should be sentenced in juvenile court and remain under juvenile court jurisdiction and in juvenile facilities (if such a measure is necessary) until they reach the age of majority.

The continuing use of current punitive sentencing legislation suggests the gradual demise of a separate juvenile justice system. This must be prevented by rebuilding the juvenile court and granting it expanded sentencing powers to prevent the negative implications the legislation presents. To best ensure public safety, a healthy, fully functioning juvenile court is essential.

V. PROPOSED STRUCTURE OF THE JUVENILE COURT TO RETAIN REHABILITATIVE GOALS WHILE RECOGNIZING THE NEED TO PROTECT PUBLIC SAFETY

The foregoing sections demonstrate that current punitive sentencing legislation is overly punitive and does not adequately protect public safety. State legislatures should not expose young offenders to the criminal court sentences that faulty criminal justice sentencing legislation demands (including mandatory minimum sentencing, sentence enhancements, and sentencing guidelines).\textsuperscript{347} Nor should they create the equivalent of a criminal justice system for young offenders in the juvenile court by using punitive adult sanctions.\textsuperscript{348} Instead, more states should adopt blended sentencing legislation.\textsuperscript{349} This type of legislation enables young offenders to receive rehabilitative services while also answering the public demand for protection from young offenders.\textsuperscript{350}

\textsuperscript{346} See O'Connor & Treat, supra note 55, at 1315–16; Del Carlo, supra note 7, at 1244.

\textsuperscript{347} This is the effect of expanded transfer legislation and legislation reducing the maximum age of juvenile court jurisdiction. See supra Part II.A, notes 67–89 and accompanying text. See, e.g., Margolis, supra note 197, at 381; Del Carlo, supra note 7, at 1231.

\textsuperscript{348} This is the effect of legislation explicitly permitting juvenile courts to impose adult sanctions on young offenders. See supra Part II.B, notes 90–108 and accompanying text. See, e.g., KAN. STAT. ANN. § 38-1663(6) (Supp. 1997); MASS. GEN. LAWS ANN. ch. 119, § 58(a) (West Supp. 1998); Smith, R., supra note 90, at 35.


\textsuperscript{350} See Feld, A Case of Reform, supra note 7, at 1038; Feld, Task Force, supra note 61, at 21–22; Del Carlo, supra note 7, at 1246–47.
A. Blended Sentencing Approach

Blended sentencing applies to only a limited class of youths. Generally, juvenile court judges may impose blended sentences on youths aged fourteen to seventeen who are charged with a felony and have a previous felony delinquency adjudication or previous commitment to state youth agency. Blended sentences generally include both a state youth facility sentence, potentially until the age of twenty-one, and a suspended adult incarceration sentence. The suspended adult sentence is imposed only if the juvenile justice system fails in its efforts to rehabilitate a young offender during his/her time in youth facilities.

Minnesota's blended sentencing statute presents a model which states should adopt. Prior to imposing a blended sentence on a youth between the ages of fourteen and seventeen who is charged with a felony, a juvenile court judge holds a hearing to determine whether the youth poses a public safety threat. If the youth is found to pose a public safety threat, and is found to have committed the felony offense, then the judge imposes a blended sentence. Upon violation

351 See Feld, A Case of Reform, supra note 7, at 1043–45, 1048–49; Feld, Task Force, supra note 61, at 23; see also Mass. Gen. Laws Ann. ch. 119, §§ 52, 58(c) (West Supp. 1998) (limiting blended sentencing to youths aged 14 to 17 who pose a present and long-term threat to public safety and who have a previous state youth agency commitment or whose offense involves infliction or threat of serious bodily harm or possession or distribution of unlawful firearms); Minn. Stat. Ann. § 260.126(1)–(2) (West Supp. 1998) (limiting blended sentencing to youths aged 14 to 17 charged with a felony who also pose a threat to public safety).


354 See Feld, A Case of Reform, supra note 7, at 1042; Feld, Task Force, supra note 61, at 23. See also Mass. Gen. Laws Ann. ch. 119, § 58(b) (West Supp. 1998) (providing that suspended adult sentences shall only be imposed on youths who do not successfully complete the state youth facility commitment and a term of probation); Minn. Stat. Ann. § 260.126(5) (West 1998) (providing that suspended adult sentences may only be imposed on youths violating conditions of the stay or committing a new offense).


356 See Minn. Stat. Ann. § 260.126(1)–(2) (West 1998); Feld, A Case of Reform, supra note 7, at 1044.

of a condition of the sentence (including any conditions placed on the youth by the state youth agency) or upon commission of a new offense, a juvenile court judge may, but is not required to, impose the suspended adult sentence on the young offender.\textsuperscript{358} Successful completion of the state youth agency portion of the sentence releases the offender from the adult sentence.\textsuperscript{359}

States adopting blended sentencing legislation do not need any other punitive sentencing legislation such as transfer statutes or legislation reducing the maximum age of juvenile court jurisdiction. A juvenile court judge can impose a punitive suspended adult sentence on any young offender aged fourteen or older who commits a violent offense.\textsuperscript{360} The youth must be provided an opportunity to rehabilitate him/herself; however, if the judge determines that the youth is not making an attempt, as evidenced by failure to comply with the sentence or state youth agency conditions, the judge can impose the adult sentence at any time.\textsuperscript{361} This serves the same intended incapacitation, retributive, and deterrent purposes of other punitive sentencing legislation.\textsuperscript{362}

\section*{B. The Benefits of the Blended Sentencing Approach}

There are several reasons why blended sentencing schemes provide the best approach toward sentencing young offenders. Blended sentencing schemes do not overpenalize youths, they ensure that more youths are afforded rehabilitation opportunities, and they offer public protection by more effectively rehabilitating youths so that they are less likely to re-offend.\textsuperscript{363}

Blended sentencing legislation does not overpenalize young offenders because it requires an assessment of the need for adult or juvenile sanctions based on the young offender’s rehabilitation success,
not based on the offense, the arbitrary distinction which transfer statutes make.\textsuperscript{364} Blended sentencing legislation recognizes the poor applicability of a bright-line test to distinguish adults from juveniles.\textsuperscript{365} Traditionally, the test was an arbitrary age difference.\textsuperscript{366} Depending upon the state, when youths reached the age of seventeen or eighteen, they became adults with the attainment of the requisite birthday.\textsuperscript{367} Juvenile transfer legislation has altered the test to determine when a youth becomes an adult as measured by the offense charge leveled against the youth.\textsuperscript{368}

In contrast, blended sentencing legislation suggests that the determination of when a youth becomes an adult varies between offenders based on individual characteristics such as level of cognitive development and maturity.\textsuperscript{369} Some young offenders may need, and benefit from, rehabilitative services available through the juvenile justice system.\textsuperscript{370} Others may already display the maturity and developmental rigidity of an adult.\textsuperscript{371} As Minnesota considered adopting blended sentencing legislation as a response to juvenile crime, 1992-94 Minnesota Juvenile Justice Task Force committee chair Barry C. Feld observed:

The Task Force recognized that one fundamental deficiency of all [transfer] legislation is its binary quality, \textit{either} juvenile \textit{or} adult, even though adolescence is a developmental continuum requiring a continuum of controls. To avoid recreating a false dichotomy, the Task Force recommended, "a more graduated juvenile justice system that establishes a new transitional component between the juvenile and adult systems . . ."\textsuperscript{372}

Thus, blended sentencing schemes offer rehabilitation with a punitive provision attached should rehabilitation fail.\textsuperscript{373} That is, through


\textsuperscript{366} See \textit{id.} at 1019; Baldi, \textit{supra} note 56, at 592.


\textsuperscript{368} See \textit{id.} at 1020.

\textsuperscript{369} See Feld, \textit{Task Force}, \textit{supra} note 61, at 22.

\textsuperscript{370} See Feld, \textit{A Case of Reform}, \textit{supra} note 7, at 1034-35.

\textsuperscript{371} See \textit{id.}

\textsuperscript{372} See \textit{id.} at 1038 (emphasis in original); \textit{see also} Feld, \textit{Task Force}, \textit{supra} note 61, at 22.

\textsuperscript{373} See Blegen, \textit{supra} note 11, at 48; Feld, \textit{A Case of Reform}, \textit{supra} note 7, at 1041-42; Del Carlo, \textit{supra} note 7, at 1246.
a blended sentence, a young offender receives rehabilitative services through the state youth agency, but if the youth is unsuccessful in his/her rehabilitation attempts, the youth is sent to prison.374

Blended sentencing legislation does not overpenalize young offenders for a second reason—juvenile court judicial discretion. Blended sentencing schemes supply juvenile court judges with the discretion that other sentencing legislation denies them.375 Under a blended sentencing scheme, a juvenile court judge may select the length and nature of the sentence he/she imposes.376 The judge also has complete discretion as to when and whether to impose the suspended adult sentence.377 Similarly, discretion as to when a young offender has been sufficiently rehabilitated to return him to the community lies with the experienced juvenile court judge.378 Traditionally, juvenile court judges committing young offenders to a state youth authority had little control over the actual length of a youth’s disposition.379 They played no role in determining when to return the youth to the community.380

Judicial discretion prevents overpenalization because it is not exercised indiscriminately over classes of youths.381 The exercise of dis-

374 See id.
376 See id.
377 See Minn. Stat. Ann. § 260.126(5) (West 1998); Blegen, supra note 11, at 48; Del Carlo, supra note 7, at 1246.
378 See Blegen, supra note 11, at 48; Del Carlo, supra note 7, at 1247.
379 See Blegen, supra note 11, at 49 (discussing new Missouri provision granting juvenile court authority to set a minimum period of youth agency custody); Feld, A Case of Reform, supra note 7, at 1083–84 (contrasting the traditional approach with a 1980 determinate sentencing plan in Minnesota); Passarelli, supra note 10, at 576, 585 (explaining the authority vested in the Massachusetts Department of Youth Services to control sentence duration determinations for youths not sentenced under the blended sentencing statute). The reasoning for this approach is the idea that youth authority employees working with a young offender are in a better position to determine when a youth has sufficiently benefitted from rehabilitative services to justify the offender’s return to the community. See Feld, A Case of Reform, supra note 7, at 1083–84; Passarelli, supra note 10, at 583–84, 584 n.66.
380 See Feld, A Case of Reform, supra note 7, at 1083; Passarelli, supra note 10, at 584–85. Recent legislation enacted in Missouri removes this decision from the state youth agency and returns it to juvenile court judges. See Mo. Ann. Stat. § 211.181(4) (West 1996 & Supp. 1999); Blegen, supra note 11, at 49. The Missouri statute enables a juvenile court judge to impose a determinate sentence of commitment to the state youth agency. See Mo. Ann. Stat. § 211.181(4) (West 1996 & Supp. 1999); Blegen, supra note 11, at 49. The youth may not be released from this sentence until the commitment period set by the judge expires or the state agency with custody of the youth petitions the court. See id.
381 See Baldi, supra note 56, at 589; Holden, supra note 71, at 848.
cretion is based on individual offender characteristics, including the offender’s rehabilitation success. In other words, juvenile court judges are unlikely to release young offenders from their suspended adult sentences until they demonstrate that they have utilized and improved their behaviors and thinking through rehabilitative services.

Blended sentencing legislation ensures that rehabilitative services are provided to young offenders. Unlike other punitive sentencing legislation, young offenders receiving a blended sentence are offered an opportunity to rehabilitate themselves in the juvenile justice system. It is the last opportunity the juvenile justice system has to change a youth’s inappropriate behaviors and thinking. The length of juvenile court jurisdiction is extended to twenty-one to provide time to accomplish this change. Furthermore, young offenders who do not fit the blended sentence offender classification (or other legislative transfer criteria) are ensured that they will receive a juvenile court sentence, which provides rehabilitative services.

Finally, blended sentencing legislation offers public safety protection in two primary ways. First, blended sentences have the potential to more effectively rehabilitate youths so that they are less likely to re-offend. Blended sentences not only ensure that youths have the opportunity to rehabilitate themselves, but also impose a suspended adult sentence on youths as an additional incentive to succeed. Using both a carrot and a stick encourages more youths to actively engage in rehabilitative services. Second, a sentence involving adult incarceration of a set time period is meted out only on those young offenders most likely to pose a threat to public safety.

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383 See Feld, A Case of Reform, supra note 7, at 1038; Feld, Task Force, supra note 61, at 22; Del Carlo, supra note 7, at 1246.

384 See Feld, A Case of Reform, supra note 7, at 1038; Feld, Task Force, supra note 61, at 22.

385 See Feld, A Case of Reform, supra note 7, at 1047; Feld, Task Force, supra note 61, at 23.

386 See Feld, A Case of Reform, supra note 7, at 1044.

387 See Del Carlo, supra note 7, at 1246.

388 See Feld, A Case of Reform, supra note 7, at 1038; Feld, Task Force, supra note 61, at 22; Del Carlo, supra note 7, at 1246-47.

389 See Del Carlo, supra note 7, at 1247.
Imposing a blended sentence assures the public that the youths most likely to re-offend are incarcerated and kept away from the community.\textsuperscript{392} Young offenders who are unsuccessful in effectively utilizing rehabilitative services receive the punitive adult sentence previously suspended by the juvenile court judge.\textsuperscript{393}

C. The Appropriate Manner in Which to Implement the Blended Sentencing Approach in a Model Juvenile Court

To further ensure that sentences are appropriate, and to insulate the system from public and political pressure based on the fear of young offenders, legislatures must write five additional requirements into blended sentencing legislation. First, specialization of the juvenile court is essential so that no judge may rotate through the juvenile court as one of many court assignments. Second, all juvenile court judges must receive extensive training on cognitive development and its relationship to juvenile offending. Third, to become a juvenile court judge, all candidates must exhibit a background demonstrating experience in, or exposure to, both pro-prosecution and pro-defense ideology. Fourth, blended sentencing legislation must afford young offenders the same procedural safeguards adult offenders receive. Finally, all juvenile court judges must be appointed, not elected.

1. Juvenile Court Specialization

Specializing the juvenile court, as Massachusetts and Minnesota have done, ensures that juvenile court judges are best able to determine the appropriate sentence for a young offender.\textsuperscript{394} Furthermore, it insulates the juvenile justice system from serving as the de facto designated place for inexperienced, newly appointed district court judges to begin their judicial careers.\textsuperscript{395} Special training ensures devo-

\textsuperscript{392} See id.
\textsuperscript{393} See Feld, A Case of Reform, supra note 7, at 1042; Blegen, supra note 11, at 48; Del Carlo, supra note 7, at 1247.
\textsuperscript{394} See MASS. GEN. LAWS ANN. ch. 218, § 58 (West Supp. 1997) (discussing distribution of specialized juvenile court judges throughout Massachusetts counties); Daniel Golden, The Fates of Families: As the State Fails to Cope With Troubled Families, Responsibility is Falling to the Juvenile Courts. Activist Judges are Filling the Vacuum, Expanding Their Roles to Become Resource-Brokers, Catalysts, and Advocates, BOSTON GLOBE, June 3, 1990 (Magazine), at 17; David L. Yas, Should Massachusetts Trial Judges Be Specialists? Some in Bar Advocate Civil/Criminal Split, MASS. LAW. WKLY., July 8, 1996, at Section A.
\textsuperscript{395} See Golden, supra note 394.
tion to family law and the juvenile justice field. An exclusive focus on juvenile law provides expertise in the field based on the judges' additional knowledge of the subject and experiences on the bench.

Specialized juvenile court judges can monitor the individual youths visiting their courtrooms. They can best assess re-offending rates and any escalation in the type of offending. They can measure the success of rehabilitation programs in reducing or preventing re-offending. These judges are aware of the rehabilitative programs in the community, and can ensure that youths receive and attend programs. As a result, specialized juvenile court judges are in the best position to be aware of which youths pose the greatest danger to public safety.

2. Training for Juvenile Court Judges

Requiring juvenile court judges to receive extensive training on the developmental nature of adolescence aids the judges in assessing which young offenders pose a threat to the public and, consequently, should receive blended sentences. It also suggests that the judges will be able to apply their knowledge to implement the most effective and appropriate sentencing approaches to curb other forms of juvenile offending.

An offender's criminal liability for an offense and, thus, the appropriate corresponding punishment, is traditionally premised on the seriousness of the offense. Seriousness of the offense is measured by considering the harm caused and the offender's culpability. Offender culpability is the blameworthiness of the offender's choice to engage in the conduct that caused harm. Assuming arguendo that a

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596 See id.
598 See Golden, supra note 394.
599 See id.
600 See id.
601 See id.
602 See id.
604 See Feld, Punishment, Treatment, and the Difference, supra note 382, at 898.
605 See id.
606 See id.
607 See id.
youth and adult can inflict the same harm, the two types of offenders differ dramatically in their culpability due to their developmental differences.\(^{408}\) Youths are less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of their acts, and more vulnerable to peer group influence and group process dynamics.\(^{409}\)

Laws have historically demonstrated a different approach to youths.\(^{410}\) As previously mentioned, the majority of the United States Supreme Court in *Thompson v. Oklahoma* reasoned that youths are less blameworthy for their acts than adults.\(^{411}\) The Court cited the cognitive differences of inexperience, less education, limited ability to evaluate the consequences of his/her conduct, and peer pressure as reasons a youth should not suffer the same penalty as an adult committing the same offense.\(^{412}\) Similarly, in *Bellotti v. Baird*, the Supreme Court recognized that states may limit the rights of youths because, unlike adults, youths lack the ability to make mature decisions.\(^{413}\)

As a result, juvenile court judges must be able to understand the development stage of a young offender and his/her level of involvement in the offense to identify the appropriate sentence and needed services.\(^{414}\) Punishing a youth beyond his/her level of culpability is an ineffective, unconstitutional method of attempting to curb the offender's likelihood of re-offending and is unlikely to deter or prevent others from committing similar offenses.\(^{415}\)

3. Background Requirements for Juvenile Court Judicial Candidates

Requiring a blended prosecution and defense background of juvenile court judges may reduce slanted sentencing views and ensures experience in approaching and addressing young offenders and their offenses.\(^{416}\) A judge without such a balanced background may believe

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\(^{408}\) See id. at 898–900; Sheffer, *supra* note 11, at 509.


\(^{410}\) See Feld, *Punishment, Treatment, and the Difference, supra* note 382, at 901; Sheffer, *supra* note 11, at 509.

\(^{411}\) 487 U.S. 815 at 834–35.

\(^{412}\) See id.

\(^{413}\) See 433 U.S. at 635–36.


\(^{415}\) See id.

that he/she must continue to evince a pro-prosecution, pro-defense, or other perspective because that was a factor in his/her appointment. 417 Furthermore, a judge may be less familiar with the appropriate punishment justifications for a particular sentencing approach. 418 Without experience in, or exposure to, both approaches, a judge could be more likely to sentence in accordance to the view with which he/she is most familiar, or in accordance with his/her personal views. 419

In addition, requiring a balanced criminal law background aids in insulating the juvenile justice system from political appointments to the bench for reasons other than expertise and experience in the field. 420 As Betty Jo Anthony, a Roanoke County prosecutor and President of the Virginia Women Attorneys Association comments, “I think there's very little of that [personal qualification] scrutiny of the candidates now; so what you have is that [selection of judicial candidates to present to the Governor] turns into a popularity contest.” 421

4. Due Process Procedural Safeguards

To prevent unconstitutional infringement on the liberty interests of young offenders, juvenile courts must provide youths facing a
blended sentence with all procedural safeguards available to adults. Blended sentencing permits juvenile court judges to impose on a young offender a suspended sentence of the same severity an adult might receive.\textsuperscript{422} The judge can lift the stay and require the youth to serve the full sentence at the judge's discretion.\textsuperscript{423} It appears to be a due process violation to sentence a youth to the same severity of punishment as an adult offender without providing him/her with equivalent procedural safeguards.\textsuperscript{424}

The Supreme Court already provides youths with several procedural rights afforded adults including: right to notice of charges, right to counsel, right to cross-examine, right against self-incrimination, right to appeal, right to a record of proceedings, protection against double jeopardy, and proof beyond a reasonable doubt burden of persuasion on the prosecution.\textsuperscript{425} However, youths sentenced in juvenile court are not entitled to all the same procedural safeguards as adults.\textsuperscript{426} It is essential that they receive the same safeguards, and many states enacting blended sentencing legislation have extended the right to a jury trial to juveniles in recognition of this fact.\textsuperscript{427} Legal scholars argue that states should extend the right to bail on the same grounds.\textsuperscript{428}

\textsuperscript{422} See supra Part II.C, notes 109-24 and accompanying text.

\textsuperscript{423} See supra Part II.C, notes 109-24 and accompanying text.

\textsuperscript{424} See U.S. CONST. amend. XIV; Dawson, supra note 7, at 969, 990-91.


\textsuperscript{426} See supra Part III.A.1(c), notes 182-96 and accompanying text; Schall v. Martin, 467 U.S. 253 (1984) (affirming statute authorizing pretrial detention of youths if there is a "serious risk" that the youth will commit a subsequent offense before the trial date. The Court reasoned that youths are always under some form of custody and the harm to the community threatened by a young offender may be greater than an adult offender because of the high rate of recidivism among juveniles.); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that youths are not constitutionally entitled to jury trials in juvenile proceedings because the rehabilitative nature of the juvenile court is different from the nature of adult proceedings); Smith, A., supra note 16, at 1022.


\textsuperscript{428} See generally Baldi, supra note 56; cf. Schall, 467 U.S. 253 (holding that juveniles are not constitutionally entitled to bail prior to juvenile adjudication proceedings).
5. Judicial Independence Free from Public Influence

Finally, appointing judges to the juvenile court frees them from dependence on the public for the future of their careers. As a result, they are less likely than elected judges to succumb to the pressure of popular opinion in sentencing young offenders.

It is especially important for juvenile court judges to work independently of public pressure because public sentencing demands are focused on revenge and protection of public safety to the exclusion of offender culpability, which varies across young offenders, especially by level of development. Public demands for a punitive response to juvenile offending are often based on fear-invoking media attention devoted to violent juvenile crime, rather than an accurate picture of the threat to the public that young offenders actually pose. Media-fed punitive public demands, combined with those of politically motivated prosecutors and harsh sentencing statutes, already place great pressure on judges to severely sentence offenders. Given the already strong societal pressures, a juvenile court judge's own desire for re-election is an unnecessary added incentive to encourage a judge to impose a severe sanction on a young offender. Reflecting on political "get tough" rhetoric, University of Richmond School of Law Professor Robert E. Shepherd, Jr. warns that, "sound bites do not equal sound policy."

With these protections in place, the public can trust juvenile court judges to make the most appropriate sentencing decisions. Furthermore, state legislatures can then more confidently permit juvenile


430 See Godfrey, supra note 429; Hammack, supra note 417. However, as of 1998, 34 states require retention elections for appointed judges after a period of service on the bench, thus reducing their freedom from public opinion. See Larry T. Aspin & William K. Hall, Retention Elections and Judicial Behavior, 77 JUDICATURE 306, 312 (1994); Godfrey, supra note 429.

431 See Smith, A., supra note 16, at 1005-06; Streib, supra note 73, at 429-51; Del Carlo, supra note 7, at 1249. See also supra Part IV.B.2, notes 326-34 and accompanying text.

432 See D'Ambra, Why Waiver is Not a Panacea, supra note 61, at 277; O'Connor & Treat, supra note 55, at 1311; Smith, A., supra note 16, at 957-58, 961 & 957 n.9.

433 See Feld, A Case of Reform, supra note 7, at 966, 1087; Smith, A., supra note 16, at 989 & 990 n.135; Hammack, supra note 417. In her article, Harvard Law School Clinical Instructor Abbe Smith discusses the dissatisfaction of former Philadelphia trial court judge Lois Forer with the criminal justice system. See Smith, A., supra note 16, at 990 n.135. Judge Forer chose not to impose a mandatory five year sentence on "an unemployed first-time offender who committed a toy-gun robbery for $50 out of desperation," but left the bench instead. See id.

434 See Shepherd, What Does the Public Really Want, supra note 152, at 52.
court judges to exercise discretion in sentencing and should pass legislation granting juvenile court judges a vast array of sentencing powers.

The trust and confidence in juvenile court judges by the state legislature is evidenced in Minnesota's blended sentencing statute.\(^{435}\) Minnesota juvenile court judges are permitted to exercise case-by-case discretion in sentencing young offenders.\(^{436}\) Furthermore, they are permitted discretion to determine whether the violation of a blended sentence condition or the commission of a new offense should invoke the suspended adult sentence.\(^{437}\) As discussed, there is no automatic imposition of the suspended sentence.\(^{438}\)

**Conclusion**

Most current punitive sentencing trends are ineffective and inappropriate. They do not ensure adequate public safety protection, and they overpenalize young offenders. The haphazard adoption of several types of criminal and juvenile justice sentencing legislation has had an exceptionally punitive effect on young offenders. Legislation sentencing young offenders based solely on age (e.g., legislation lowering the maximum age of juvenile jurisdiction) or solely on offense (e.g., some forms of transfer), uses an inappropriate blanket approach toward classes of young offenders. It is likely that many of these youths could benefit from rehabilitative services if provided the opportunity. Similarly, indiscriminately granting criminal court sentencing powers to juvenile court judges could encourage these judges to overlook important cognitive development and maturity distinctions of young offenders. These distinctions may indicate that a youth can be rehabilitated if provided the opportunity, and not warehoused in adult facilities.

Blended sentencing legislation schemes offer the most promising approach to resolving any threat juvenile offending poses to the public. Blended sentencing provides rehabilitation opportunities and services to those offenders able to utilize them to successfully return to their communities. Furthermore, blended sentencing prevents other offenders from re-offending by placing them in prison. Either way, the public is protected from repeat offending. However, recognizing the


\(^{436}\) See Del Carlo, *supra* note 7, at 1246; see also Ludwig, *supra* note 55, at 18.

\(^{437}\) See Feld, *A Case of Reform*, supra note 7, at 1042; Del Carlo, *supra* note 7, at 1246.

\(^{438}\) See id.
importance of successful rehabilitation, the onus is on juvenile court judges and juvenile justice system personnel to aggressively examine and create ways in which the more violent young offenders can be rehabilitated in the juvenile justice system. As Federal Circuit Judge Skelly Wright warned more than twenty-five years ago in his United States v. Bland dissenting opinion:

[T]here is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration . . . . And the kind of society we have in the years to come will in no small measure depend upon our treatment of them now.439

To minimize juvenile offending, the solution remains granting sentencing discretion to juvenile court judges. Exercising this discretion in the most appropriate manner requires specialization of the juvenile court and its judges, including extensive training on juvenile cognitive development and its relationship to offending. Furthermore, a system of judicial appointment, and a required judicial background including both pro-prosecution and pro-defense ideology are essential. A unified legislative approach entrusting juvenile court judges to sentence appropriately ensures the best opportunities for young offenders and the best protection of public safety.

439 472 F.2d 1329, 1349 (D.C. Cir. 1972) (Wright, J., dissenting), cert. denied, 412 U.S. 909 (1973); see also Acton, supra note 54, at 292 (discussing Justice Skelly Wright's dissent); Del Carlo, supra note 7, at 1251.