



SEARCHING FOR JUSTICE FOR JUVENILES IN
AMERICA: ARE THERE LESSONS TO BE LEARNED
FROM THE UNITED KINGDOM?

Cristina Becker

Washington and Lee Law
School

Poverty Seminar 391

4/27/2012

SEARCHING FOR JUSTICE FOR JUVENILES IN AMERICA: ARE THERE LESSONS TO BE LEARNED FROM THE U.K.?

I. INTRODUCTION

The United States and the United Kingdom take radically different approaches to juvenile justice. However, this was not always the case. Much like the U.K., the United States originally embraced a *parens patriae* (father of the people)¹ perspective to juvenile justice to sooth injustices that surfaced as a result of treating juveniles the same as adults in criminal court.² Prior to its first juvenile justice court in 1899, the country adjudicated youths the same as adults, often placing them in the same prisons as young as seven years old.³ However, a movement in 1825 promoted the doctrine of *parens patriae* over juvenile issues.⁴ This movement advocated for the separation of children from adults in prison because it considered them naturally less culpable and more amenable to change.⁵ The *parens patriae* philosophy influenced the opening of juvenile courts across the country,⁶ and advanced the individualized system toward a more

¹ National Report Series: Juvenile Justice Bulletin, 1999, *available at* https://www.ncjrs.gov/html/ojdp/9912_2/juv1.html.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

rehabilitative perspective.⁷

However, in the early 1990s, a new movement gained momentum in the U.S. in response to an increase in juvenile crime.⁸ The Superpredator Theory proposed that a group of hyper-delinquent youth would pervade America by the mid to late 1990s, and that the current juvenile system was insufficient to deter or punish their behavior.⁹ This movement led to the U.S. once again trying children in the adult system through transferring—the very thing that the creation of the juvenile justice system attempted to abolish. Punishment and sentencing became harsher and recidivism rates rose. In fact, today, up to 200,000 children are transferred to adult courts, compared to 7,300 in 1986—prior to the superpredator theory.¹⁰ Although the “superpredator” never emerged, the draconian approach to juvenile crimes remained, maintaining the U.S.’s steady march towards retribution and deterrence.

The U.K., by contrast, continues its protective approach to juveniles who commit crimes. Unlike the U.S., the U.K. does not apply adult sentencing standards to juvenile crimes. In fact, they do not transfer juveniles to adult court, even for the most heinous crimes.¹¹ Instead, the U.K. created an integrated network of social services, job training, and family support services for both parents and children, in order to nourish the whole juvenile and prevent future criminal

⁷ See Nicholas W. Bakken, *You Do the Crime, You Do the Time: A Socio-Legal History of the Juvenile Court and Transfer Waivers* 1-2 (2007).

⁸ See WILLIAM BENNETT & ROBERT DI IULIO, *BODY COUNT: MORAL POVERTY...AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 8 (1997).

⁹ *Id.* at 27.

¹⁰ See Laurence Steinberg, *Should Juvenile Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies* 3 (2000) (describing the effect of the Superpredator Theory); see also Richard Redding, *The Effects Of Adjudicating And Sentencing Juveniles As Adults: Research and Policy Implications*, 1 *YOUTH VIOLENCE AND JUVENILE JUSTICE* 128, 129 (2003) (illustrating the legislative effect of the Superpredator Theory).

¹¹ See Youth Justice Board, available at <http://www.justice.gov.uk/youth-justice/courts-and-orders> (showing that there are no adult court transfers, only juvenile justice measures).

activity.¹² In short, the U.K. takes a rehabilitative approach to juvenile justice. It does not focus on one's receipt of just deserts to meet social and criminal justice goals, but on attacking the root of the problems of juvenile crime, such as poverty, family issues, and access to justice.

Social Justice, as advanced by the U.S. and the U.K., encompasses individual freedoms and rights, human dignity, societal protection, and elimination of unjust inequalities.¹³ Criminal Justice goals, on the other hand, focus on rehabilitation of the offender, retribution of the individual for the crime, and deterrence of future crimes. Although social and criminal justice goals are similar in both the United States and the United Kingdom, the U.S. approach possibly only satisfies its goals of retribution and deterrence. U.S. legislation drafted in the 1990s has made it easier to transfer juveniles to adult courts at younger ages, and children as young as ten, spend their lives in adult prison. Despite unfavorable outcomes—higher recidivism rates—the U.S. continues to widen its net to ensnare more juveniles in the adult court system.¹⁴ In its extreme approach to juvenile justice, the U.S.'s failure to factor in social justice in its juvenile justice system has grown exponentially since the introduction of the Superpredator Theory.

Current United States policies on transferring juveniles to adult courts profoundly increase the effects of poverty on youth offenders' lives, creating a social and economic disparity between those transferred, and those who remain in the juvenile justice system. A higher rate of

¹² See Bob Ashford, *Towards a Youth Crime Prevention Strategy* 17-18 (2007) (detailing the U.K. approach to juvenile justice).

¹³ See Gary Craig, *Social Justice* available at http://www.capacitythinking.org.uk/ISJA/articles_7_gcsj.html; see also Dan Froomkin, *New Social Justice Index Places U.S. Near Bottom* (10/27/11), available at http://www.huffingtonpost.com/2011/10/27/social-justice_n_1035363.html.

¹⁴ See Richard Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, *YOUTH VIOLENCE AND JUVENILE JUSTICE* 128, 129 (2003) (stating that waivers to adult court can strip youths of juvenile justice protections).

detention means that more children are away from their communities and growing up in adult facilities, often with violent criminals. When a youth offender is released from adult prison, he must face society with a permanent criminal record, few skills, and the obstacle of societal reintegration. A significant number of juvenile offenders come from impoverished areas, and these hindrances to their success caused by adult detention, place more strain on juveniles by placing them in a worse place than prior to incarceration.

This paper argues that the United States should abolish its juvenile transfer policies in order to achieve its social and criminal justice goals. As they stand, the policies do not meet its goals of deterrence, rehabilitation, and even arguably, retribution. Data show that recidivism rates for juvenile offenders began declining prior to the effects of state and federal legislation. And given the trend towards harsh sentencing, especially life imprisonment for juveniles, the U.S. may not be meeting its retribution goal because the punishment exceeds the crime, rendering just deserts unjust.

Additionally, transferring polices prevent the U.S. from meeting its social justice goals. Not only does adult prison cause young offenders to lose the protections of the juvenile system,¹⁵ transferring juveniles to adult court compounds the effects of poverty by disadvantaging young offenders. It also further entrenches a criminal mindset that they may not have learned if housed with other juveniles. Instead, young offenders must shed their childhoods to navigate the rougher adult system. Also, by releasing un-rehabilitated former juvenile offenders back into

¹⁵ See Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, YOUTH VIOLENCE AND JUVENILE JUSTICE 128, 129 (2003) (stating that waivers to adult court can strip youths of juvenile justice protections).

their respective neighborhoods, communities suffer from a skill-less, newly-adult local workforce.

In an effort to meet its criminal and social justice goals, the U.S. should find alternatives to adult prison transfers. This paper asks that the U.S. adopt the United Kingdom's restorative justice approach to juvenile sentencing, as it sheds light on alternative methods to adult detention. The U.K.'s manner of handling youth offenders differs vastly from that of the U.S. Preference for providing community-based programs ranks even above detention in a juvenile facility.¹⁶ Children, the U.K. believes, benefit most when kept in their homes and supported by local organizations such as job training programs, drug rehabilitation, and educational services.¹⁷ The U.K. attempts to take a less brutal approach to juvenile justice, and incorporates social justice goals to rehabilitate the youth within his own community.

This paper suggests that if the U.S. continues its existing detention-heavy approach to juvenile justice, it will fall short of its social and criminal justice goals. Instead of deterring youth offenders, adult imprisonment increases the recidivism rate by exacerbating the same poverty issues that tend to influence child criminality in the first place.¹⁸ Essentially, the criminal justice system produces counter-rehabilitative effects in juveniles. A child enters a prison, but leaves as an adult—often an adult with a more developed criminal mind who is then released back into his community. This paper ultimately points out that the U.S. should espouse the U.K.'s approach, and that adult imprisonment is not the answer for juvenile offenders

¹⁶ See Bob Ashford, *Towards a Youth Crime Prevention Strategy* 16-18 (2007) (comparing juvenile justice statistics).

¹⁷ See Bob Ashford, *Towards a Youth Crime Prevention Strategy* 22-24 (2007) (detailing U.K.'s community-based programs).

¹⁸ Redding, *supra* note 15, at 129 (stating that adult prisons increase recidivism because they limit successful reintegration into community life).

because the harshness and poor outcomes do not contribute to the majority of its social and criminal justice goals.

II. THE UNITED STATES

A. Social Justice Goals and Criminal Justice Theories

The juvenile justice system originally centered on providing rehabilitation and diverting children from adult court.¹⁹ The government did not consider juveniles to be without hope—or criminally responsible for their actions—and used the juvenile justice system to try to reform them. Zimring writes that from the late eighteenth century until the late eighties, the goal of the "court was to save kids from the savagery of the criminal courts and prisons."²⁰ However, the theory of the "superpredator" and the momentum of stricter punishment shifted the country's perspective on juvenile criminal accountability and responsibility, and focused on reducing and preventing crime by deterrence rather than rehabilitation. And children found themselves back in the savage folds of adult courts and prisons.

So why have states veered from its original course and taken a more stringent approach to juvenile justice? The strongest explanation is the "Superpredator Theory" offered in the early 1990s.²¹ In *Body Count*, John J. DiIulio Jr. and William Bennett posited that

America [would be]. . . home to thickening ranks of juvenile
'superpredators' -- radically impulsive, brutally remorseless

¹⁹ Franklin Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 Cal. L. Rev. 2477 (2000) (discussing the history of the juvenile justice system).

²⁰ *Id.* at 2480.

²¹ See WILLIAM BENNETT & ROBERT DI IULIO, *BODY COUNT: MORAL POVERTY...AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 27 (1997).

youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders....At core, the problem is that most inner-city children grow up surrounded by teenagers and adults who are themselves deviant, delinquent or criminal.²²

DiIulio and Bennett wove a future rife with young, black, male criminals.²³ Sensationalist with an element of racism, this theory has been debunked, most likely because the "superpredator" never emerged. And although the number of youth under 18 confined in adult prisons has more than doubled in the past decade,²⁴ juvenile crime declined drastically since the late 1980s, prior adoption of legislation drafted in response to the Superpredator Theory.²⁵ More important, violent juvenile crime fell 74% from 1993 to 2008.²⁶ *Body Count* also suggested that juvenile offenders would turn into adult offenders; however a 2007 study by the Department of Justice showed that only 25% "of juveniles who offended at ages 16–17 also offended as adults at ages 18–19."²⁷ Compared with the adult recidivism rate of 43-50%, this is low.²⁸ There is no sign

²² *Id.* at 27.

²³ *Id.* (detailing that the majority of offenders would be from single-parent, inner-city, African-American parents).

²⁴ BUREAU OF JUSTICE ASSISTANCE, *Juveniles in Adult Prison: A National Assessment* iii (2000) (describing the state of juvenile justice).

²⁵ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION [*hereinafter* OJJDP] 1 (2008) (listing juvenile crime statistics).

²⁶ *Id.*

²⁷ OJJDP, *Juvenile Offenders and Victims: 2006 National Report* 80 (2006) (giving juvenile crime statistics).

²⁸ State Recidivism: The Revolving Door 1 (2008) available at http://www.pewcenteronthestates.org/uploadedFiles/Pew_State_of_Recidivism.pdf.

that juveniles are superpredators or more likely to re-offend. However, the harsh legislative and policy effects remained intact.

Even DiIulio regrets the legal consequences that ensued after his theory spread.²⁹ However, his recantation was too late, and statutory reforms created for an imaginary enemy were in full effect. In response to DiIulio's villainization of America's future youth, the federal government and state legislatures revised laws to facilitate the transfers of "juvenile offenders from the juvenile court to the criminal court for trial and sentencing."³⁰ One example is a California law that allows some juvenile crimes to count against its Three Strikes sentencing rule, bringing juveniles steadily closer to life imprisonment in adult facilities.³¹ Also, transfers of juveniles to adult prisons have increased, and [the age floor]³² extended to as low as age seven.³³ The image of the juvenile offender thus transitioned from a misguided child to a hardcore offender.

Removing the Superpredatory Theory from the equation still leaves the U.S. with tougher laws on juvenile crime. If States chose to independently strengthen juvenile criminal laws, their choice is not supported by data. Additionally, their harshness does not seem to lead to deterrence

²⁹ See Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, February 9, 2001, N.Y. TIMES, <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html?pagewanted=all&src=pm> (interviewing DiIulio on *Body Count*).

³⁰ Richard E. Redding, *The Effects Of Adjudicating And Sentencing Juveniles As Adults: Research and Policy Implications*, Youth Violence and Juvenile Justice 128 (2003).

³¹ Amanda K. Packel, *Juvenile Justice and the Punishment of Recidivists under California's Three Strikes Law*, 90 Cal. L. Rev. 1157 (2002).

³² UCLA SCHOOL OF LAW JUVENILE JUSTICE PROJECT, *The Impact of Prosecuting Youth in the Adult Criminal Justice System* 12 (2010).

³³ See Michele Deitch, et al., *From Time Out to Hard Time: Young Children in the Juvenile Justice System* 48 (2009).

or true retribution, thus falling short of their criminal justice goals. Scholars now question the existing juvenile justice legislation, but little has been done to change it.

The failure to incorporate social justice goals into criminal justice goals stagnate the new legislation. According to the Government Accountability Office [hereinafter "GAO"] there is correlation between poverty and "adverse outcomes" such as crime.³⁴ Low wages and slow economic growth, GAO posits, makes criminal activity more attractive and increases crime rates.³⁵ Weighing the cost of the likelihood of arrest—which is relatively low—against need and societal pressures, renders crime a potential vehicle for attaining financial goals.³⁶ If poverty can drive criminal activity, then the inextricable link between social and criminal justice cannot be ignored. In other words, solving criminal justice issues without examining social justice problems is overly myopic because it ignores significant variables that influence criminal behavior.

The U.S. tends to analyze only the ends and not the means, and its criminal justice theories encompass ideal societal outcomes. There are two main criminal justice theories in the United States: retributive and utilitarian.³⁷ The "retributive theory of punishment seeks to justify the imposition of punishment on a wrongdoer on the basis of desert. The idea is that by doing wrong, the actor deserves blame and in some cases even punishment."³⁸ The utilitarian theory on the other hand focuses on maximizing the common good, and embraces rehabilitation

³⁴ See Government Accountability Office, *Poverty in America: Consequences for Individuals and the Economy*, 4 (2007).

³⁵ See *id.* at 17 (discussing a possible causal link between low income and crime).

³⁶ See *id.* GAO details the adverse outcomes of poverty on an individual: poor health, crime, and reduced labor market participation; which in turn negatively affects economic growth.

³⁷ John Bogart, *Punishment and the Subordination of Law to Morality*, 7 *Oxford J. Legal Stud.* 421 (1987)

³⁸ *Id.*

and two types of deterrence: "the wrongdoer is deterred from future infractions (specific deterrence) . . . [and] from infractions by the example of punishing known wrongdoers (general deterrence)." ³⁹ The retributive theory is seen as retrospective, and deterrence prospective. ⁴⁰ Or more specifically, retribution refers to punishment for acts in the past, and the deterrence theory refers to diverting possible acts in the future.

Viewing the trend towards harsher sentencing and punishment standards, the U.S. seems to have adopted a more blended approach—both deterrent and retributive—for juveniles. States have opted for "legislative changes in transfer laws . . . [that lower] the minimum age[,] . . . expanding the list of crimes for which transfer is an option, vesting greater discretion in prosecutors, and eliminating some of the factors judges must consider before transferring." ⁴¹ So, instead of focusing on rehabilitation through the juvenile justice system, the courts have chosen to punish more children as adults.

Washington and Lee University

A. Recidivism and Effects of Adult Imprisonment

Recidivism varies between states. In 2008, New York, Florida, Pennsylvania and Virginia, re-arrested 55% of their juvenile offenders. And studies conducted in Pennsylvania, Florida, New Jersey and New York, and Minnesota, demonstrated a 10 to 20% higher recidivism rate for juveniles incarcerated in adult detentions. ⁴² According to a 2007 report by the U.S. Centers for Disease Control and Prevention (CDC) Task Force on Community Preventive

³⁹ *Id.* at 426.

⁴⁰ *Id.* at 425-426.

⁴¹ Redding, *supra* note 15, at 128.

⁴² Redding, *supra* note 15, at 135.

Service, juveniles who have been tried as adults are 34% more likely to re-offend than those placed in juvenile facilities.⁴³ This could be because juveniles sent to adult prison were more recalcitrant and more intractable in the first place. Yet, there are other possible explanations for the higher recidivism rate. One, juveniles are more impressionable than adults, and are thus more deeply affected by their environment.⁴⁴ Two, juveniles, who are still developing their self-identities, have a lack of positive mentors in adult prisons. Three, education for juveniles is subpar in adult prisons. Four, juveniles must deal with sexual assault from a more limited mental base than adults. And lastly, adolescents in adult prison often end up in isolation for their own protection, and grow up in an anti-social environment.

What is more, adult imprisonment of young offenders also causes communities to suffer. Neighborhoods already burdened by poverty become more so because juveniles must grapple

with:

- The stigmatization and other negative effects of labeling [them] as convicted felons
- The sense of resentment and injustice [they] feel about being tried and punished as adults
- The learning of criminal mores and behavior while incarcerated with adult offenders

⁴³ CENTER FOR DISEASE CONTROL, *Latest Findings from the CDC: Prosecuting Youths as Adults Creates Younger Repeat Offenders Separate Juvenile Justice System is Essential to Reduce Recidivism* 1(2007) (discussing recidivism rates of juveniles).

⁴⁴ BUREAU OF JUSTICE ASSISTANCE, *Juveniles in Adult Prison: A National Assessment* iii (2000) (explaining how juveniles are more emotionally and mentally fragile than adults).

- The decreased focus on rehabilitation and family support in the adult system.⁴⁵

These factors exacerbate existing poverty conditions. Juveniles return home with tarnished records and learned anti-social behavior, making it harder to obtain a job and contribute to their communities.

Furthermore, juveniles must manage these circumstances with a more limited emotional and cognitive capacity than adults. In 2004, Dr. Paul Thompson released a brain imaging study that described stages of cognitive development between the ages of five and twenty-one.⁴⁶ The images showed that a human brain continues to mature during one's early twenties, and that cognitive functioning and reasoning are the last to develop.⁴⁷ He found that the frontal cortex, which controls impulse control, is also one of the last areas of the brain to mature.⁴⁸ If this is true, then equating teens and adults in regards to criminal responsibility is questionable, and therefore rehabilitation is a realistic goal for juvenile offenders.

The Supreme Court also adopted the view that juveniles are less culpable than their adult counterparts. In *In re Gault*, the Court required due process in juvenile delinquency cases, and detailed the history of the distinction between juvenile and adult court.⁴⁹ In *Gault*, the Court stated that the reformers of juvenile justice "believed that society's role was not to ascertain

⁴⁵ See Robert E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, DEPARTMENT OF JUSTICE (August 2008), available at www.campaignforyouthjustice.org/.../UCLA-Literature-Review.pdf.

⁴⁶ Paul Thompson, *Time-Lapse Imaging Tracks Brain Developing from ages 5 to 20*, available at <http://www.loni.ucla.edu/~thompson/DEVEL/PR.html> (2004) (showing brain images of people ages 5 to 20, demonstrating different levels of development).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *In re Gault*, 387 U.S. 1 (1967) (quoting Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119-120 (1909)).

whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁵⁰ The Court views a child as a "work in progress" instead of an established dissociative being unmoored from the standard norms. The Court also references that the original purpose of the juvenile system was rehabilitative, not punitive; and in doing so, alleviates part of the child's responsibility and shifts it to the system. Without stating it blatantly, the Court seems to prod the juvenile justice perspective back toward its original approach—incorporating social justice goals to help meet those of the criminal justice system.

More recently in 2005, the Court in *Roper v. Simmons* questioned the depth of culpability of adolescent offenders. The government charged seventeen year-old Simmons as an adult for committing first-degree murder, and sentenced him to death.⁵¹ The Court found that the Cruel and Unusual Punishment Clause of the Eighth Amendment prevented the imposition of the death penalty on adolescents. It recognized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."⁵² And that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults."⁵³ Thus, the Court found juveniles, by nature, to be less culpable than adults because they have less control over their thoughts and behaviors.

Children incarcerated in adult prison must go through phases of child development while in a hostile environment. There is also a danger that they will adopt inappropriate role models in

⁵⁰ See *Gault*, 387 U.S. 1 at 15.

⁵¹ See *Roper v. Simmons* **543 U.S. 551 (2005)**.

⁵² See *id.* at **543 U.S. 551 at 569**.

⁵³ *Id.*

adult inmates. During a time of intense search for self-identity, juveniles may forego available rehabilitative opportunities in order to achieve belongingness or protection in an adult facility. Sexual assault is a constant danger in prison, even more so for children who may be physically smaller and less mentally sophisticated than his adult counterpart. A recent study found that in 2005, juveniles comprise twenty-one percent of all sexual assaults perpetrated in prison though they make up only one percent of the prison population.⁵⁴ By contrast, 2.6% of youths in juvenile facilities reported being sexually assaulted by fellow inmates.⁵⁵ Thus, the threat of sexual violence is ten times higher in adult prisons.

Additionally, the highest rate of suicide in prison is of those under eighteen— 101 out of one hundred thousand compared to the national average of 5.2 out of one hundred thousand.⁵⁶ This is a clear example of how children fail to cope in a facility not equipped for juveniles. For their own protection, many prisons place youths in solitary confinement. Total isolation of child offenders could have a profound effect a child's developing psyche.

Although the aforementioned factors—poor mentors, sexual assault, suicide, and developing mental stages—likely exacerbate poverty conditions; education has an even stronger documented correlation with poverty. Every one-year increase in schooling decreases crime by

⁵⁴ CAMPAIGN FOR YOUTH JUSTICE, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* 8 (2007) (discussing sexual assault statistics).

⁵⁵ US DEPARTMENT OF JUSTICE, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, March 28, 2010, available at <http://bjs.ojp.usdoj.gov/index.cfm?iid=2113&ty=pbdetail>.

⁵⁶ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 54, at 8 (discussing suicide and homicide in state prisons).

30%.⁵⁷ Forty percent of adult prisons do not offer educational services to their juvenile populations, and only eleven percent of prisons have special educational services,⁵⁸ "[T]he prevalence of youth with learning and emotional disabilities in juvenile corrections is 32 percent, which is notably higher than the prevalence of disability among school-age children in the United States, which is about nine percent."⁵⁹ Without an education the likelihood of obtaining a sustainable job when released is low. GAO studies discovered that unemployment is linked to criminal activity, and a return to crime for these individuals affect recidivism rates. .

The effects that adult prisons have on juvenile prisoners are visible, and they travel with the offender after his release. Although the Court and prisons recognize youths' general vulnerability and susceptibility to influence, little has been done to change the system. And if the average teenager has fewer resources than an adult to cope with external pressures, then a poor adolescent has even less. Poor children often grapple with absent parents, lack of food, nutrition, education, and health services. Equipped with such few basic resources, a poor adolescent may find it harder to manage adult prison and his release back into society.

⁵⁷ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 54, at 8 (discussing educational services for juveniles in adult prison).

⁵⁸ *Id.*

⁵⁹ Mary Quinn, Robert Rutherford, Jr., & Peter Leone, *Students with Disabilities in Correctional Facilities* (2001), JOURNAL FOR EXCEPTIONAL CHILDREN, (Dec. 2001), available at <http://www.cec.sped.org/AM/Template.cfm?Section=Home&CONTENTID=2459&TEMPLATE=/CM/ContentDisplay.cfm&CAT=none>.

B. Transferring

In preparation for the "superpredators," the U.S took a "get tough" approach that resulted in increased transfers of younger juveniles to adult criminal court.⁶⁰ There are three ways to transfer a case to adult court:

- 1) Judicial Waiver –juvenile court judges are given discretion to transfer juveniles to adult court;
- 2) Concurrent Jurisdiction - sometimes called "Prosecutorial Discretion" - prosecutors have the power to decide whether to file in adult or juvenile court. There is no transfer hearing, although some states allow judges to reverse the waiver to adult court;⁶¹
- 3) Statutory Exclusion – laws that require a youth to be automatically tried as an adult based on different criteria: the youth's age, the seriousness or type of crime, and the juvenile's prior record.⁶² If a juvenile is above a certain age, committed a felony, or has a long offense history, the juvenile could be automatically transferred.⁶³

The first two transfer methods rely on government discretion, which may reflect the current retributive policies, and lead towards an increase in transfers. The judges and prosecution must consider various factors, such as: the child's prior record, age, and magnitude

⁶⁰ See Richard E. Redding, *The Effects of Adjudicating and sentencing Juveniles as Adults*, Villanova School of Law and Drexel University 128,128 (2010) (discussing tougher laws on juvenile crime).

⁶¹ See Emily A. Polacheck, *Juvenile Transfer: From “Get Better” to “Get Tough” and Where We Go from Here*, WILLIAM MITCHELL L. REV. 1163, 1172 (2010) (explaining the different types of juvenile transfers).

⁶² See *id.*

⁶³ See *id.*

of the crime.⁶⁴ The totality of these factors determine whether the child is "amenable to care," meaning whether he will likely benefit from the more rehabilitative services of the juvenile justice system.⁶⁵

The third type, automatic transfers, relies on a statutorily mandated formula that requires consideration of the above enumerated factors. Currently, twenty-nine states have automatic transfer policies, which is up from fourteen states in 1979.⁶⁶ The increase in participating states is due to the change in juvenile punishment policies in the 1990s, which led states to automate transfers to reflect new perspectives on juvenile criminal responsibility.⁶⁷

If transfer laws send more children to adult facilities, and prisons negatively affect the likelihood that a child who is poor will remain poor, then current transfer laws perpetuate poverty. Adult prisons offer juveniles few advantages, and lead to higher recidivism rates. Children in prisons do not benefit from age-appropriate services, and develop social skills based on their violent environment. Transferring children to adult facilities produces more crime and does little to protect communities in the long term.

III. THE UNITED KINGDOM

The United Kingdom's juvenile justice trend in the 1990's diametrically opposed the "superpredator" theory in the United States. Instead of developing harsh laws to deal with rising

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See* Robert E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, DEPARTMENT OF JUSTICE (August 2008), available at www.campaignforyouthjustice.org/.../UCLA-Literature-Review.pdf.

⁶⁷ *See id.* (describing the history of automatic transfers).

juvenile crime, it adopted a rehabilitative and restorative approach to an eye toward deterrence. A convergence of multiple party perspectives culminated in the two concepts advocated by the Youth Justice Movement: one, that "the great majority of children who offend will eventually 'grow out of crime,'" and two, that the detention of juvenile delinquents is the most potentially harmful placement.⁶⁸ "Minimum intervention" became the overall approach to juvenile offenders.⁶⁹ This meant avoiding removing the child from his community and pathologizing his behavior to prevent pushing him "further into the system."⁷⁰

Multiagency Youth Offending Teams reflect the U.K.'s holistic justice measures.⁷¹ The government favors community-based organizations over detention. Each team "must include at least one . . . social worker from the local authority social services department (SSD), probation officer, police officer, person nominated by a health authority within the local authority area, and person nominated by the local authority's chief education officer."⁷² All team members strive to meet the needs of the young offender to prevent him from entering juvenile detention, and to provide avenues toward rehabilitation.

In recent years, the U.K. public perspective on juvenile justice has changed. More citizens feel unsafe despite the fact that juvenile crime has remained steady and recidivism has decreased 17% since 2000 and 55% less youths entering the system since 2007.⁷³ However,

⁶⁸ See Anthony Bottoms & James Dignan, *Youth Justice in Great Britain*, 31 CRIME & JUST. 21, 33 (2004).

⁶⁹ See *id.*

⁷⁰ See *id.* at 33-34

⁷¹ See *id.* at 77.

⁷² See *id.* at 78.

⁷³ See Bottoms *supra* note 68 at 4.

unlike the United States the U.K. does not choose to try children in adult court, nor does it house their juveniles with adult offenders.⁷⁴ Instead, it places children in community-based programs, drug treatment centers, and as a final step, into juvenile facilities or separate wings in adult prisons.⁷⁵ Alternative treatments lead to a lower recidivism rate than the United States. In the U.K. the juvenile re-offending rate is 36.9%.⁷⁶ That is a little less than 20% lower than the recidivism rate in the U.S. And re-arrests for violent offenses in the U.K. are approximately .96 out of 100 offenders,⁷⁷ where as violent offender recidivism rates reach up to over 40% in a larger state such as New York.⁷⁸

The U.K. intertwines social justice with its approach to juvenile justice. Its methods are rehabilitative and restorative rather than retributive or merely deterrence. Lower recidivism rates points to U.K. successes in its milder management of child offenders. The U.K uses a multi-pronged strategy to minimize re-offenses. It provides services dependent on the needs of the child: foster care services, parenting skill initiatives, surveillance, education, accommodation, and job training.⁷⁹ Regional Youth Offending Teams manage and assign services tailored to each child. Social services can be expensive, and policies and social attitudes in the U.K. differ from that in the U.S. However, a look at the Youth Justice Board's cost-benefit analysis of preventative services versus non-intervention is convincing. Services provided to people age ten

⁷⁴ See Rob Allen, *Prison is No Place for Children*, THE GUARDIAN, Aug. 6, 2009, <http://www.guardian.co.uk/commentisfree/2009/aug/06/youth-prison-young-offenders>.

⁷⁵ See *id.*

⁷⁶ See MINISTRY OF JUSTICE, *Re-offending of juveniles: results from the 2009 cohort England and Wales*, MINISTRY OF JUSTICE STATISTICS BULLETIN 2 (2009) (discussing recidivism rates).

⁷⁷ See *id.* at 10.

⁷⁸ Jeffrey Fagan, et al., *Be Careful What You Wish For: Legal Sanctions and Public Safety among Adolescent Felony Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61 40 (2007).

⁷⁹ Youth Justice Board, *Youth Justice*, available at <http://www.justice.gov.uk/youth-justice>.

to twenty-eight, without behavioral problems, costs £7,423 per annum, whereas the cost is £70,019 for people with behavioral problems that received no government intervention.⁸⁰ Between 2004 and 2005, the U.K. spent two-thirds of its youth justice budget on custodial accommodation.⁸¹ The cost of children in custody was approximately £7000 for the life of their detention, minus health care costs.⁸² With 2,122 juveniles in custody⁸³ as of 2011, the government spent approximately £14,854,000 on custodial care. In 2006-2007, the U.K. granted £23,681,728 to preventative and rehabilitative agencies.⁸⁴ Considering that the U.K. estimates the social and economic costs of repairing juvenile crime to be £60 billion a year, choosing to spend funding on preventative costs makes practical sense. Effective anti-reoffending measures support the U.K.'s desire to shift its budget from custodial care to preventative services.

Washington and Lee University

IV. RECOMMENDATIONS

Alternatives to adult detention are not new concepts in the United States; however, the juvenile justice system no longer adopts them as part of its main approach to managing young offenders. Abandoning its retributive and deterrent-heavy rhetoric could allow the U.S to embrace the U.K.'s more rehabilitative measures. As it stands, adult prisons do not offer a real

⁸⁰ See Bob Ashford, *Towards A Youth Crime Prevention Strategy* 17-18 (2007) (detailing cost of care for those with behavioral problems).

⁸¹ See *id.*

⁸² See Barbara Barrett, et al., *Mental Health Provision for Young Offenders: Service Use and Cost, 2005*, available at <http://bjp.rcpsych.org/content/188/6/541.full>.

⁸³ See MINISTRY OF JUSTICE, *Re-offending of juveniles: results from the 2009 cohort England and Wales*, MINISTRY OF JUSTICE STATISTICS BULLETIN 2 (2009) (discussing recidivism rates).

⁸⁴ See Ashford, *supra* note 80, at 13 (stating total costs spent on juvenile justice matters).

solution to juvenile delinquency, but foster recidivism by exacerbating existing poverty issues in the lives of juveniles.

The successes of the U.K.'s preventative and post-offense programs offer real alternatives to transferring. Relying on governmental and judicial discretion to determine whether a child is amenable to care is too arbitrary. Adopting a per se amenable approach—an approach that assumes children are amenable to juvenile court protections—gives rise to a more rehabilitative approach to juvenile justice. Although many U.K. services are bureaucratic, the U.S. can begin its reform by encouraging the creation of independent community-based programs through government funding.

In order to reduce re-offense rates and harm to America's young offenders, the U.S. must first acknowledge that adult prisons are not viable options because their environs damage juveniles, and that there are other more effective ways to deal with deviant behavior that preserves the dignity of the offender and returns the juvenile justice system to its original goal of rehabilitating youth. A return to America's original approach to its juvenile justice system will force the U.S. to once again recognize the importance of the role social justice goals in its criminal justice system. The changes must be three-fold: 1) a policy shift to a rehabilitative and restorative approach to juvenile justice; 2) a dismantlement of existing harsh legislation; and 3) community involvement in the implementation of preventative and rehabilitative agencies.

Adult imprisonment and transfers are not effective. They do not successfully deter juvenile criminal behavior, nor justly punish it. The high suicide and sexual assault rates indicate that adult imprisonment is too harsh on children. Juvenile offenders feel the effects of transferring long after release, which has a residual negative effect on their communities. A

community without skilled or educated youth is one susceptible to crime and poverty. Also adult imprisonment removes youths from their communities and families, leaving them un-whole and without resources. The burdens that adult imprisonment places on communities are too great, and those burdens diametrically oppose the nation's social and criminal justice goals.⁸⁵

Currently, social justice goals do not inhere in the U.S. approach to juvenile justice. Policy-makers eliminated these goals when they introduced new legislature in the 1990s and 2000s. However, these laws do not reflect criminal data, and are helping to shape unfounded public opinion. The U.S. must consider a policy shift to include social justice concerns. It is not a radical change, but a return to the original purpose of the juvenile justice system.

The legislatures must respond to a new perspective. Otherwise, they will retreat further from their retributive goal. As public opinion accepts a more rehabilitative approach, the concept of just deserts will also shift and dislocate the current measuring stick for justice. Laws must adroitly respond to current public policy.

Fortunately, existing programs in the U.K. pave the way for systematic change in the U.S. "Many 'therapeutic' programs oriented toward facilitating constructive behavior change have shown very positive effects—even for serious offenders," whereas deterrent-based programs may increase recidivism rates.⁸⁶ Moving away from adult prisons toward drug

⁸⁵ Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, YOUTH VIOLENCE AND JUVENILE JUSTICE 128, 129 (2003) (stating that "[c]riminal adjudication and incarceration appear to retard rather than enhance community protection over time and diminish rather than enhance juvenile offenders' accountability and development of competencies.").

⁸⁶ Mark Lipsey, et al., CENTER FOR JUVENILE JUSTICE REFORM, *Improving the Effectiveness of Juvenile Justice Programs: A New Perspective on Evidence-Based Practice* 18 (2010).

rehabilitation and job training programs, leads young offenders further from the harms of adult prison and harsher sentencing. The U.K. has found both economic and societal benefits to preventive and rehabilitative programming. The high cost of juvenile crime encourages the government to adopt programs that work. The U.S. is not without similar programs; however, they need to be threaded through the juvenile justice system to be truly efficient. The initial cost of creating community-based agencies will be high, but may eventually pay off in the future, and most importantly offset the cost of crime.

Finally, more data should be gathered regarding the effects of rehabilitative programming in the United States. Although comparisons to a similar judicial system are helpful, not all methods and approaches may be successful given differences in national views on governmental protectionism and individual responsibility. Also, a stronger distance between reduction in crime and harsher sentencing should be established. However, what is clear is that the current juvenile system is ineffective and has strayed far from its original path. And following alternative successful programming as of that in the U.K. could be the answer.

BIBLIOGRAPHY

1. National Report Series: Juvenile Justice Bulletin, 1999, *available at* https://www.ncjrs.gov/html/ojjdp/9912_2/juv1.html.
2. Nicholas W. Bakken, *You Do the Crime, You Do the Time: A Socio-Legal History of the Juvenile Court and Transfer Waivers* (2007).
3. William Bennett & Robert DiIulio, *Body Count: Moral Poverty...And How to Win America's War Against Crime and Drugs* (1997).
4. Laurence Steinberg, *Should Juvenile Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies* 3 (2000) (describing the effect of the Superpredator Theory); *see also* Richard Redding, *The Effects Of Adjudicating And Sentencing Juveniles As Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE AND JUVENILE JUSTICE (2003).
5. Youth Justice Board, *available at* <http://www.justice.gov.uk/youth-justice/courts-and-orders>.
6. Bob Ashford, *Towards a Youth Crime Prevention Strategy* (2007).
7. Gary Craig, *Social Justice* *available at* http://www.capacitythinking.org.uk/ISJA/articles_7_gcsj.html; *see also* Dan Froomkin, *New Social Justice Index Places U.S. Near Bottom* (10/27/11), *available at* http://www.huffingtonpost.com/2011/10/27/social-justice_n_1035363.html.
8. Richard Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, YOUTH VIOLENCE AND JUVENILE JUSTICE (2003).
9. Franklin Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 Cal. L. Rev. (2000).
10. William Bennett & Robert DiIulio, *Body Count: Moral Poverty...And How to Win America's War Against Crime and Drugs* (1997).
11. Bureau of Justice Assistance, *Juveniles in Adult Prison: A National Assessment* (2000).
12. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION [*hereinafter* OJJDP] (2008).
13. OJJDP, *Juvenile Offenders and Victims: 2006 National Report* (2006).
14. State Recidivism: The Revolving Door 1 (2008) *available at* http://www.pewcenteronthestates.org/uploadedFiles/Pew_State_of_Recidivism.pdf.

15. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, February 9, 2001, N.Y. TIMES, <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html?pagewanted=all&src=pm>.
16. Amanda K. Packel, *Juvenile Justice and the Punishment of Recidivists under California's Three Strikes Law*, 90 Cal. L. Rev. 1157 (2002).
17. UCLA SCHOOL OF LAW JUVENILE JUSTICE PROJECT, *The Impact of Prosecuting Youth in the Adult Criminal Justice System* (2010).
18. Michele Deitch, et al., *From Time Out to Hard Time: Young Children in the Juvenile Justice System* (2009).
19. Government Accountability Office, *Poverty in America: Consequences for Individuals and the Economy* (2007).
20. John Bogart, *Punishment and the Subordination of Law to Morality*, 7 Oxford J. Legal Stud. 421 (1987)
21. CENTER FOR DISEASE CONTROL, *Latest Findings from the CDC: Prosecuting Youths as Adults Creates Younger Repeat Offenders Separate Juvenile Justice System is Essential to Reduce Recidivism* 1 (2007).
22. BUREAU OF JUSTICE ASSISTANCE, *Juveniles in Adult Prison: A National Assessment* iii (2000).
23. Robert E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, DEPARTMENT OF JUSTICE (August 2008), available at www.campaignforyouthjustice.org/.../UCLA-Literature-Review.pdf.
24. Paul Thompson, *Time-Lapse Imaging Tracks Brain Developing from ages 5 to 20*, available at <http://www.loni.ucla.edu/~thompson/DEVEL/PR.html> (2004).
25. *In re Gault*, 387 U.S. 1 (1967) (quoting Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119-120 (1909)).
26. *Roper v. Simmons* **543 U.S. 551 (2005)**.
27. US DEPARTMENT OF JUSTICE, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, March 28, 2010, available at <http://bjs.ojp.usdoj.gov/index.cfm?iid=2113&ty=pbdetail>.
28. CAMPAIGN FOR YOUTH JUSTICE, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (2007).
29. Mary Quinn, Robert Rutherford, Jr., & Peter Leone, *Students with Disabilities in Correctional Facilities* (2001), JOURNAL FOR EXCEPTIONAL CHILDREN, (Dec. 2001), available at

<http://www.cec.sped.org/AM/Template.cfm?Section=Home&CONTENTID=2459&TEMPLATE=/CM/ContentDisplay.cfm&CAT=none>.

30. Emily A. Polacheck, *Juvenile Transfer: From “Get Better” to “Get Tough” and Where We Go from Here*, WILLIAM MITCHELL L. REV. 1163, 1172 (2010).
31. Anthony Bottoms & James Dignan, *Youth Justice in Great Britain*, 31 CRIME & JUST. 21, 33 (2004).
32. Rob Allen, *Prison is No Place for Children*, THE GUARDIAN, Aug. 6, 2009, <http://www.guardian.co.uk/commentisfree/2009/aug/06/youth-prison-young-offenders>.
33. MINISTRY OF JUSTICE, *Re-offending of juveniles: results from the 2009 cohort England and Wales*, MINISTRY OF JUSTICE STATISTICS BULLETIN 2 (2009) (discussing recidivism rates).
34. Jeffrey Fagan, et al., *Be Careful What You Wish For: Legal Sanctions and Public Safety among Adolescent Felony Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61 40 (2007).
35. Youth Justice Board, *Youth Justice*, available at <http://www.justice.gov.uk/youth-justice>.
36. Barbara Barrett, et al., *Mental Health Provision for Young Offenders: Service Use and Cost*, 2005, available at <http://bjp.rcpsych.org/content/188/6/541.full>.
37. Mark Lipsey, et al., CENTER FOR JUVENILE JUSTICE REFORM, *Improving the Effectiveness of Juvenile Justice Programs: A New Perspective on Evidence-Based Practice* 18 (2010).