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BLACK FACES, BROWN FACES.. .WHY ARE WE DIFFERENT THAN WHITE FACES? AN ANALYTICAL COMPARISON OF THE RATE OF CERTIFICATION OF MINORITY &NON-MINORITY JUVENILE OFFENDERS

Keisha L. David

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COMMENTS

BLACK FACES, BROWN FACES. . .WHY ARE WE DIFFERENT THAN WHITE FACES? AN ANALYTICAL COMPARISON OF THE RATE OF CERTIFICATION OF MINORITY & NON-MINORITY JUVENILE OFFENDERS

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First and foremost I thank my Lord and Savior Jesus Christ, who gave me the strength to write this comment and whose spirit is ever present in my life. Thanks to my parents, who always encouraged me to strive for higher heights. Words cannot express the depth of my love for you. To my good friend, Terence Davis, who is always a source of strength, I thank you for your support and for the laughs. Thanks also to my mentor, the Hon. Judge Carmen Kelsey, who has been my inspiration to aspire for the judiciary. I am grateful for your advice and encouragement. To my confidant and friend, Professor Rey Valencia, who always offers a listening ear, thanks so much for your endless support. Many thanks to Professor Stephanie Stevens for all of your insight and assistance throughout this writing process. To Denise Mejia, whose outstanding editorial skills helped to make this comment a reality, I truly thank you. Thanks also to Associate Dean Yvonne Cherena-Pacheco, who cared enough to believe in me. Your encouragement and prayers have been golden throughout this law school experience. Finally, to all individuals who impact the lives of young children through the juvenile system, this comment intends to heighten awareness, arouse productive activity and challenge you to make a difference!

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I. INTRODUCTION

“if care and concern is what the system would
mete out to my children, who are white, it
should do no less for the sons and daughters
of African-American parents”¹

At fifteen years old, he was just a kid at heart. At fifteen, he was a success in school and quite a charmer with the young girls. Yet at fifteen years old he became a murderer.

After being pulled over by police officers with his older brother, T.J. was taken to the police station.² At five feet four and one hundred pounds, he was a frail young man; however, he was cuffed to a chair, not charged with a single crime.³ Giving a sarcastic remark got him a kick in the groin and a smack across the face at the hand of an angered Caucasian police officer, who then pushed T.J.'s chair down to the floor, causing the child to land face down with a knee in his back.⁴

1. Vincent Schiraldi, *The Juvenile Justice System in Black and White*, JUV. JUST. UP-DATE, June-July 1998, at 3, 8.

2. See Peter Richmond, *No Way Out*, GQ MAGAZINE, Oct. 1998, at 232, 234 (explaining the experience of one juvenile whose life was changed when he was certified as an adult at fifteen years old).

3. See *id.*

4. See *id.* at 234-35.

T.J. was taken into a small fingerprint room.⁵ The officers' version of the scene stated that the officer was fingerprinting T.J.⁶, but why? There had been no crime. Inside the fingerprint room a brutal struggle ensued between T.J. and the officer, which consisted of the child being held in a headlock, pounded on his skull, kned in the stomach, and squeezed in a tight bear hug.⁷ When T.J. screamed he was told to shut up.⁸ Somehow, T.J. freed himself and managed to grab the officer's gun.⁹ Realizing what happened, the officer yelled an obscenity and lunged toward the frightened child, who shot the officer.¹⁰ Hearing the gunfire, another officer opened the door, while T.J. was still firing, striking the second officer.¹¹ Both officers died.¹²

T.J. was certified to stand trial as an adult on two counts of first-degree murder, along with other charges.¹³ Young T.J. was found not guilty by reason of insanity on all but two charges, and faced roughly a one-year sentence.¹⁴ The judge, however, called the child a "walking time bomb"¹⁵ and imposed the maximum sentences for the remaining charges, which combined, amounted to twenty-five long, hard years in the penitentiary.¹⁶ One must ask, did society declare this teenage child a vicious and hardened criminal and then send him off to prison to become one?¹⁷

This comment will focus on the certification¹⁸ of juvenile offenders in Texas and will compare the rate at which juveniles of different ethnic groups are being certified to stand trial as adults.¹⁹ It will demonstrate

5. *See id.* at 235.

6. *See id.*

7. *See id.*

8. *See Richmond, supra note 2.* at 235.

9. *See id.*

10. *See id.*

11. *See id.* at 236.

12. *See id.*

13. *See id.*

14. *See Richmond, supra note 2.* at 236 (referring to the likely sentence for the two remaining charges: voluntary manslaughter and illegal use of a handgun in the course of committing a violent crime).

15. *Id.* at 237.

16. *See id.* The sentence was ten-years for manslaughter and fifteen-years for the use of a handgun. *See id.*

17. *See id.*

18. *See* DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 4 (1991). Certification is the process by which juvenile courts deliberately waive original jurisdiction and pass certain juveniles along to the adult system, where they will be processed and tried as adults. *See id.*

19. *See id.* (discussing the words certified, waived, and transferred as often being used interchangeably to refer to the same process of transferring jurisdiction from juvenile

and articulate the racial disparities of the certification process as it relates to minority groups, such as African-Americans and Hispanics, as opposed to their non-minority counterparts.

Part II of this comment will relay some historical information regarding the juvenile justice system and the background of juvenile certification. Part III will discuss the procedure of how a juvenile is actually certified, while part IV will present a comparative analysis of the rate of certification for youth of different ethnic backgrounds with a focus on minority versus non-minority groups. Part IV will also paint a realistic portrait of the racial disparities among minority youth, highlighting the following areas: arrest, certification, and release/transfer hearings for juvenile offenders. Part V will explore the ramifications and consequences minority children face when they are certified, and will address the ultimate consequences and possible threats to society as a result of these children being certified as adults at such tender ages. Finally, Part VI will propose some possible solutions for dealing with the problem of violent juvenile offenders, and what can be done about their delinquent conduct.

II. HISTORY/BACKGROUND

A. *Background of Juvenile Justice System*

The origin of the juvenile justice system can be traced back over a century to 1899 when Cook County, Illinois founded the first juvenile court.²⁰ Based on the doctrine of *parens patriae*,²¹ a state makes it its duty or responsibility to protect children whose parents are incapable or unwilling to provide a safe, nurturing and supervised environment.²²

courts to adult courts). For purposes of this comment, the words certification, transfer, and waiver will be used interchangeably to refer to the same process.

20. See *id.* at 6; See BARRY GLICK ET AL., *NO TIME TO PLAY: YOUTHFUL OFFENDERS IN ADULT CORRECTIONAL SYSTEMS* 8 (1998); Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22-JUN CHAMPION 10, 11 (1998); Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1257 (1996).

21. See *Schall v. Martin*, 467 U.S. 253, 265 (1983); *In re Gault*, 387 U.S. 1, 16 (1967); Alan J. Tomkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1622 (1996); DELUXE BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (defining *parens patriae* as the role of the state to act as guardians of persons, such as juveniles). This idea of *parens patriae* comes from the notion that the state must care for those who cannot care for themselves, as in the case of minors who are not receiving the proper care from their parents. See Tomkins, *supra*, at 1622. The State has made it its duty to protect the child and act in the child's best interest. See *id.*

22. See *In re Gault*, 387 U.S. at 16; Aron & Hurley, *supra* note 20, at 11; Cintron, *supra* note 20, at 1257-58; Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2428 (1996).

Early reformers said that it is not society's role to determine whether a child is "innocent" or "guilty."²³ Rather, it is society's responsibility to determine what the child is like, how the child has become what she is, and what positive steps have been taken, both in the child's interest and the state's interest, to save the child from a life headed in a downward spiral.²⁴

Because of the specialized needs of young offenders, the criminal justice system found it necessary to develop a separate system specifically for juvenile offenders.²⁵ The purpose of the juvenile justice system was to provide a more rehabilitative and treatment-oriented program for delinquent juvenile offenders.²⁶ The rationale was that if a juvenile offender could be properly treated and rehabilitated, their outlook on life would change, thus giving them an opportunity to turn their life around.²⁷

Rehabilitation would give juveniles a second chance in society, thus enabling them to become successful and more productive citizens.²⁸ This rationale was distinctly different from that of the adult criminal justice system in that the adult system was more punitive in nature, with the element of punishment as its nucleus.²⁹

23. See *In re Gault*, 387 U.S. at 15; Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

24. See *In re Gault*, 387 U.S. at 15; Mack, *supra* note 23, at 119-20.

25. See 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, 512 (1995); Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 375 (1998).

26. See Cintron, *supra* note 20, at 1258; Guttman, *supra* note 25, at 512.

27. See Cintron, *supra* note 20, at 1258.

28. See generally Justice Policy Institute, *Second Chances* (visited July 5, 1999) <<http://www.cjcj.org/centennial/maxwell.html>> (reporting the successful turn around in the life of B.M., an ex-gangbanger and drug dealer, who remained under the jurisdiction of the juvenile system). As a child, B.M. faced life with a drug addicted father and separated parents. See *id.* At 10 years old, one day after school this young man came home to find his father in the bathtub unconscious, saturated by his own feces and urine, and surrounded by drug needles. See *id.* Despite the difficult home life, this African-American man made a change when he encountered the Evening Reporting Center Program in Chicago. See *id.* This program serves as a preventive detention program for kids in an effort to keep kids off the streets. See *id.*; Justice Policy Institute, *Second Chances* (visited July 5, 1999) <<http://www.cjcj.org/centennial/campbell.html>> (discussing the circumstances that led a juvenile offender to become a responsible, productive citizen and national weightlifting champion). By age 14, this juvenile, previously known as "Crime Boy," had nearly 59 felony charges to his wrap sheet. See *id.* Prosecutors labeled this young man a "career criminal." See *id.* In spite of his lengthy record, the judge gave "Crime Boy" one more chance in the juvenile system, sending him to the Last Chance Ranch in Florida. See *id.* It was at this ranch that "Crime Boy" was laid to rest and P.C. reclaimed his life as a productive citizen. See *id.*

29. See Cintron, *supra* note 20, at 1258 (stating that the adult system is different from the juvenile system in that while the juvenile system is more rehabilitation oriented, the

The juvenile justice system was designed with a protective and nurturing purpose in mind.³⁰ This newly implemented juvenile system identified a "child" within its jurisdiction as one who was over the age of seven and under the age of eighteen.³¹ The system only held children older than the age of seven accountable for their actions because children younger than seven were thought to not possess the mental capacity to form the criminal intent required to be held fully responsible for their actions.³² This idea is known as the "infancy defense."³³

Along with the "infancy defense," there existed one other means by which children were exempt from their acts. Children between the ages of seven and fourteen were held accountable for crimes, unless they could overcome a rebuttable presumption of culpability.³⁴ This presumption could be rebutted if it could be shown that the child lacked the mental capacity and ability to understand the difference between right and wrong

adult system is more retributive, seeking punishment of the offenders). The adult system is more punitive in nature because when adults are sentenced for their crime they are usually sent to a facility that has little or no treatment services for inmates. There are also very few vocational and educational resources, which handicaps inmates in trying to better themselves. Inmates in the adult system are usually just put in a small room, sometimes isolated from others, in an effort to force them to think of what horrible crime they have committed, while simply waiting out their time of punishment; *see also* JOHN KAPLAN ET AL., *CRIMINAL LAW CASES AND MATERIALS* 47-49 (5th ed. 1996). From this, one can infer that the adult system treats offenders in a more punitive manner.

30. *See* GLICK, *supra* note 20, at 8. The juvenile courts' focus was to "protect the health and welfare of children." *See id.*

31. This age scale of seven to age eighteen stems from the common law "infancy defense," which states children younger than seven were not able to form criminal intent. *See In re Gault*, 387 U.S. 1, 19 (1967). This age scale is also formulated from the TEX. FAM. CODE ANN. § 51.02 (2)(A)(B) (West 1996) indicating that:

A "child" means a person who is:

A. ten years of age or older and under 17 years of age; or

B. 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct indicating a need for supervision. . .

Id.

32. *See In re Gault*, 387 U.S. at 16; Mabel Arteaga, Note, *Juvenile Justice with a Future for Juveniles*, 2 CARDOZO WOMEN'S L.J. 215, 216 (1995); Cintron, *supra* note 20, at 1259; Klein, *supra* note 25, at 375; Michael P. Brown, *Juvenile Offenders: Should They Be Tried in Adult Courts?*, USA TODAY, Jan. 1, 1998, at 52.

33. *See* Arteaga, *supra* note 32, at 215 (advancing the notion that children may not have the level of maturity to fully understand the wrongfulness of their actions).

34. *See* BLACK'S LAW DICTIONARY 379 (6th ed. 1990) (defining culpability as "[b]lameworthiness," requiring a showing that the person acted purposely, knowingly, recklessly or negligently). Under common law, unless the children had a justifiable reason for not being accountable, youthful offenders were considered to be at fault for their actions. *See also* Arteaga, *supra* note 32, at 216; Klein, *supra* note 25, at 375.

and to understand what his/her actions meant.³⁵ Children older than fourteen, were presumed to be fully aware of their actions and to possess the culpability to be held accountable for their actions.³⁶

Currently in Texas, juvenile courts have exclusive original jurisdiction³⁷ over most proceedings involving a child who is at least ten years old but not older than seventeen years old, as provided by the Texas Family Code.³⁸

B. *Background of Juvenile Certification*

In theory, the ideal purpose or goal of the juvenile justice system is to be more rehabilitative in nature; however, juveniles have been subjected to transfer to adult court since the inception of the juvenile system in 1899.³⁹ Traditionally, these transfers usually took place only in egregious cases, and usually involved older juveniles who were detained for violent crimes or large thefts.⁴⁰ In these instances, the juveniles were transferred to adult court by grand jury indictment.⁴¹

When considering the possibility of transferring a juvenile offender, one must consider the type of offense for which transfer may be warranted. In Texas, juveniles may be certified to stand trial in an adult criminal court for an array of offenses. These offenses range from a small

35. See Arteaga, *supra* note 32, at 216; Cintron, *supra* note 20, at 1259; Klein, *supra* note 25, at 375; Brown, *supra* note 32, at 52.

36. See Arteaga, *supra* note 32, at 216; Cintron, *supra* note 20, at 1259; Klein, *supra* note 25, 375; Brown, *supra* note 32, at 52.

37. See BLACK'S LAW DICTIONARY 564 & 1099 (6th ed. 1990) (defining exclusive original jurisdiction as a court's sole discretion to hear a case at its inception).

38. See TEX. FAM. CODE ANN. §§ 51.02(2)(A)(B), 51.04(a) (West 1996).

Section 51.02(2) A "child" means a person who is:

- (A) ten years of age or older and under seventeen years of age; or
- (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Section 51.04(a):

This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time he engaged in the conduct, and the juvenile court has exclusive original jurisdiction over proceedings under this title.

Id.

39. See Susan A. Burns, Comment, *Is Ohio Juvenile Justice Still Serving Its Purpose?*, 29 AKRON L. REV. 335, 338 (1996); Beth Wilbourn, Note, *Waiver of Juvenile Court Jurisdiction: National Trends and the Inadequacy of the Texas Response*, 23 AM. J. CRIM. L. 633, 635 (1996).

40. See Wilbourn, *supra* note 39, at 635.

41. See *id.*

offense, such as felonious criminal mischief, to a much more serious offense, such as capital murder.⁴²

Before a juvenile can be certified to stand trial as an adult, there are certain determinative factors that must be considered. The U.S. Supreme Court, in *Kent v. United States*,⁴³ created a framework listing eight factors to consider when determining if transfer is appropriate in a given case.⁴⁴ In 1967, Texas adopted its own version of the *Kent* factors.⁴⁵ These dis-

42. Some of these offenses include: assault; aggravated assault; kidnapping; aggravated kidnapping; robbery; aggravated robbery; graffiti; arson; murder; capital murder; criminal negligent homicide; sexual assault; aggravated sexual assault; manslaughter; burglary; injury to a child, elderly or disabled individual; weapons in a prohibited place; and criminal mischief. See TEX. PEN. CODE ANN. §§ 22.01, 22.02, 20.03, 20.04, 29.02, 29.03, 28.08, 28.02, 19.02, 19.03, 19.05, 22.011, 22.021, 19.04, 30.02, 22.04, 46.03, 28.03 (Vernon Supp. 1999) (noting the various offenses that fall under the purview of potential certification). The reign on young juvenile offenders has been tightened even more with an amendment to the jurisdictional age for transfer to adult criminal court. As of September 1, 1999, a child as young as 10 years old may be transferred to adult court if "the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code." See TEX. FAM. CODE ANN. §§ 51.02(2)(A)(B), 51.04(a) (West 1999).

43. *Kent v. United States*, 383 U.S. 541 (1966).

44. See *id.* at 566-67.

These determinative factors are:

- 1) [t]he seriousness of the alleged offense to the community, and whether protecting the community necessitates waiver;
- 2) [w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- 3) [w]hether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
- 4) [t]he prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney);
- 5) [t]he desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia;
- 6) [t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
- 7) [t]he record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; and
- 8) [t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id.

45. See Beth Wilbourn, *Child or Adult? Case Studies and Analysis of Juvenile Certification in Texas*, STATE B. OF TEX. SEC. REP. JUV. L., Sept. 1995, at 11, 12 & n.26 (herein-

cretionary transfer factors were later codified in 1973.⁴⁶ Recently, Texas modified this list of factors requiring juvenile courts to consider the following four factors when determining if transfer is appropriate:

1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
2. the sophistication and maturity of the child;
3. the record and previous history of the child; and
4. the prospects of adequate protection of the public, and the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.⁴⁷

after *Child or Adult?*) (citing TEX. REV. CIV. STAT. ANN. art. 2338-1 § 6 (Vernon 1971) (repealed 1973))).

46. See TEX. FAM. CODE § 54.02(f) (West 2d ed. 1977):

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (2) whether the alleged offense was committed in an aggressive and premeditated manner;
- (3) whether there is evidence on which a grand jury may be expected to return an indictment;
- (4) the sophistication and maturity of the child;
- (5) the record and previous history of the child; and
- (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Id.

47. See TEX. FAM. CODE ANN. § 54.02(f) (Vernon 1996) (listing the revised list of *Kent* factors); Thao Lam, *Certification vs. Determinate Sentencing: A Study of the Two Procedures That Address the Problem of Violent Juvenile Offenses in Texas*, STATE B. OF TEX., SEC. REP. JUV. L., Mar. 1998 at 44, 45 (discussing the adoption of a *Kent*-style judicial transfer model which provides guidance to juvenile courts in deciding when to waive jurisdiction and transfer the case to adult court); see also Interview with the Honorable Carmen Kelsey, District Court Judge of 289th Judicial District Court, in San Antonio, Tex. (Jan. 8, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating that possible reasons for Texas modifying its list of *Kent* factors could be due to a re-vamping of the Code in 1995, and also due to efforts to get tough on crime and become harsher on juvenile offenders). Before the 1995 amendment, Texas included the four above-mentioned factors that are currently listed in TEX. FAM. CODE ANN. § 54.02 and also two other factors. Texas previously also considered: (1) whether the alleged offense was committed in an aggressive and premeditated manner, i.e. the seriousness of the alleged offense, and (2) the prosecutive merit of the complaint, i.e. whether there is evidence upon which a Grand Jury may be expected to return an indictment. These factors were eliminated because they were seemingly unnecessary. See *id.* For instance, the prosecutive merit factor was very easy to prove because all that was needed was for an Assistant District Attorney to testify that, in their legal opinion, evidence existed upon which a Grand Jury could indict. See *id.* This factor also seemed to be pointless as an individual factor because the

In *Kent*, the Court held that juvenile court jurisdiction is properly waived if the offense is heinous, if it can be prosecuted upon merit, or if the public is better protected if the child is transferred.⁴⁸ *Kent* further stated that the offense may be transferred if it is an aggravated offense or, if less serious, the offense exemplifies a pattern of repeated offenses that shows the child may be beyond the benefit of possible rehabilitation.⁴⁹ In *United States v. One Juvenile Male*,⁵⁰ *Kent* is further supported in noting that a motion for transfer is proper when the risk of harm to society is determined to outweigh the juvenile's chance of rehabilitation.⁵¹ This prospective risk of harm may result from the juvenile receiving a more lenient sentence in juvenile court.⁵²

The certification process, or transfer to adult court, begins with the rationale that children who continuously get into trouble have a propensity for crime and should be locked up for a long time.⁵³ These children may have committed violent offenses and are thought to need harsher punishment for their heinous crimes. The idea is that the juvenile system does not offer strict enough punishment,⁵⁴ thus punishment in the more callous adult system is seemingly more appropriate.

Over the years, the percentage of juveniles being certified has increased steadily. For example, in 1984 only ninety-seven juveniles were certified in Texas.⁵⁵ By 1993, the number of juveniles certified as adults had risen to 327.⁵⁶ According to research from the Office of Juvenile Justice and Delinquency Prevention (OJJDP), transfer cases increased seventy-one percent between 1985 and 1994.⁵⁷

This increase in transfers has been attributed to the rapid increase in juvenile crime.⁵⁸ Since 1986, offenses against persons have increased ninety-eight percent, property offenses are up twenty-three percent, and

judge was making probable cause findings in the case; thus, this probable cause determination is evident in the Texas Family Code § 54.02(a)(3). *See id.*

48. *See Kent v. United States*, 383 U.S. 541, 566 (1966) (referring to the formulation of criteria that is to be considered by a court when evaluating the possibility of waiver of jurisdiction); *Child or Adult?*, *supra* note 45, at 12.

49. *See Kent*, 383 U.S. at 566; *Child or Adult?*, *supra* note 45, at 12.

50. *United States v. One Juvenile Male*, 40 F.3d 841 (6th Cir. 1994).

51. *See United States v. One Juvenile Male*, 40 F.3d 841, 844 (6th Cir. 1994).

52. *See id.* at 844.

53. *See Klein*, *supra* note 25, at 373.

54. *See CHAMPION & MAYS*, *supra* note 18, at 65; Aron & Hurley, *supra* note 20, at 12.

55. *See Child or Adult?*, *supra* note 45, at 12-13.

56. *See id.*

57. *See Jeffrey A. Butts, Delinquency Cases Waived to Criminal Court, 1985-1994* (visited Sept. 19, 1998) <<http://www.ncjrs.org/txtfiles/fs-9752.txt>>.

58. *See Guttman*, *supra* note 25, 508 (pondering the rationale behind an increase in the prosecution of juveniles as adults).

drug offenses increased 120%.⁵⁹ In 1995, United States juvenile courts processed approximately 1.7 million delinquency cases.⁶⁰

According to the FBI's Uniform Crime Report, violent juvenile crime increased 110% by 1995.⁶¹ These disturbing statistics are played out in startling stories such as the schoolhouse murders in Jonesboro, Arkansas;⁶² the shocking murder by ten and eleven year olds in Chicago;⁶³ a school cafeteria turned blood bath at the hands of a fifteen year old boy in Oregon;⁶⁴ and the Columbine High School turned battlefield as two troubled teens sprayed the campus with bullets, leaving remnants of carnage and mass hysteria.⁶⁵

Society believes that stronger measures are needed when elderly widows are raped, eight-year old girls are brutally murdered, and society's

59. See Anne L. Stahl, *Delinquency Cases in Juvenile Courts, 1995* (visited Oct. 11, 1998) <<http://www.ncjrs.org/txtfiles/fs9879.txt>>.

60. See *id.*

61. See Anthony Stith, *Special Report: Why Children Kill*, BLACK CHILD, Jan. 31, 1998, at 15, 15.

62. See Jonathan Alter, *Harnessing the Hysteria*, NEWSWEEK, Apr. 6, 1998, at 27 (detailing the events in Jonesboro: as middle-school students assembled outside for a fire alarm, two boys opened fire on the students killing four of their classmates and a teacher); Peter Annin & Jerry Adler, *Murder at an Early Age*, NEWSWEEK, Aug. 24, 1998, at 28; David Brauer & John McCormick, *The Boys Behind the Ambush*, NEWSWEEK, Apr. 6, 1998, at 20; Charlotte Faltermayer, *What is Justice for a Sixth-Grade Killer?*, TIME, Apr. 6, 1998, at 36; Margot Hornblower, *The Boy Who Loved Bombs*, TIME, June 1, 1998, at 42; Richard Lacayo reported by Victoria Rainert, *Toward the Root of the Evil Schoolboy Massacres May be an Aberration. But the Question Remains: Why do Kids Kill?*, TIME, Apr. 6, 1998, at 38; Clarence Waldron, *Why Are So Many Children Committing Murder?*, JET, June 8, 1998, at 14.

63. See *Chicago Boys Who Dropped 5-Year Old from 14th Floor Will Go to Youth Prison*, JET, Feb. 19, 1996, at 23 (recounting the story of how in 1994, two African-American boys, ages ten and eleven, dropped a five-year-old child to his death from the 14th floor window of a high-rise apartment building in Chicago); Waldron, *supra* note 62, at 14.

64. See Joshua Hammer, *'Kip Is Out of Control'*, NEWSWEEK, June 8, 1998, at 32; Hornblower, *supra* note 62, at 42 (detailing the tragedy in Springfield, Oregon, where after being suspended from school for having a gun, fifteen year old Kip Kinkel embarked on a "personal apocalypse"). The rampage began with Kip murdering both his parents, then entering his school cafeteria the next day and unloading a .22 caliber semi-automatic rifle on his classmates, killing two students and wounding several others. See *id.*; Patrick Rogers et al., *Up Front*, PEOPLE, June 8, 1998, at 64; Waldron, *supra*, note 62, at 14.

65. See Bill Hewitt et al., *Sorrow and Outrage: A Colorado Town Endures Terror, Then Tears, in an All Too Familiar Scenario*, PEOPLE, May 3, 1999, at 94 (describing the horrifying events of the massacre at Columbine High School); Andrew Phillips, *Lessons of Littleton*, MACLEAN'S, May 3, 1999 at 18 (reporting on the terrifying occurrences where two young boys brutally murdered several classmates at their high school); Roger Rosenblatt, *Welcome to the Works of the Trench Coats*, TIME, May 3, 1999, at 88; T. Trent, *Searching for Answers*, NEWSWEEK, May 20, 1999, available in 1999 WL 9500124 (expanding upon the events that led up to and followed in the hysterical rampage at Columbine).

protective police officers are gunned down in cold blood, all at the hands of juvenile offenders.⁶⁶ Thus, transfer to the adult criminal justice system would seemingly be the answer.

Transferring juveniles to adult court was thought to have a deterrent effect that would discourage juveniles from committing these types of heinous crimes.⁶⁷ However, deterrence has not proven to be the result.⁶⁸ To the contrary, transferred juveniles are more likely to increase the recidivism rate and commit future crimes.⁶⁹ Studies have shown that many juveniles who are certified already have a lengthy record of repeat recidivism.⁷⁰ The upsurge in recidivism rates is due to children not being rehabilitated.⁷¹ Children are merely being warehoused in facilities where they become experts in committing crime without learning to deal with and change their delinquent behaviors.⁷²

So what are the seemingly favorable reasons for transferring juvenile offenders to the adult criminal justice system? Those in favor of the certification or transfer process argue that with the recent increase in juvenile crimes, transfer to the adult system is the only way to 'teach these kids a lesson.'⁷³ Their message to violent juvenile offenders put simply: 'If you can't do the time, don't do the crime.'⁷⁴ The notion of getting their "just

66. See Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 268 (1991).

67. See CHAMPION & MAYS, *supra* note 18, at 64.

68. See HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 156 (1995); Klein, *supra* note 25, at 402; Brown, *supra* note 32, at 52.

69. See Judge Glenda Hatchett, *Why We Can't Wait: The Juvenile Court in the New Millennium*, CRIME & DELINQ., Jan. 1998, at 83, 85; Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, CRIM. JUST., Summer 1995, at 39, 42 (noting higher rates of recidivism for juveniles tried in adult courts in contrast with those who are similarly situated but tried in juvenile court).

70. See CHAMPION & MAYS, *supra* note 18, at 61 (stating that a category of juveniles likely to be certified as adults are those who have an extensive offense history); ELLEN NIMICK ET AL. NATIONAL COUNCIL OF JUVENILES AND FAMILY COURT JUDGES, JUVENILE COURT WAIVER: A STUDY OF JUVENILE COURT CASES TRANSFERRED TO CRIMINAL COURT 5 (1986) (recognizing that juveniles who were certified to adult court often had several previous offenses).

71. See Vanessa Pogue, *The Overrepresentation of Minority Youth in the Texas Juvenile Justice System*, STATE B. OF TEX. SEC. REP. JUV. L., Mar. 1998 at 26, 27.

72. See *id.* (expressing the end result of failing to rehabilitate juvenile offenders).

73. CHAMPION & MAYS, *supra* note 18, at 75.

74. See EDWARD HUMES, NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT 185 (1996); Gary Marx, *Young Killers Remain Well-Publicized Rarity 'Superpredators' Fail to Grow into Forecast Proportions*, CHI. TRIB., Feb. 11, 1998, at 1 (concluding that juveniles who commit crimes should be able to do the time that is re-

desserts”⁷⁵ seems unanimous among these advocates of juvenile certification. In their eyes, these juveniles seem to be “committed to lawlessness, unlikely to change, and unworthy of [rehabilitative] treatment.”⁷⁶

Supporters of juvenile certification find difficulty in justifying potential rehabilitation for juveniles who have committed such horrendous crimes, which invoke strong feelings of fear and indignation amongst all of society.⁷⁷ In other words, supporters of certification may think if the juvenile has committed a horrendous crime, why exert efforts and resources in trying to rehabilitate an inherently violent person. It is assumed that as a result of the serious nature of the offense or the criminal persistence of the offender, the adult criminal justice system is the best way to handle these youth.⁷⁸ For supporters of the certification process, these juveniles are not viewed as children, but as “juvenile predators.”⁷⁹

Proponents of the certification process argue that certification seems to be the best method because it is presumed that some juveniles are beyond hope of any chance of rehabilitation; in other words, they are ‘too bad.’⁸⁰ The juvenile system holds little hope for improvement or treatment for these offenders.⁸¹ Supporters of juvenile certification also believe that the only way to protect society is to get these ruthless, delinquent young criminals off the streets.⁸²

quired for such an offense); Eric Zorn, *Even Young Thugs Are Still Children*, CHI. TRIB., Sept. 22, 1994, at 1.

75. See Cary Rudman, *Violent Youth in Adult Court: Process and Punishment*, CRIME & DELINQ., Jan. 1986, at 75, 77 (recommending “just desserts” as fitting punishment for some juvenile offenders).

76. M. A. BORTNER & LINDA M. WILLIAMS, *YOUTH IN PRISON: WE THE PEOPLE OF UNIT FOUR 27* (1997).

77. See GLICK, *supra* note 20, at 9 (stating that society is tired of being intimidated by these youths and is intolerant of providing nurturing treatment programs for violent delinquents); Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 282 (1991).

78. See CHAMPION & MAYS, *supra* note 18, at 148.

79. Klein, *supra* note 25, at 410 (referring to a statement by Senator Ashcroft when he called young offenders “juvenile predators”); See Marx, *supra* note 74, at 1 (identifying juvenile offenders as juvenile “super-predators[s]”); Clarence Page, *No Quick Fix for Keeping Kids Out of Trouble*, CHI. TRIB., Feb. 15, 1998 at, 23 (noting the statement of Princeton University Professor, John Dilulio, who first coined the term “super-predators” when referring to the new breed of young criminals).

80. CHAMPION & MAYS, *supra* note 18, at 74.

81. See *id.*; Guttman, *supra* note 25, at 509. In effect, “society has given up” on these youths. See *id.*

82. See GLICK, *supra* note 20, at 9 (summarizing notions of those favoring certification who argue that juvenile crime has made neighborhoods unsafe and citizens fearful). As a result, juvenile certification is on the rise across the country. See *id.*

Although society has acknowledged the rapid increase in juvenile crime, and that for some, certification is the answer, opponents of the certification process pose a different view, overall, on the issue. Those opposed to the transfer process argue that on the whole, juvenile transfers to the adult system fail to do what the process was designed to do.⁸³ Juveniles were originally transferred to the adult system because a harsher sentence was needed than what was available in the juvenile system.⁸⁴ However, many of the juveniles that are certified receive a lesser sentence under the adult system than they would in the juvenile system.⁸⁵

It has also been shown that most juveniles who are affected by the transfer process are not those for whom the juvenile transfer mechanism was created.⁸⁶ The juvenile transfer process was created to deal with those youthful offenders whose crimes could not be punished in juvenile court.⁸⁷ Yet the juveniles most frequently transferred are often first-time violent offenders and nonviolent repeat offenders who have not been given a chance to benefit from the juvenile system.⁸⁸ They are often transferred to adult criminal court without any prior treatment or rehabilitation programs having been attempted. This is further evidence of the ineffectiveness and misuse of the transfer process. Some commentators suggest that the large number of juveniles being transferred to adult criminal court is indicative of the possible failure of the juvenile justice system.⁸⁹

An additional factor to consider for not transferring juveniles is that judges in adult criminal courts are not as inclined to put a young child in a dangerous and demoralizing adult prison with more hardened criminals.⁹⁰ As a result, juvenile offenders have a lower conviction rate in the adult system, where the charges often result in a plea bargain to a lesser offense or probation.⁹¹

One study revealed that of the ninety-eight percent of juvenile cases transferred, over half of those cases resulted in fines or probation rather

83. See Klein, *supra* note 25, at 401.

84. See Guttman, *supra* note 25, at 509.

85. See *id.* at 529; Klein, *supra* note 25, at 402.

86. See Cintron, *supra* note 20, at 1272.

87. See Guttman, *supra* note 25, at 525 (indicating that transfer was designed for 'chronic' offenders who could not be rehabilitated in the juvenile system).

88. See Cintron, *supra* note 20, at 1272.

89. See *id.* at 1274; see also Hatchett, *supra* note 69, at 83 (agreeing that the current state of the juvenile system is less than desirable).

90. See Guttman, *supra* note 25, at 529; Klein, *supra* note 25, at 402.

91. See DAVID MUSICK, AN INTRODUCTION TO THE SOCIOLOGY OF JUVENILE DELINQUENCY 215 (1995) (noting that most of the juvenile offenders tried in adult court are given probation); Shepherd, *supra* note 69, at 42; Guttman, *supra* note 25, at 529; Klein, *supra* note 25, at 402.

than incarceration for the juvenile.⁹² It is certainly debatable whether judges in adult criminal courts are doing the right thing for a child by giving a lesser sentence or fine as punishment for the horrific crime that caused the child to be transferred.⁹³

Another argument against the certification of juvenile offenders is that in the adult system, sanctions or punishments are imposed at a much slower rate than in the juvenile system.⁹⁴ Studies have shown that for a juvenile to be transferred, convicted, and sentenced in adult court it would usually take an average of 246 days, as opposed to ninety-eight days in juvenile court.⁹⁵ Psychologists argue that swiftness in punishment is essential to the potential for change in a delinquent juvenile's behavior.⁹⁶

Additionally, opponents of the certification process argue that transferred juveniles have a higher rate of recidivism than similarly situated juveniles who were not transferred.⁹⁷ Those juveniles who end up in the adult system are more likely to commit another crime as opposed to juveniles who remain under the jurisdiction of the juvenile justice system.⁹⁸ This result often occurs because juveniles in the adult system are

92. See Cintron, *supra* note 20, at 1273 (1996); Guttman, *supra* note 25, at 529 (1995).

93. Proponents may argue that judges who give lesser sentences are doing what is right by protecting the child from the horrors of adult prison. However, opponents of this view may argue that judges who are not fully punishing these "juvenile predators" are hurting them more because they are not being held accountable for their actions and have not learned anything that would change their behavior in a positive manner. Thus, more crime, and often more serious crime, may likely result.

94. See Klein, *supra* note 25, at 402.

95. See *id.*; Rudman, *supra* note 75, at 75, 83; Shepherd, *supra* note 69, at 39, 42.

96. See Shepherd, *supra* note 69, at 39, 42. Juvenile offenders, though criminals, are still children who are often experiencing adolescence. See *id.* This adolescent period is the most impressionable, and consequently, the most delicate time to sow seeds of behavioral change. See *id.* For juvenile offenders, the sooner treatment or rehabilitative programs are commenced, the higher the likelihood of a positive outcome, which will ultimately result in a more successful and productive citizen. See *id.*; see also Klein, *supra* note 25, at 402 (arguing that the faster a juvenile's case is adjudicated for punishment, the better the chances of rehabilitating that child to ensure behavior modification).

97. See Shepherd, *supra* note 69, at 39, 42; Klein, *supra* note 25, at 403.

98. See SNYDER & SICKMUND, *supra* note 68, at 158 (implying that juveniles who are disciplined under the juvenile court system are less likely to re-offend than juveniles who are disciplined under the adult criminal court system). Three out of five youths who were sanctioned under the juvenile system never returned to the juvenile court for a new offense. See *id.* Thus, it may be reasonably inferred that juveniles who are prosecuted in the adult court system are more likely to re-offend than those offenders in the juvenile system. See *id.*; see also Hatchett, *supra* note 69, at 85.

exposed to more experienced and hardened criminals who often train these juvenile offenders in how to follow their criminal way of life.⁹⁹

III. PROCEDURE OF CERTIFICATION

After exploring the background of the certification process, it is important to examine the procedure of how a juvenile offender is certified or waived into adult criminal court. When a juvenile commits an offense that warrants waiver of juvenile court jurisdiction, there are specific ways that the transfer process may be achieved.

A. *Three Types of Waiver*

It is a settled law that any matter that involves an offense committed by a "child" is under the exclusive original jurisdiction of the juvenile court.¹⁰⁰ However, a juvenile court may "waive" exclusive original jurisdiction and transfer the child to adult criminal court to be prosecuted under the adult system. Traditionally, the decision to waive exclusive original juvenile court jurisdiction was at the discretion of the juvenile court judge.¹⁰¹ Today, this waiver or transfer process may occur by either of three ways: statutory waiver, prosecutorial waiver, or judicial waiver.¹⁰²

1. Statutory/Legislative Waiver

One method by which juvenile offenders may be transferred to adult criminal court is by statutory waiver. Statutory, or legislative, waiver is

99. See Klein, *supra* note 25, at 405 (emphasizing the notion that the violent mentality of juvenile offenders incarcerated with adults is enhanced while in prison and heightened after release).

100. TEX. FAM. CODE ANN. §§ 51.02(2)(A)(B) & 51.04(a) (Vernon 1996).

Section 51.02(2) A "Child" means a person who is:

(A) ten years of age or older and under 17 years of age; or
seventeen years of age or older and under eighteen years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Section 51.04(a):

This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time he engaged in the conduct, and the juvenile court has exclusive original jurisdiction over proceedings under this title.

Id.

101. See SNYDER & MELISSA SICKMUND, *supra* note 68, at 85.

102. See Shepherd, *supra* note 69, at 39, 40; *Child or Adult?*, *supra* note 45, at 11, 12; Cintron, *supra* note 20, at 1263; Guttman, *supra* note 25, at 520; Klein, *supra* note 25, at 384; Sabo, *supra* note 22, at 2425-28; Brown, *supra* note 32, at 52.

accomplished by statutes making it permissible to exclude certain youths from juvenile court jurisdiction who would normally be classified as juveniles and prosecuted under the juvenile system.¹⁰³ These youths are charged with certain offenses, and are automatically excluded from the juvenile system and transferred to the adult system.¹⁰⁴ This exclusion is based solely on either the nature of the offense, or the offense and the age of the juvenile offender combined.¹⁰⁵

Although Texas does not utilize statutory waiver, the Family Code establishes the following ages and offenses for juveniles who could potentially be transferred:

- A. if the child was 14 years of age or older when the offense was allegedly committed, if the offense is a capital felony, an aggravated controlled substance felony or a felony in the first degree, and no adjudication hearing has been conducted on the offense; or
- B. if the child was 15 years of age or older when the offense was allegedly committed, if the offense is a second or third degree felony or a state jail felony, and no adjudication hearing has been conducted on the offense.¹⁰⁶

Supporters of statutory waiver argue that this transfer method is the most effective means for accomplishing society's goals for violent and repeat offenders, which are retribution and deterrence.¹⁰⁷ Statutory waiver also increases equity and adds predictability to the certification process.¹⁰⁸ Those in favor of statutory waiver would also argue that the process is effective because it ensures that only the more serious offenders are subjected to the adult sentences.¹⁰⁹

Although statutory waiver seems to be an effective means of transfer, this method does have severe drawbacks that could be detrimental to those involved. Statutory waiver is not as favored, in comparison to other methods of transfer, because of its adverse effect of sweeping too broadly and unfairly stifling the rehabilitative opportunities of first time juvenile

103. See Klein, *supra* note 25, at 390.

104. See Cintron, *supra* note 20, at 1267-68 (acknowledging the ramifications of statutory waiver); Brown, *supra* note 32, at 52.

105. See Sabo, *supra* note 22, at 2427-28.

106. TEX. FAM. CODE ANN. § 54.02(a)(2) (Vernon 1996). The Texas statutes do not expressly exclude these children; however, the statutes make it permissible to exclude them in some cases. See *id.*

107. See Klein, *supra* note 25, at 391.

108. See *id.*

109. See *id.* (stating that statutory waivers "guarantee" that most serious offenders receive more stringent punishments).

offenders.¹¹⁰ Rehabilitative opportunities are diminished for these juveniles by thrusting them into the adult criminal justice system.¹¹¹ Statutory waiver focuses solely on the offense not the individual offender, leaving no room for discretion to determine whether a juvenile offender can possibly be rehabilitated.¹¹² Thus, children who might be saved through successful treatment programs in the juvenile system, are unfortunately transferred to the adult criminal justice system where only "prison, punishment and stigma await them."¹¹³

2. Prosecutorial Waiver

Prosecutorial waiver is another means of transferring juvenile offenders to adult criminal court. With prosecutorial waiver, there is usually concurrent jurisdiction, meaning that both the juvenile and the adult system have jurisdiction over the case.¹¹⁴ Here, the prosecutor has the exclusive discretion to decide the judicial forum in which the juvenile will be tried.¹¹⁵

Prosecutorial waiver is the least common method of juvenile waiver because it has the potential to be done carelessly and arbitrarily.¹¹⁶ This may be spawned by the fact that the prosecutor's decision, unlike a judge's decision, cannot be appealed.¹¹⁷ Additionally, with prosecutorial waiver, there is a greater likelihood that prosecutors may disproportionately transfer minority youth, as opposed to non-minority youth.¹¹⁸ It has been recognized that minority youth are disproportionately over-represented in the juvenile system.¹¹⁹ In some instances, race and ethnicity have been shown to be factors associated with prosecutors' selection of cases where transfer motions were filed.¹²⁰ Therefore, it is reasonable

110. *See id.* at 390 (inferring that under statutory waiver, many juveniles would automatically be excluded from the juvenile system based on their offenses).

111. *See Rudman, supra* note 75, at 75, 92 (implying that juveniles in adult facilities may not receive proper treatment).

112. *See Cintron, supra* note 20, at 1269.

113. Guttman, *supra* note 25, at 508. Juveniles who end up in adult prison are branded with the negative stigma of being labeled forever as a criminal and bad. *See id.*

114. *See Bishop & Frazier, supra* note 77, at 284-85.

115. *See Cintron, supra* note 20, at 1270; Bishop & Frazier, *supra* note, 77 at 285; Brown, *supra* note 32, at 52.

116. *See Klein, supra* note 25, at 395 (noting that the "potential for abuse is great" when prosecutors have the discretion to file juvenile cases in adult criminal court).

117. *See Cintron, supra* note 20, at 1270.

118. *See Klein, supra* note 25, at 396. African-American youth are especially affected by these disproportionate transfers. *See id.*

119. *See Guttman, supra* note 25, at 526 & n.115.

120. *See id.* at 526-27 & n.116 (quoting Robert O. Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L. J. 975, 1001 (1992)).

to infer that there is a greater likelihood of a disproportionate number of minorities within the system.

Unfortunately, the wrath of disproportionate certification falls more heavily on African-American youth and Hispanic youth than on non-minority youth.¹²¹ The rate of confined African-American youth is three times higher than the rate of confined Caucasian youth.¹²² Additionally, Hispanic youth are incarcerated sixty percent more than Caucasian youth.¹²³ Furthermore, the dispositions, or sentences, received by minority youth continues to be more severe than the dispositions Caucasian youth receive.¹²⁴

Another legitimate concern with prosecutorial waiver is that prosecutors may be more susceptible to the political pressures that are inherent in their jobs.¹²⁵ Most prosecutors' jobs are dependent on the tenure or job security of those who hired them.¹²⁶ Thus, it is unfair to the child to have the fate of their young life hang in the balance of a political struggle.

3. Judicial Waiver

One other method of transferring juveniles to adult court is by judicial waiver. In Texas, the juvenile system utilizes only the judicial waiver process as the mechanism to transfer juvenile offenders to the adult criminal court.¹²⁷ Judicial waiver gives discretionary power to the judge of a juvenile court to decide if a youthful offender should be transferred to the adult system.¹²⁸ Upon a motion from the prosecutor, the judge conducts a hearing to determine whether transfer is appropriate in the case presented.¹²⁹ The decision to transfer a juvenile is based on whether sufficient evidence has been presented to support the conclusion that the juvenile committed the offense and that treatment would be futile.¹³⁰

121. See Klein, *supra* note 25, at 396.

122. See Guttman, *supra* note 25, at 526 n.115.

123. See *id.*

124. See *id.*

125. See Klein, *supra* note 25, at 397; see also Hatchett, *supra* note 69, at 85 (suggesting that politics control the decisions affecting juveniles and the future of our country).

126. See Klein, *supra* note 25, at 397.

127. See Robert O. Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L.J. 975, 981 (1992); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT* 85 (1995); Wilbourn, *supra* note 39, at 11, 12.

128. See Hatchett, *supra* note 69, at 85 (asserting that the decision to transfer a child to adult criminal court should be made by juvenile court judges on a case-by-case basis); Wilbourn, *supra* note 39, at 11, 12; Klein, *supra* note 25, at 385; Brown, *supra* note 32, at 52.

129. See Sabo, *supra* note 22, at 2425.

130. See *id.* at 2436.

While judicial waiver seems to be the best method, there are some possible flaws in the procedure that could prove catastrophic for young offenders. Giving juvenile court judges the sole discretionary power to determine whether a child should be transferred has the potential to result in an abuse of discretion.¹³¹ Some judges may use this power to the detriment of youthful offenders who may come before them. Along with abuse of discretion, there also lies the possibility of political warfare being combated in the courtroom at the cost of a juvenile offender's future.¹³² Judges may be driven to the right decision "politically," when it is in direct conflict with the right decision for the child involved.¹³³ This problem of "political warfare" is especially prevalent in Texas because most juvenile court judges are elected officials and thus may sometimes be forced into the best decision "politically" rather than for the juvenile.

In spite of its drawbacks, judicial waiver is the most common method of transfer,¹³⁴ and is most favored because it allows for a full examination of the facts of a case to determine if transfer is appropriate.¹³⁵ Judicial waiver allows the judge to consider the totality of the circumstances, including whether the judge believes that the child is amenable to treatment.¹³⁶ This full assessment gives more children an opportunity to get help for the problems that may be at the root of their delinquent behavior, and ultimately gives the child a second chance at life.

131. See Guttman, *supra* note 25, at 531, 535-37 (discussing the possibility of judicial waiver being used as a "rubber stamp" for transfer motions, resulting in an abuse of discretion by judges, further noting that judicial waiver must be used carefully "to avoid abuses").

132. Political warfare in the courtroom could result in a situation where a judge may want to try to do the best thing for the child by allowing the child to go through treatment and rehabilitation programs. However, because of political pressures to "get tough on crime," a judge may be more inclined to certify the child as an adult and send him/her off to the adult criminal court to receive punishment for their crime. See Klein, *supra* note 25, at 387 (referring to public pressure to "get tough" on juvenile crime). This could prove detrimental to the youthful offender involved because a child who would otherwise receive a second chance at life through treatment and rehabilitation, could possibly be forced into an adult jail to become a criminal expert, thus increasing their criminal activity and decreasing their chance for future success.

133. See Hatchett, *supra* note 69, at 85 (suggesting that judges may allow "reactionary politics" to control decision-making); Guttman, *supra* note 25, at 520 (referring to the public pressure that judges face when deciding whether or not to transfer a juvenile offender).

134. See Bishop & Frazier, *supra* note 77, at 283; Klein, *supra* note 25, at 385.

135. See Sabo, *supra* note 22, at 2425-26 (noting that the judge considers the child's offense and personal circumstances to determine whether the child is amenable to rehabilitative treatment in the juvenile system, or whether the juvenile court should waive jurisdiction).

136. See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 701 (1991) (implying that by using judicial waiver, juvenile judges are allowed to consider many factors, including whether a juvenile offender is amenable to treatment).

For example, the totality of the circumstances review was used in one case involving a juvenile, age fifteen, who was charged with first-degree murder.¹³⁷ In this case, the child was facing the possibility of transfer to the adult criminal justice system, where, if convicted, he would possibly receive a life sentence in an adult prison.¹³⁸ However, the judge listened to all the factors and examined the nature of the offense, the child's prior record, the child's maturity, the child's family history, and the child's amenability to treatment and rehabilitation.¹³⁹ Ultimately, the judge concluded that the child would be best treated in the juvenile justice system.¹⁴⁰

IV. COMPARISON OF CERTIFIED JUVENILES FROM DIFFERENT ETHNIC BACKGROUNDS

A. *Race as a Factor in the Rate of Juveniles Arrested*

The arrest rate of juvenile offenders is yet another area that shows an excessive number of minority youth being targeted.¹⁴¹ When compared with their numbers in the general population, the arrest rate of minority youth is greatly disproportionate.¹⁴² For instance, nationwide, African-American youth constitute about fifteen percent of all juveniles ages ten to seventeen.¹⁴³ However, research shows that they comprise approxi-

137. See Guttman, *supra* note 25, 518-20 (referring to the case history of a young offender charged with first degree murder who was not certified as an adult due to the juvenile judge's consideration of the totality of the circumstances). In this case, the young boy, Steven, was accompanied by two older youths and had a gun with him only for protection. See *id.* at 519. When shots began to ring out, Steven nervously retaliated by firing, shooting one person six times and another person once or twice. See *id.*

138. See *id.* at 519.

139. See *id.* at 518-20. In this particular case, the child had an I.Q. of seventy-seven and an expressive language disorder; he experienced low grades in class and failed classes in seventh grade. See *id.* at 518, 520. He also missed over eighty days of school. See *id.* at 519. When he did attend school, the child was withdrawn and depressed. See *id.* The child's mother responded in a negative way to his behavior and finally locked him out of the house. See *id.* The child was alienated from his family and his peers. See *id.* at 520. He was also extremely susceptible and very vulnerable to negative peer pressure, finding his sense of self in others. See *id.* at 519. All these circumstances were compounded with a life of economic deprivation and frequent exposure to crime and drugs. See *id.* at 520. Despite public pressure to transfer Steven, the judge considered all these circumstances and decided to maintain juvenile court jurisdiction. See *id.* at 519-20.

140. See *id.* at 518-20.

141. See SNYDER & SICKMUND, *supra* note 68, at 104. In 1992 violent crime arrest rates for African-American youth were five times the arrest rate of Caucasian youth. See *id.*

142. See Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 392 (1996).

143. See *id.* at 392.

mately twenty-eight percent of arrested youth.¹⁴⁴ According to the National Juvenile Court Data Archive, African-American youth are arrested more frequently than other youth.¹⁴⁵ African-American teenagers, who were found to have committed approximately the same amount of violent crimes as Caucasian teenagers, were four times more likely to be arrested for these crimes than Caucasian teenagers.¹⁴⁶ Likewise, it is more probable that young Hispanic males will be detained at intake than other youth.¹⁴⁷ Overall, minority male youth are more likely to be incarcerated than their non-minority peers.¹⁴⁸

One qualitative study revealed that decisions to arrest juveniles are based on the youth's "group affiliation, age, race, grooming, dress, and demeanor."¹⁴⁹ The perception of how a juvenile is viewed by law enforcement officials plays a large part in many arrests. For example, youth who are perceived as dangerous or criminal are less likely to be thought of as innocent.¹⁵⁰ Furthermore, it has been determined that race has a hand in the offense(s) for which a juvenile offender is charged.¹⁵¹ This is evident in the direct causal link that has been exhibited between being charged with more serious offenses and being an African-American youth.¹⁵²

One particular research study, aimed at assessing the issue of race and its effects on arrest among African-American youth, gathered a sample of 1,777 juvenile cases and 170 in-depth interviews.¹⁵³ This study revealed that police officers frequently stopped and questioned minority youth; these youth were in their own neighborhoods and were simply standing at

144. *See id.* at 392 & n.2 (citing the arrest statistics compiled by the Federal Bureau of Investigation for youths who commit property, drug or violent crimes).

145. *See* Coramae Richey Mann, *A Minority View of Juvenile Justice*, 51 WASH. & LEE L. REV. 465, 465-66 (1994); Pogue, *supra* note 71, at 27.

146. *See* Schiraldi, *supra* note 1, at 3.

147. *See* Pogue, *supra* note 71, at 31. Hispanic males are more likely to be detained in large urban counties in Texas than Caucasians. *See id.*

148. *See id.* at 27.

149. *Id.* at 28 (citing Pivlian and Briar's 1964 classic study of police discretion in detention and arrest of youthful offenders); *see also* JUVENILE JUSTICE: POLICIES, PROGRAMS, AND SERVICES 153-55 (Albert R. Roberts ed., Nelson-Hall 2d ed. 1998) (discussing the police discretion that police officers use in stopping delinquent youth); Darlene J. Conley, *Adding Color to a Black and White Picture: Using Qualitative Data to Explain Racial Disproportionality in the Juvenile Justice System*, J. OF RES. IN CRIME AND DELINQ., May 1994, at 140-43.

150. *See* Pogue, *supra* note 71, at 28.

151. *See id.* at 29.

152. *See id.*

153. *See* Conley, *supra* note 149, at 135, 139; Arthur H. Garrison, *Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 51 (1997).

a corner or walking down the street.¹⁵⁴ Another study revealed the astonishing fact that bias may play a part in some of the charging practices used by police, which ultimately result in more lenient or more sympathetic treatment of Caucasians.¹⁵⁵ The study proclaimed the very discouraging fact that “[African-Americans] are more likely than [Caucasians] to be charged with more offenses, and [Caucasians] are more likely than [African-Americans] not to be charged.”¹⁵⁶

Additional research was conducted in a large urban county in Texas by randomly selecting a sample of 300 juvenile offenders.¹⁵⁷ The sample was evenly distributed: 1/3 African-American, 1/3 Hispanic, and the remaining 1/3 Caucasian.¹⁵⁸ Once more, a sizeable disparity was demonstrated between the detention of minorities and non-minorities.¹⁵⁹ Of the 300 detainees, forty-nine percent of the African-American youth and thirty-six percent of the Hispanic youth were detained, while only twelve percent of the Caucasian youth were detained.¹⁶⁰

Researchers have tried to determine why minority youth are overly represented in the juvenile justice system. One commentator has settled on the viewpoint of selection bias.¹⁶¹ Selection bias considers actions, notwithstanding intent, that yield a disproportionate arrest rate among a specific group.¹⁶² Within this viewpoint, the author advances the argument that African-Americans and Hispanics are not committing more crime, but rather are subjected to harsher treatment and are more likely to be “caught.”¹⁶³ When comparing the arrest rates for violent crimes between Caucasian, African-American and Hispanic youth, the numbers ring a resounding disparity. Minority juveniles are arrested at a higher rate than non-minority juveniles.¹⁶⁴

154. See Conley, *supra* note 149, at 135, 141; see Garrison, *supra* note 153, at 51 (examining the study conducted by Darlene J. Conley).

155. See Richard Sutphen, et al., *The Influence of Juveniles' Race on Police Decision-Making: An Exploratory Study*, 44(2) JUV. & FAM. C1. J., 1993, at 69, 75; see also Garrison, *supra* note 149, at 53.

156. Sutphen, *supra* note 155, at 75; see also Garrison, *supra* note 153, at 53.

157. See Pogue, *supra* note 71, at 31. The study was conducted by Texas A & M under Dr. Ramdas Menon of Texas A & M University and Dr. Paul E. Tracy, Professor of Political Economy and Sociology at the University of Texas at Dallas. See *id.* at 30.

158. See *id.* at 31.

159. See *id.*

160. See *id.*

161. See *id.* at 29; see also Andrew Blum, *Jail Time by the Book*, ABA J., May 1999, at 18, 18 (inferring from a University of Washington Study that selection bias does exist because minority youth seem to be punished more harshly than non-minority youth)

162. See Garrison, *supra* note 153, at 45.

163. See Pogue, *supra* note 71, at 29.

164. See Garrison, *supra* note 153, at 33.

A study conducted in Dallas County revealed the fact that although African-Americans made up only twenty-five percent of the Dallas County population, they represented nearly fifty percent of all referrals to the juvenile system in Dallas.¹⁶⁵ Moreover, the study found that African-Americans made up more than half of the youth in secure detention and sixty percent of the referrals made by Dallas County to the Texas Youth Commission.¹⁶⁶ When considering these shocking statistics, which show that minority juveniles are being arrested more than non-minority juveniles, the increased rate of juvenile certification for minority juvenile offenders seems more explicable.

B. *Race as a Factor in Juvenile Certification*

The certification or transfer process is a difficult process for all persons subjected to it. Youthful offenders are often afraid, because of their uncertainty of the unknown, and contemplate what will happen to them in adult prison.¹⁶⁷

Although the certification process touches many youth, minorities are more adversely affected than others.¹⁶⁸ This process specifically affects African-American and Hispanic youth, with a greater impact evident in the African-American community.¹⁶⁹ Delinquency cases involving African-American youth have a higher probability of being transferred than cases involving other juvenile delinquents.¹⁷⁰ In particular, studies have shown that more African-American youth are transferred to adult court than Caucasian youth.¹⁷¹

165. See Pogue, *supra* note 71, at 32. The decision to conduct the study was made in September of 1994 and the report was completed in January of 1996. See *id.* at 37 n.39. Therefore, it may be inferred that the study was conducted between late 1994 and early 1996.

166. See *id.*

167. See Klein, *supra* note 25, at 405 (expressing the fear of one juvenile who was incarcerated in an adult facility).

168. See GLICK, *supra* note 20, at 14 (determining that minority youth make up the majority of juveniles adjudicated as adults); Klein, *supra* note 25, at 398.

169. See GLICK, *supra* note 20, at 14; Butts, *supra* note 57.

170. See Butts, *supra* note 57.

171. See GLICK, *supra* note 20, at 28. In Texas, 130 African-American juveniles were held as adults, while only 34 Caucasian juveniles acquired the same status. Klein, *supra* note 25, at 398 (referring to a study showing that African-American juveniles were transferred more than Caucasian juveniles). *But cf.* Guttman, *supra* note 25, at 537 n.176 (citing Robert O. Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L. J. 975, 1023 (1992), who discounts the notion that minorities were transferred at a higher rate than non-minorities, finding that Caucasians were transferred at a higher percentage than African-American or Hispanic youth; *But see* Guttman, *supra* note 25, at 537 (recognizing that this notion of non-minorities being transferred more than minority youth can be attributed to the fact that in Texas, prosecutors do not file transfer

Assertions that minority juveniles are more adversely affected by the criminal system than their non-minority counterparts ring true in the alarming statistics surrounding minority crime rates and detention. For instance, in 1991, African-Americans comprised fifteen percent of the juvenile population, yet these African-American youth represented fifty-two percent of all cases transferred to adult criminal court.¹⁷² In 1994, of the delinquency cases involving African-American youth, 1.9 percent were transferred to adult criminal court, in comparison to only 1.2 percent of cases involving Caucasian youth being transferred.¹⁷³ In 1995, minority youth constituted approximately thirty-two percent of the youth population in the country.¹⁷⁴ However, at that time, minority youth represented sixty-eight percent of all juveniles in secure detention and sixty-eight percent of juveniles in secure institutional environments.¹⁷⁵

The African-American population is so prevalent in the criminal justice system that studies have revealed the startling fact that one in four African-American children born in the United States in 1997 will serve a prison term at some time in their lives.¹⁷⁶ With all factors being equal (age, gender, seriousness of offense and prior records), non-Caucasian youth had a higher probability of receiving the harshest discipline, as opposed to Caucasian youth.¹⁷⁷ Furthermore, one study revealed the probability of an African-American youth being committed to a corrective agency; an African-American youth charged with a violent felony offense was over three times more likely than a Caucasian youth charged with the same offense to be sent to a corrective agency.¹⁷⁸

motions against Caucasians as frequently as prosecutors file transfer motions against minority youth; thus, the number of transfer motions are likely to seem somewhat higher for Caucasian juvenile offenders).

172. See Klein, *supra* note 25, at 398 (illustrating the percentage of African-American youth, ages 10 to 17, in the United States compared with the percentage of African-American youth who were certified).

173. See MELISSA SICKMUND ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 31 (1997); U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996 479 (Kathleen MaGuire & Anne L. Pastore eds., 1997).

174. See HEIDI M. HSIA & DONNA HAMPARIAN, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: DISPROPORTIONATE MINORITY CONFINEMENT: 1997 UPDATE 1 (Sept. 1998).

175. See *id.*

176. See Schiraldi, *supra* note 1, at 3.

177. See Blum *supra* note 161, at 18 (relying on a University of Washington study which suggests that minority youth receive harsher sentences than non-minority youth); Schiraldi, *supra* note 1, at 3.

178. See Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 623 (1993).

Research by the Justice Department revealed the fact that in two-thirds of studies conducted, race was shown to have some effect at some stage in the juvenile justice system.¹⁷⁹ Specifically, race was thought to affect the motion for transfer decisions.¹⁸⁰ When viewing the minority population overall in Texas, 77.3 percent of African-Americans were transferred and 74.5 percent of Hispanics were transferred.¹⁸¹

C. *Race as a Factor with Determinate Sentencing Hearings*

Release/transfer hearings seem to be another area where racial disparities lie with regard to juvenile offenders. In 1987, Texas passed the Determinate Sentencing Act ("Act"),¹⁸² which extended the jurisdiction of the juvenile court. Under determinate sentencing, children who have been adjudicated delinquent, begin their sentence under the jurisdiction of the juvenile court, receiving all the beneficial treatment programs available in the juvenile system.¹⁸³

The Act is significant because it provides an intermediate measure of adjudication between the traditional juvenile delinquency proceedings and the much feared certification or transfer to adult criminal court.¹⁸⁴ Having been referred to as "a happy medium,"¹⁸⁵ determinate sentencing allows stiff criminal punishment, while maintaining jurisdiction over the juvenile, who can benefit from the effective treatment and rehabilitative programs available in the juvenile system. Under the amended Act, when the child reaches the age of seventeen and a half, and no later than thirty days prior to the child's eighteenth birthday,¹⁸⁶ a hearing is held in juvenile court to determine if the child: (1) will be released at that time, (2) transferred to an adult facility, or (3) remain in a juvenile facility for the remainder of the detention period.¹⁸⁷

179. See Schiraldi, *supra* note 1, at 3.

180. See Dawson, *supra* note 127, at 1023.

181. See *id.* at 982, 1023. These statistics were gathered from an assessment surveying 112 cases from Sept. 1, 1987 to Aug. 31, 1988. See *id.*

182. See Beth Weinmann, *Release/Transfer Hearings Under the Determinate Sentencing Act*, STATE B. OF TEX. SEC. REP. JUV. L., Sept. 1995, at 21, 21.

183. See *id.* (indicating that under Determinate Sentencing, a juvenile offender begins his/her sentence at the Texas Youth Commission).

184. See Lam, *supra* note 47, at 45.

185. *Id.* (referring to determinate sentencing as a happy medium between traditional juvenile proceedings and transfer to adult court).

186. See Weinmann, *supra* note 182, at 21.

187. These provisions can be found in the Texas Family Code which states the following:

§ 54.11

(i) On conclusion of the hearing on a person who is referred for transfer. . . , the court may order:

Statistics from these release/transfer hearings reveal that a disproportionately high number of minority juvenile offenders are being transferred to adult prisons or jails.¹⁸⁸ One study showed that of the 44.5 percent of detained African-American youth who had a release/transfer hearing, 47.3 percent were transferred to an adult facility.¹⁸⁹ The same study showed that of the 31.1 percent of detained Hispanic youth who also had a hearing, 34.4 percent were sent to an adult jail or prison.¹⁹⁰ These statistics reflecting the disposition of minority youth are significantly higher than those statistics reflecting the disposition of non-minority youth. Of the 23.4 percent of detained Caucasian youth who had a release/transfer hearing, only 18.3 percent were transferred to the adult penal system.¹⁹¹ Thus, the overall chances of being transferred to an adult jail or prison are 49.2 percent for Hispanics, 47.3 percent for African-Americans, and 34.7 percent for Caucasians.¹⁹²

Additionally, some counties have a higher transfer rate than others. In past years, one of the highest rates of transfer in Texas occurred in Bexar County, which had a transfer rate of seventy-eight percent.¹⁹³ Of the seventy-eight percent of youths transferred in Bexar County, seventy-eight percent of these youths were Hispanic.¹⁹⁴ Dallas County also transferred many juveniles, with that county's transfer rate at forty-one percent.¹⁹⁵

(1) the return of the person to the Texas Youth Commission; or

(2) the transfer of the person to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of the person's Sentence

(j) On conclusion of the hearing on a person who is referred for release under supervision. . . . the court may order the return of the person to the Texas Youth Commission

TEX. FAM. CODE ANN. § 54.11 (i)(1)(2) & (j) (Vernon 1996). This three-tier disposition process was added to the Act in its 1991 amendment. See *In re* H.V.R. 974 S.W.2d 213, 214 (Tex. App.-San Antonio 1998) (listing the possible disposition options under determinate sentencing); see also Weinmann, *supra* note 182, at 21-22. Originally, the Act only had two disposition options: "(a) release under the supervision of TYC or (b) transfer to the TDCJ." See *id.* at 21. There were concerns that the two-tier options were too rigid and too inflexible, causing an unreasonable decision-making process. See *id.* As a result of these concerns, the legislature amended the Act devising the current three-tier disposition options. See *id.* The new option of recommitment to the TYC provides a device for keeping juveniles in custody for some time, without resulting to the discouraging transfer to the adult system. See *id.* at 22.

188. See Weinmann, *supra* note 182, at 25.

189. See *id.*

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.*

194. See Weinmann, *supra* note 182, at 26.

195. See *id.* at 25.

The seven most active counties in Texas combined transferred ninety-five percent of the minority youth transferred, with forty-nine percent being Hispanic juvenile offenders and forty-six percent being African-American juvenile offenders.¹⁹⁶ Again, the rate of Caucasian juvenile offenders was below that of minority youth, with the Caucasian rate of transfer totaling thirty-five percent over the seven counties.¹⁹⁷

D. *Do People Try Harder for Non-minority Children?*

America has a model system in place for dealing with juvenile delinquency.¹⁹⁸ This system is made up of numerous vocational, educational, rehabilitative and treatment oriented programs that have been established with the primary goal of helping a juvenile offender.¹⁹⁹

The system is supposed to operate as a working utopia that is advantageous for all juvenile offenders. However, the system does not seem to be utilized fully until a Caucasian child is arrested.²⁰⁰ It is then that "those children," the non-minorities, get the FULL benefit of ALL the available treatment programs, and everyone rallies around to show support.²⁰¹ Usually, family members and neighbors from all around come to vouch for the non-minority child, community service is set up, restitution is arranged and other measures are taken to aid the non-minority juvenile offender.²⁰²

Unfortunately, a much different fate lies ahead for African-American and Hispanic juvenile offenders. The seemingly "model system" does not seem to function at its fullest capacity when the fate of a minority child is at stake.²⁰³ Few seem to rally around to offer support for the minority child. "[W]hile we as a society are willing to give second chances to white children, that understanding gets lost when it comes to black or Latino kids."²⁰⁴ The truth remains that not all children come from neighbor-

196. *See id.* The seven most active counties are: Dallas, Harris, Bexar, Tom Green, Travis, Bell, and McLennan. *See id.*

197. *See id.*

198. *See* Schiraldi, *supra* note 1, at 3 (referring to the current juvenile justice system).

199. *See* Interview with the Honorable Carmen Kelsey, *supra* note 47 (discussing some of the programs available within the juvenile system). There are: community service projects; counseling programs; restitution programs; family violence prevention and anger management classes; and job training programs. *See id.*

200. *See* Schiraldi, *supra* note 1, at 3.

201. *See id.* (interpreting the high level of support for the child to indicate FULL benefits or "special attention").

202. *See id.*

203. *See id.* (inferring that minority children are treated differently).

204. Christopher John Farley & James Willwerth, *Crime/A TIME Investigation: Dead Teen Walking, The U.S. Is One of the Few Nations That Put Juveniles on Death Row*, TIME, Jan. 19, 1998, at 50 (quoting Steven Hawkins' interpretation of the fact that two-thirds of

hoods with stable families, high socio-economic backgrounds and low crime rates.²⁰⁵ There are some children, more often minority children, who are branded by the poverty and instability that has unfortunately plagued their lives and has ultimately led to their delinquent path of self-destruction.²⁰⁶ One commentator writes, “[t]oo often . . . [African-American youth] are defended by apathetic attorneys, ministered to by disinterested bureaucrats, and imprisoned in dangerous warehouses.”²⁰⁷

Thus, to punish these disadvantaged children more harshly is to punish them not for their criminal or delinquent acts, but for who they are.²⁰⁸

V. I AM 14 & I AM IN ADULT JAIL: WHAT IS GOING TO HAPPEN TO ME?

A. *Ramifications/Consequences*

When young children are certified to stand trial as adults and sentenced under the adult system, there are several severe ramifications. One overwhelming repercussion of being prosecuted in the adult system is that these children are no longer protected from any future stigma because of their delinquent act.²⁰⁹ The “juvenile” status protects the child’s name from any criminalizing connotations.²¹⁰

However, when a child is prosecuted in the adult system, that child must permanently live with the negative stigma that befalls him or her and will forever be tarnished by the negative label of “criminal.”²¹¹ As a

juvenile offenders on death row are minorities). Steven Hawkins is the Executive Director of the National Coalition to Abolish the Death Penalty. *See id.*

205. *See Pogue, supra* note 71, at 36.

206. *See Guttman, supra* note 25, at 516. Factors such as family problems, lack of bonding, peer pressure, and economic deprivation tend to cause delinquent behavior. *See generally* Hatchett, *supra* note 69, at 87 (delineating some of the risk factors children face).

207. Schiraldi, *supra* note 1, at 3. Vincent Schiraldi is the Director of the Justice Policy Institute in Washington, D. C. *See id.*

208. *See Pogue, supra* note 71, at 36.

209. *See Guttman, supra* note 25, at 529.

210. When a child is still labeled as a “juvenile,” they are protected from any criminal connotations being attached to them personally. *See A Juvenile v. Commonwealth*, 347 N.E. 2d 677, 684 (Mass. 1976); Judge Lindsay G. Arthur and Lori J. Schwartz, *Certification-An Overview*, 44(2) *JUV. & FAM. Ct. J.* at 61, 61 (1993). This may be demonstrated in the media’s refusal to show the face of a juvenile offender when appearing in court and unwillingness to print in newspapers the names of minor children involved in crimes. A juvenile offender’s name is often not printed unless the juvenile is certified to stand trial as an adult in criminal court, where they are no longer viewed as a child.

211. *See Guttman, supra* note 25, at 529. The negative stigma of being labeled as a “criminal” comes as a result of the youthful offender being identified as a criminal and by having his/her name and face attached to their criminal act. *See id.* A juvenile offender, who is tried as an adult, is plagued with a criminal record that catalogues all criminal activity and leaves the young criminal with a negative name. *See id.*

result of having a criminal record, these children have difficulty finding employment, and are thereby, deprived of any opportunity to succeed in life.²¹² The negative stigma of "criminal" seems to forever haunt these juvenile offenders, making the probability of future success scarce and almost non-existent. Consequently, repeat offenses often occur among these youth.²¹³

Another consequence of transferring a juvenile offender to adult criminal court is the possibility that these children will be mistreated. Studies have shown that juveniles in adult facilities are more likely to be sexually and physically abused.²¹⁴ Of the delinquent youth in adult facilities, 45.7 percent of juveniles in adult facilities reported being victims of violent attacks.²¹⁵ Additionally, juveniles in adult facilities are five times more likely to be sexually assaulted.²¹⁶ Furthermore, juveniles are twice as likely to be physically beaten by staff members in adult facilities than in juvenile facilities.²¹⁷

Besides the physical and sexual abuse, mental instability is also very prevalent among juveniles in adult facilities.²¹⁸ These children are very fearful of being in adult jails.²¹⁹ Studies have shown that the suicide rate is eight times higher for juveniles in adult facilities than for youth in juvenile facilities.²²⁰ While mental instability is present in youngsters in juvenile facilities, these instances are more resounding in juveniles in adult facilities. These adult facilities create an unfamiliar environment for children.²²¹ The fear of what may happen to them often results in suicide as

212. *See id.*

213. *See* Hatchett, *supra* note 69, at 85; Shepherd, *supra* note 69, at 42; Klein, *supra* note 25, at 403, 410.

214. *See* Klein, *supra* note 25, at 404; Brown, *supra* note 32, at 52.

215. *See* Klein, *supra* note 25, at 404.

216. *See id.*

217. *See id.*

218. *See id.* at 405 (referring to the increased suicide rate of juveniles in adult facilities). One may argue that the increase in suicides seems to indicate some level of mental instability for these juvenile offenders.

219. *See id.*

220. *See* Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 *IND. L.J.* 999, 1006 (1991); Klein, *supra* note 25, at 405.

221. *See* Interview with Juvenile Detention Worker, in San Antonio, Tex. (Oct. 8, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). This unfamiliar environment is caused by children being thrust into facilities where other offenders are often older than the juvenile offenders, and who may be more acquainted with the underworld of crime *See id.* This unfamiliar environment also comes from the difficulty that juveniles encounter in adult facilities trying to cope with the different changes from a juvenile detention center to an adult jail. *See id.* Little things such as the meals that the children are served take a mental toll on the youth. *See id.* Often it is hard for a fourteen-year-old child in the adult facility to become accustomed to being served black coffee with his/

an easy out.²²²

Also, juvenile delinquents in adult facilities do not receive as much educational or vocational training as those youth in the juvenile system.²²³ It is crucial for these juvenile offenders to receive educational and vocational training because that knowledge and skill will enable them to go out into society and get jobs and become productive law-abiding citizens. With an education and job training skills, these youth are more likely to be able to earn a living and journey successfully through life's rites of passage. They may no longer be compelled to succumb to the pressures of the streets because they will be able to increase their self-esteem, overcome those obstacles and lead productive lives.

The juvenile system overall, and particularly the Texas Youth Commission, has a vast variety of educational, vocational and rehabilitative programs available for juvenile offenders.²²⁴ These programs are available to educate juveniles while they are being detained in order to give them

her breakfast. *See id.* Juveniles may have a hard time coping with these changes because, as children, many kids do not even drink coffee, especially black coffee. *See id.* At least in the juvenile facilities, the children are still, somewhat, treated as children with respect to meals. *See id.* The meals usually consist of some type of cereal or other foods juveniles are more inclined to eat. *See id.*

222. *See* Chung, *supra* note 220, at 1006 (inferring that the overwhelming feelings of fear and anxiety experienced by juveniles in adult facilities may drive them to suicide as the solution and only escape). Among juveniles incarcerated in adult facilities, the suicide rate was five times higher than that of other youth. *See id.* Even more alarming was the fact that suicide rates for juveniles in adult prisons was eight times higher than suicide rates for youth in juvenile facilities. *See id.*; Klein, *supra* note 25, at 405.

223. *See* Cintron, *supra* note 20, at 1273 (concluding that because resources are so limited in the adult criminal court system, there is little left for juvenile offenders); Klein, *supra* note 25, at 403 (discussing the circumstances of one juvenile who was incarcerated in an adult facility where he received no services). If allowed to remain in a juvenile facility, the child would have had the opportunity to receive some helpful services. *See id.*

224. *See* Jody Roberts, *The Change in the Philosophy and Operation of the Texas Youth Commission*, STATE B. OF TEX. SEC. REP. JUV. L., Mar. 1998, at 21, 22 (discussing the resocialization program of the Texas Youth Commission (TYC) which focuses on correctional treatment, work, academic and career technology education, and disciplinary training). The correctional treatment program encompasses group therapy where the juveniles must go through different phases. *See id.* at 22-23. For juveniles at one TYC facility, the first step is memorizing the "lay-out," which includes the "juvenile's name, hometown, age, crime, and the name of juvenile's victim." *Id.* at 23. The work aspect of resocialization allows the youthful offenders to develop a wholesome work ethic. *See id.* This part of the program is achieved by allowing the juveniles to maintain the grounds of the different juvenile facilities. *See id.* The heart of the program, academic and career education, is aimed at educating the youth by teaching them the fundamental educational elements of reading, writing and arithmetic, and showing them that they can learn. *See id.* at 22. The disciplinary training part of the program is achieved by rigorous physical exercise, by teaching social skills, and through interpersonal relations. *See id.*; *see also* Weinmann, *supra* note 182, at 26 (discussing two of the programs offered to juvenile offenders

vocational skills. These skills will help the youth to earn a living upon their release from the system, and to be rehabilitated in a way that would make them more productive citizens. Some of the programs in the juvenile system include: community service projects, restitution, counseling, anger management classes, Operation Outreach at a local prison, the Challenge ropes course, and job training programs.²²⁵ These programs are geared towards getting at the heart of what is causing the delinquent behavior and re-channeling that negative energy into something positive by way of treatment and rehabilitation, which will, hopefully, change the child's life for the better.

In adult jails such resources are very limited, if available at all.²²⁶ Since the adult system has an overwhelming caseload and limited resources, adult criminal courts are not able to rehabilitate juvenile offenders.²²⁷ So, baring in mind the fact that these juveniles are being thrust into the adult system at the tender ages of fourteen and fifteen and are not receiving rehabilitative treatment, what will happen to these children when they are released?

While proponents of the certification process make valid arguments regarding why juvenile delinquents should be certified to stand trial as adults, it appears that little thought has been given to the aftermath of this disturbing decision. Certification of juvenile offenders is only a

by the Texas Youth Commission: (1) capital offender treatment program and (2) sexual offender treatment program).

225. See Interview with the Honorable Carmen Kelsey, *supra* note 47 (expanding upon the programs available). Some of the programs and goals include: community service projects to assist juvenile offenders in reaching out to the community that they have, in some way, harmed in an effort to make amends; counseling programs to get these troubled youths to discuss the underlying issues that have been the root of their delinquent behavior; restitution programs to give these juveniles a chance to pay back a debt to society and to the victim of their crime; and family counseling to aid the juveniles and their parents in how to better communicate to alleviate future criminal activity. *See id.* Other programs include: Operation Outreach at a local prison used primarily as a "scared straight" tactic giving juveniles a first-hand look at what goes on in an adult prison to hopefully dissuade them from committing future crimes, and Challenge ropes course to allow the juveniles to reach inside themselves and learn how to use tools other than violence to complete tasks and to achieve their goals; the ropes course also introduces these juveniles to the important aspects of effective communication and team building in an effort to decrease future criminal activity. *See id.* Additionally, there are family violence prevention and anger management classes geared at helping these youth and their families learn how to solve conflicting problems without resorting to violence, and job training programs, which are utilized in an effort to teach these wayward youth some important vocational skills that will be significant in their job marketability and in attaining future success. *See id.*

226. See Cintron, *supra* note 20, at 1273.

227. *See id.* at 1273 (1996) (acknowledging that adult courts use their limited resources for the adult criminals, leaving the juvenile offenders who are in adult criminal court to receive the "leftover resources").

“quick fix” decision that is proving to be an ineffective solution to juvenile crime.²²⁸

For instance, if a child is certified as an adult at the age of fourteen and is sentenced to a twenty-year sentence, what will happen when that child, now age thirty-four, is released from prison? The reality is that a child who has been imprisoned in an adult facility for an extended period of time is now more of an expert in the field of crime.²²⁹ They have studied under the tutelage of some of the most dangerous and hardened criminals, and may have been taught everything there is to know about the “facts of life” – criminal life.

Juveniles incarcerated in adult facilities are forced to become more violent.²³⁰ As inmates who are certainly younger and may be smaller than the average adult inmate, juveniles have to become more violent in adult facilities because it is the only way to survive.²³¹ They must toughen up and fight to survive, or they may be subjected to the awful horrors of abuse and violence that many juveniles in adult facilities face. The underlying truth is that the way these children are treated, and the level of treatment and rehabilitation that they receive while incarcerated, will ultimately affect the way they behave when they are reintegrated into society.²³²

Many juveniles who have made bad choices that have landed them in adult jail are simply misguided youth who lack structured guidance.²³³ They are unfairly categorized and are subsequently thrown into an environment where they develop the characteristics and mindsets of criminals.²³⁴ Consequently, society is left to deal with the wrath of un-reformed juveniles.²³⁵

Another problem with juveniles who have been certified and placed in adult facilities is that children who have been confined for an extended

228. See GLICK, *supra* note 20, at 10 (1998); Hatchett, *supra* note 69, at 85; Klein, *supra* note 25, at 401.

229. See Hatchett, *supra* note 69, at 85 (suggesting that juveniles placed in institutions learn nothing more than how to be better criminals).

230. See Klein, *supra* note 25, at 405.

231. See *id.*

232. See Guttman, *supra* note 25, at 509.

233. See Aron & Hurley, *supra* note 20, at 63 (1998) (noting that these youth have “erred” and merely need more guidance).

234. See *id.*; Hatchett, *supra* note 69, at 85.

235. See Hatchett, *supra* note 69, at 85 (recognizing that children released from adult institutions return to society in no better shape than before they were detained); Cintron, *supra* note 20, at 1275 (concluding that because so many juveniles are transferred to adult courts without receiving any type of rehabilitative treatment, nor are they forced to accept full responsibility for their actions in the adult system, these juveniles return to society the same way).

period of time become “institutionalized.”²³⁶ They do not know how to function as productive adult citizens. This idea of becoming “institutionalized” was evident in the case of T.J., the juvenile offender introduced at the beginning of this comment. T.J. did not know how to buy bread; he did not know how to pay at a restaurant; he did not know how to use a bankcard or how to manage a checkbook.²³⁷ This lack of common sense knowledge was a result of T.J. growing up in prison where none of those functions were necessary.²³⁸ In prison, an incarcerated person just follows orders and has little autonomy regarding life decisions.

Juveniles in adult facilities are not given a chance to learn what it is like to live a normal adult life. All these children know of the adult world is what is demonstrated to them by criminals who have been their only role models or guides for the term of their incarceration.

Also, in many respects, these juveniles still have the mentality of children because it was at this stage of their adolescence that they made a bad choice. This bad choice caused their innocence to be snatched away, forcing them to become acquainted with a dysfunctional and confusing world of crime and criminals. Therefore, these children are not sure how to function as productive citizens in the “real world.”

Fortunately, this desolate fate does not occur for all juvenile offenders. Research results show that Caucasian youth are moving forward with jobs and relationships that may alter their path from a life of violence to becoming a success story.²³⁹ After the teen years, Caucasian teenagers “mature out” of criminal and violent behavior.²⁴⁰

Conversely, young adulthood brought on a resurgence of violence in African-American teenagers.²⁴¹ Perhaps this resurgence could be attributed to the fact that more African-American youth are transferred to the adult criminal court and ultimately to adult prisons, where they are forced into a training ground for learning more criminal activity and thus are more likely to re-offend.²⁴²

236. A person who has been “institutionalized” is usually someone who has been in a prison or lock-up facility for so long they would not likely know how to properly function in society. For years, their way of life has been that of a prisoner; therefore, their lifestyle is accustomed to that of prison life. See THE CONCISE OXFORD DICTIONARY 614 (8th ed. 1990) (noting that an institutionalized person is “made apathetic and dependent after a long period in an institution”).

237. See Richmond, *supra* note 2, at 239 (illustrating examples of how T.J. was institutionalized).

238. See *id.*

239. See Schiraldi, *supra* note 1, at 3 (noting that Caucasian youth exhibit a turn around in current delinquent behavior and go on to lead successful lives).

240. See *id.*

241. See *id.*

242. See *id.*

VI. SO WHAT IS THE ANSWER? (PROPOSED SOLUTIONS)

The notion of juvenile criminals getting their “just desserts”²⁴³ in the adult system does not seem effective, nor does the notion of going easy on juveniles and giving them a “free crime”²⁴⁴ in the juvenile system. Therefore, this comment proposes some solutions that may be a comfortable compromise for all interested parties.

First, it may prove helpful to increase the jurisdictional age of the juvenile system. Second, more punishment power allotted to juvenile judges may also prove beneficial. Using determinate sentencing as a primary means of punishment, as opposed to its current stance as a secondary measure, merits consideration in line with this proposal. Finally, considering a juvenile offender’s amenability to rehabilitative treatment and expressly stating such in the Texas Family Code may also be advantageous.

A. *Increasing the Jurisdictional Age*

One possible solution to dealing with juvenile crime, without transferring young children to adult court, is to increase the jurisdictional age for juvenile court jurisdiction. Currently, in Texas, the juvenile court has exclusive original jurisdiction over proceedings involving children who are age ten to seventeen.²⁴⁵ Research has shown that the closer a juvenile offender is to the ceiling age for juvenile court jurisdiction, the more likely it is that the child will be transferred.²⁴⁶ This may be true because juveniles near the ceiling age of the juvenile system are thought to be near adulthood, and thus, are perceived to be more prepared to combat the tumultuous situations that lie ahead for an inmate in an adult facility. Another possible reason for this increased transfer rate among older ju-

243. See Rudman, *supra* note 75, at 76-77 (referring to juvenile offenders getting the punishment that is fitting for their offense).

244. See Guttman, *supra* note 25, at 530 (referring to the idea of “free crime” to mean that juveniles who remain in the juvenile system are not punished).

245. See TEX. FAM. CODE ANN. § 51.02(2)(A) & (B) & § 51.04(a) (Vernon 1996) (defining a “child” and exclusive original jurisdiction in juvenile court).

Section 51.02(2) A “child” means a person who is:

- (A) ten years of age or older and under 17 years of age; or
- (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. *Id.*

Section 51.04(a):

This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time he engaged in the conduct, and the juvenile court has exclusive original jurisdiction over proceedings under this title.

Id.

246. See Guttman, *supra* note 25, at 536.

venile offenders is that the older the child, the less time they can serve in the juvenile system.²⁴⁷

Under the current age jurisdiction, a sudden transfer into the adult system may occur at an age that is too young for a child to handle maturely. Therefore, this comment proposes raising the juvenile jurisdictional age to nineteen or twenty years old.²⁴⁸ Presently, the Texas Youth Commission can detain a juvenile until the age of twenty-one;²⁴⁹ therefore, this proposed age increase is justifiable. This method has found acceptance in Minnesota and should be considered for Texas.²⁵⁰

247. See Interview with Stephanie Stevens, Attorney & Clinical Professor, in San Antonio, Tex. (July 12, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Under these circumstances, a juvenile may only be sentenced to the Texas Youth Commission (TYC) until the age of 21; if the juvenile is given probation for the offense, the child may only be on juvenile probation until age 18; see also Rudman, *supra* note 75, at 92 (indicating that juveniles serve shorter sentences in the juvenile system because of the age limitations).

248. This potential age increase may help alleviate the lack of maturity for most juveniles who would be certified.

249. See Kim Osburn, *Marlin Reception Center: What Can a Juvenile Expect?*, STATE B. OF TEX. SEC. REP. JUV. L., June 1998, at 4, 4.

250. See MINN. STAT. ANN. § 260.126 (West 1998) (delineating the criteria upon which a child offender may remain under the jurisdiction of juvenile court). Accordingly, § 260.126 subd. 1 & 4, repealed by § 260B.130 subd. 1 & 4, states:

Subdivision 1. Designation. A proceeding involving a child alleged to have committed a felony offense is an extended jurisdiction juvenile prosecution if:

- (1) the child was 14 to 17 years old at the time of the alleged offense, a certification hearing was held, and the court designated the proceeding an extended jurisdiction juvenile prosecution;
- (2) the child was 16 or 17 years old at the time of the alleged offense; the child is alleged to have committed an offense for which the sentencing guidelines and applicable statutes presume a commitment to prison or to have committed any felony in which the child allegedly used a firearm; and the prosecutor designated in the delinquency petition that the proceeding is an extended jurisdiction juvenile prosecution; or
- (3) the child was 14 to 17 years old at the time of the alleged offense, the prosecutor requested that the proceeding be designated an extended jurisdiction juvenile prosecution, a hearing was held on the issue of designation, and the court designated the proceeding an extended jurisdiction juvenile prosecution.

Subd. 4. Disposition.

- (a) If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall:
 - (1) impose one or more juvenile dispositions under section 260.185; and
 - (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense.
- (b) If a child prosecuted as an extended juvenile after designation by the prosecutor in the delinquency petition is convicted of an offense after trial that is not an offense described in subdivision 1, clause (2), the court shall adjudicate the child delinquent

Expanding the age jurisdiction of the juvenile court would alleviate the problem of juveniles receiving lesser sentences when transferred to the adult system.²⁵¹ More importantly, it would get at the heart of what is really needed for juvenile criminals – REHABILITATION.

B. *Increasing Punishment Power Allotted to Juvenile Judges*

Another proposed solution to the problem of juvenile certification is to increase the punishment power allotted to juvenile judges. If juvenile judges were given more jurisdictional power to impose harsher sentences within the juvenile system, more children could be helped in the juvenile system instead of being hurt by the adult system. Judges would be able to give more rigid punishment befitting to the offense, but at the same time would not totally cut the child off from educational and treatment programs that could prove instrumental in that child making a change to become a more productive citizen.

Increasing punishing power of juvenile judges is somewhat in place now in Texas since the Determinate Sentencing Act of 1987.²⁵² However, this comment proposes that determinate sentencing be considered as a primary measure for sentencing a juvenile offender instead of its current status as a “fallback measure” used when certification for a juvenile offender has been denied.²⁵³ Considering determinate sentencing first could potentially allow treatment opportunities that could change juveniles and give them a chance at a better life. Certification to the adult criminal justice system should serve as a last resort, to be used ONLY when all other measures have been exhausted.

This increase in punishment power would be beneficial because young juvenile offenders would still be held accountable for their actions, but they would have the opportunity and resources available to change their behavioral patterns. This change in behavior would ultimately lead to a

and order a disposition under section 260.185. If the extended jurisdiction juvenile proceeding results in a guilty plea for an offense not described in subdivision 1, clause (2), the court may impose a disposition under paragraph (a) if the child consents.

See also *In re Welfare of S.J.G.*, 547 N.W. 2d 456, 457, 459 (Minn. Ct. App. 1996) (referring to the extended jurisdiction juvenile classification, “EJJ”, which allows the juvenile system to maintain jurisdiction over the child past their 19th birthday, up to age 21); *In re Welfare of S.W.N.*, 541 N.W. 2d 14, 15 (Minn. Ct. App. 1995) (discussing Minnesota’s use of the extended jurisdiction juvenile classification to keep a child offender under the jurisdiction of juvenile court).

251. See Rudman, *supra* note 75, at 87-88 (suggesting that juveniles are not receiving harsh punishments in the adult criminal court, and are limited in punishment by the age jurisdictions of juvenile courts).

252. See TEX. FAM. CODE ANN. § 53.045 CMT. (Sampson & Tindalls 1998); Lam, *supra* note 47, at 45.

253. See Lam, *supra* note 47, at 48.

decrease in criminal activity by juvenile offenders because these once troubled youths will have acquired skills to make them better people.²⁵⁴ Therefore, the need or desire to be delinquent and commit crimes would likely cease, or at least diminish.

This increase in punishment power to juvenile judges would further benefit minorities, such as African-American and Hispanic youth, because they are the groups of youths who are most often transferred to adult criminal court. These two groups, in particular, would be able to build better personal character and a more positive self image apart from the traditional negative depiction of African-American and Hispanic youths as criminals.²⁵⁵ This change would be instrumental in reducing crime.

C. *Considering Juvenile Offender's Amenability to Treatment*

Although there is potential for subjectivity,²⁵⁶ it may also be helpful to expressly codify the 'amenability of the juvenile to rehabilitative treat-

254. See generally Justice Policy Institute, *Second Chances* (visited July 5, 1999) <<http://www.cjci.org/centennial/ray.html>> (discussing the experiences that changed the life of a young African-American man from a juvenile delinquent to a successful attorney). This man credits his success to several people within the juvenile system who made a positive impact on his life and who inspired him to make a change. See *id.* After growing up without a father, an abusive mother, and a lot of anger, this man was in and out of juvenile facilities. See *id.* He found the life changing support he so desperately needed through people within the juvenile system who touched his life and saw in him the potential to make a change. See *id.* He also notes that he probably would not have encountered such people if he had been in the adult criminal justice system, since the adult system has a "tendency to stereotype all young men. . . [with] its one-size-fits-all sentencing policies." *Id.*; Justice Policy Institute, *Second Chances* (visited July 5, 1999) <<http://www.cjci.org/centennial/estrada.html>> (detailing the life changing experiences of a young Hispanic man who traded in his violent gang life for a more successful life as a senior at Pepperdine University studying science and pre-medicine). This juvenile met head on with one of life's most gruesome encounters when his best friend died in his arms after being stabbed by rival gang members. See *id.* After the death of his friend this young man, J.E., turned to a life of violence with the gang to which his deceased friend once belonged. See *id.* After a life of crime, J.E. was finally sent to the Rite of Passage Wilderness Challenge Program. See *id.* There, the juvenile offenders were disciplined for their bad behavior, but were also motivated to improve. See *id.* J.E. recounts the life changing experience for him while at Rite of Passage – it was when he "[I]earned how to do fractions." *Id.* J.E. met a teacher who took an interest in him and taught him the valued skill. See *id.* J.E. recalls "something inside of me was sparked – fractions struck my passion for education." *Id.* Because of this positive turn of events, J.E. has excelled at leading a productive life and plans to attend graduate school to study neuroscience. See *id.*

255. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2063 (1993) (noting that African-Americans and other minorities are often associated with crime).

256. See Interview with the Honorable Carmen Kelsey, *supra* note 47 (addressing some of the potential problems with expressly considering 'amenability of juvenile to treatment' as a determinative factor for transfer to adult criminal court). Considering amena-

ment' as a factor for consideration when deciding if the juvenile's offense warrants transfer. Since its inception in 1973, Title 3, § 54.02 of the Texas Family Code has never expressly considered the amenability to treatment as a determinative factor in deciding if transfer is warranted.²⁵⁷ Adding or amending the current language of this factor will allow judges to get a more personal look at the juvenile charged with an offense. It will also allow judges to stay focused on the original purpose of the juvenile justice system and § 51.01(1) of the Texas Family Code - to provide for the care, safety, and wholesome development of a child.²⁵⁸ Considering if a child is amenable to rehabilitative treatment as a determinative factor of transfer would be instrumental in staying within the original goals and purposes of the juvenile system.

One noted researcher²⁵⁹ in the field of juvenile law asserts that the 'juvenile's amenability to treatment' factor is encompassed in the fourth

bility as a determinative factor could lead to a great amount of subjectivity in the courtroom. *See id.* This subjectivity could ultimately be unfair for juveniles because in a situation with all factors being equal (age, crime, gender, etc.), four similarly situated juveniles could be tried in four different juvenile courts and there could be four different results. *See id.*

257. *See generally* TEX. FAM. CODE ANN. (2d ed. 1977) § 54.02(f):

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

- 1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- 2) whether the alleged offense was committed in an aggressive and premeditated manner;
- 3) whether there is evidence on which a grand jury may be expected to return an indictment;
- 4) the sophistication and maturity of the child;
- 5) the record and previous history of the child; and
- 6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedure, services, and facilities currently available to the juvenile court.

Id.

258. TEX. FAM. CODE ANN. § 51.01 (2d ed. 1977). The code specifically § 51.01, provided:

This title shall be construed to effectuate the following public purposes:

- (1) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions.

259. The noted researcher referenced here is Robert Dawson, Professor of Law at University of Texas School of Law in Austin, Texas. Professor Dawson, a well-known researcher in juvenile law, is one of the authors of Title 3, the Juvenile Justice Section of the Texas Family Code. *See* JOHN J. SAMPSON ET AL. TEXAS FAMILY CODE ANNOTATED 129 (1998).

factor of § 54.02 of the Texas Family Code.²⁶⁰ However, the interpretation of this factor is somewhat ambiguous. It appears that this final *Kent* factor expressly addresses the need to consider the adequate protection of the public in making transfer decisions.²⁶¹ This factor misconstrues the amenability factor by assessing the juvenile's treatment probability based solely on the procedures, facilities, and services that are currently available in the system.

However, this notion or interpretation exemplifies the loss of central focus for the juvenile justice system, shifting the main concentration from the offender to the offense. This shift in focus minimizes what would best serve the needs of the offender. In its current form, the fourth factor highlights the offense committed and offers treatment based on the offense, not on the individual needs of the child. The ambiguity suggests the need for an amendment to the statute. It is important that we give our children every fighting chance possible.

The juvenile system can only treat a juvenile offender if the system investigates the child individually and discovers the underlying circumstances that led to their path of delinquency.²⁶² Psychologists have said that in determining whether a child is amenable to treatment, it is important to consider whether the child is still in the adolescent phases of development.²⁶³ Psychologists further stated that a child still in adolescence has not settled into a specific personality structure and thus is more susceptible to change.²⁶⁴ Therefore, it stands to reason that if evidence exist showing that the child is amenable to rehabilitative treatment, the juvenile judge may have more cause to maintain jurisdiction, thereby affording the child more opportunities for treatment.

Consideration of a juvenile offender's amenability to treatment, as it relates to the individual, could be particularly beneficial for minority youth. If a judge takes time to fully evaluate a child's personal back-

260. This assertion refers to an e-mail response from Mr. Dawson on January 11, 1999, where Mr. Dawson referred the author to TEX. FAM. CODE ANN. § 54.02(f) (Vernon 1996) § 54.02(f)(4):

In making the determination required by subsection (a) of this section, the court shall consider, among other matters: (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

261. See TEX. FAM. CODE ANN. § 54.02(f)(4) (Vernon 1996).

262. See Guttman, *supra* note 25, at 510 (arguing that the juvenile system cannot effectively discern how to treat a juvenile offender without first examining that child and discovering what led to the child's delinquent behavior); see also Hatchett, *supra* note 69, at 85 (declaring that "[t]he hallmark of the juvenile court is individualized treatment.")

263. See Guttman, *supra* note 25, at 533-34 (noting that if the juvenile offender is still at the adolescent stage, he/she is more open to modifying behavior).

264. See *id.*

ground, more insight might be gained as to why the child committed such an offense. If we evaluate juveniles by category of the offense, we will never see the individual child nor get at the heart of that child's problems that cause the behavior. This assertion would especially be true when evaluating the background of African-American and Hispanic youth. "[C]hildren today [especially minority children] face insurmountable odds. They are plagued by poverty, violence, homelessness, drugs, and guns."²⁶⁵ All of these factors often play a part in why a child has committed a crime.

For instance, a juvenile judge may be faced with making a decision that determines the fate of a young sixteen-year old impoverished Hispanic boy who is accused of sexually assaulting a child. Some may argue that this heinous offense is inexcusable and should be prosecuted to the fullest extent of the law. While this may be a valid argument, it is important to note that other previous circumstances or experiences may have caused such an action. It may be that the young offender was himself the victim of repetitive, violent sexual and physical abuse by older siblings and relatives. Thus, the child's action, while horrifying, would be more explicable under the young offender's pre-existing circumstance.²⁶⁶

However, this vital information would not be available, nor strongly considered, if judges do not consider whether a juvenile offender is amenable to rehabilitative treatment. If amenability is not considered in this hypothetical case, the young Hispanic boy could be transferred to an adult court and sentenced to an adult facility where he, as a juvenile inmate in an adult jail, could be subjected to sexual and physical abuse or worse. This will only perpetuate the problem when he is ultimately released as an adult. Consequently, expressly codifying the consideration of a juvenile offender's amenability to treatment is an indispensable component to effectuating change in the rate of juvenile crime, and ultimately juvenile justice.

This comment is not proposing that we do away with the process of holding juvenile offenders accountable for their actions. It is suggesting that we take the time to explore the individual child, going past the surface of the offense committed. For society to truly see change in juvenile

265. *Id.* at 516. These problems and circumstances plague children and affect their behavior. One particular circumstance, poverty, is more prevalent among minority children. *See id.* at 517.

266. *See* Hatchett, *supra* note 69, at 84 (discussing the case of one juvenile offender who had a history of unfavorable circumstances that seemed to be the root of the delinquent behavior). The young boy in this case had been in 'the system' most of his life. *See id.* The child's mother was an alcoholic, he was repeatedly beaten, had been raped by his uncle when he was six years old, and was shuffled in and out of more institutions than he remembered. *See id.*

crime, and ultimately adult crime, we must discover what is at the root of that child's delinquent behavior and attempt to make a change in the individual person.

We do our children a great disservice when we simply punish them for acts without trying to change the inward or outward disturbances that caused the acts. If we simply isolate them and continue to treat them as though they were "bad" individuals, that negative input is likely to manifest itself outwardly in the delinquent or criminal behavior of that child or adult. It is a self-fulfilling prophecy²⁶⁷ that will continue to come to fruition in a negative manner unless we make a substantive change and get past the surface.

These proposals simply ask the juvenile justice system to take some time to focus not solely on the offense, but to take a deep hard look at the individual offender, and determine why the violent behavior is being displayed. Only then can we expect to make a positive change in society's children.²⁶⁸

267. A self-fulfilling prophecy is an event or action that occurs where something that a person has continuously said or thought is acted out in reality due to previous words or thoughts. *See generally* CONCISE OXFORD DICTIONARY 1098 (8th ed. 1990).

268. *See generally* Justice Policy Institute, *Second Chances* (visited July 5, 1999) <<http://www.cjci.org/centennial/filippi.html>> (presenting the life encounters that led to this juvenile offender, S.F., becoming a member of the U.S. Army's Presidential Honor Guard, under former President George Bush). This young man endured physical and psychological torture in the home for much of his young life. *See id.* Much of the abuse was administered by his mother. *See id.* He was beaten with belts and a two-by-four; was thrown across rooms; and was punched, kicked and thrown down stairs. *See id.* His sister was also beaten and sexually abused by the stepfather; her abusive beatings were so severe she temporarily became blind and deaf. *See id.* In addition to the abuse at home, the young boy was also sexually abused by a stranger. *See id.* S.F. recounts, "I spent my whole childhood being scared to death of every adult around me." *Id.* This volcano of anger and abuse finally erupted when S.F. shot and killed his mother. *See id.* S.F. recalls, "I just wanted her to listen, just to stop yelling at me and listen." *Id.* The judge in this case did listen and decided to retain juvenile court jurisdiction over S.F. *See id.* He was sentenced to a long-term, structured therapeutic placement, where he received much needed psychological treatment. *See id.* It was at this juvenile facility that S.F.'s life began to finally take a turn in a positive direction. *See id.* S.F. notes that he, and other juveniles like him, "are living proof that prevention and rehabilitation programs are the best tools for deterring crime." *Id.*; JUSTICE POLICY INSTITUTE, *Second Chances* (visited July 5, 1999) <<http://www.cjci.org/centennial/smith.html>>. Due to his gang membership, J.S. found himself involved in a life of crime: stealing cars, dealing drugs and getting arrested. *See id.* J.S. was given a chance in the juvenile system when he was referred to the Westside Association for Community Action (W.A.C.A.), where he was closely supervised and encountered life changing mentors. *See id.* J.S. learned from mentors who understood how he was lured into gang life, but who showed him the potential consequences of his actions if he stayed in the gang. *See id.* Through the program, J.S. enrolled in an alternative school where he learned the value of an education, which was more valuable than gang life. *See id.* J.S. earned his GED at the alternative school and went on to complete a degree in business

VII. CONCLUSION

With all of the disturbing statistics on juvenile incarceration, and even more negative statistics on minority juvenile offenders, one might ask what motivates the acts that result in these statistics? While there are no studies that explicitly state why the statistics exist as they do, there is evidence of the alarming disparities.

Although we as Americans attempt to strive for a colorless society with colorblind justice, minority juvenile offenders continue to be victimized by the juvenile system. The minority child is continuously considered to be more dangerous than other juvenile offenders. Minority juveniles are overwhelmingly perceived to be unsupervised and unamenable to treatment and rehabilitation. The minority offender is more likely to be harassed, detained and treated more harshly.

As much as they are muffled and discouraged as topics of discussion, race and stereotypes still enter the purview of juvenile justice.²⁶⁹ Though not dispositive in decision-making, race is known to be a factor, particularly, in prosecutorial determinations of motions for transfer.²⁷⁰ Additionally, race has been a factor in determining what offenses will be charged.²⁷¹

In light of all these occurrences, one must ponder thoughts of why certain juveniles have certain outcomes in juvenile court. One possible explanation, and perhaps the most prevalent, is fear, which has been used to perpetuate stereotypes. These perpetual stereotypes are unfortunately finding their way into all aspect of life, including juvenile justice. However, with a greater fear of children due to juvenile crime, the reaction to increased violence should not be a sentence of hopeless incarceration. Rather, the more productive reaction would be one of benevolence and caring to effectuate change.

Though the juvenile justice system began as a rehabilitative, treatment-oriented program, the focus has shifted from the offender to the offense.²⁷² The system is now geared towards a more centralized concern for public safety and more accountability for these youthful offenders.²⁷³

administration. *See id.* J.S. is planning to continue his educational pursuits this Fall. *See id.*

269. *See* Hatchett, *supra* note 69, at 85; *see also* JUVENILE JUSTICE, *supra* note 149, at 154 (reporting the true fact that some police officers allow racial bias to prevail when deciding to stop or target minority youth).

270. *See* Pogue, *supra* note 71, at 28.

271. *See id.* at 29.

272. *See* Aron & Hurley, *supra* note 20, at 12.

273. *See* Klein, *supra* note 25, at 373-74.

Yet, it seems that all parties would be better served by not focusing solely on the offense, but rather on the offender who has committed the offense as well. Concentrating on the offender and taking affirmative steps to effectuate change may ultimately prevent subsequent crime. The decision to transfer should be determined by looking at the full circumstances of the individual child to see if transfer to adult criminal court is really the best alternative.

Not only juvenile offenders, but society as a whole would be better protected if all juvenile offenders were allowed to receive the proper treatment and rehabilitation allotted in the juvenile justice system.²⁷⁴ This treatment is essential to the overall safety of society and to making these children more productive citizens.

The most important goal should be to prevent these children from reaching the condition that caused them to be in court.²⁷⁵ “[W]e are not doing our duty to [these] children . . . when we neglect to destroy the evils that are leading them [to a] career of delinquency, when we fail not merely to uproot the wrong, but to implant in place of it the positive good.”²⁷⁶

Although reducing crime is an important issue that is at the forefront of society, it must not be forgotten that the fate of America’s children is also an important issue that cannot be ignored.²⁷⁷ After all, a fifteen-year-old juvenile who is transferred into adult criminal court is still fifteen years old.²⁷⁸ Moreover, children of any race who are experiencing teenage adolescence are at a difficult age and time in their life.²⁷⁹ Thus, a traumatic event, such as transfer, that may leave an adult undisturbed, can “overawe and overwhelm [children] in [their] early teens.”²⁸⁰

Transferring juveniles to adult criminal court seals their fate and forever dooms children who have the potential for treatment in the juvenile system.²⁸¹ We must reach out more to our children, being ever mindful of

274. See Guttman, *supra* note 25, at 531.

275. See Pogue, *supra* note 71, at 26 (stating that our goal should be to prevent the occurrences that cause delinquent behavior); Tomkins, *supra* note 21, at 1651.

276. Mack, *supra* note 23, at 122; Pogue, *supra* note 71, at 26; Tomkins, *supra* note 21, at 1651.

277. See Aron & Hurley, *supra* note 20, at 64 (1998).

278. See Zimring, *supra* note 66, at 279.

279. See *Haley v. Ohio*, 332 U.S. 596 (1948).

280. *Id.* at 599.

281. See Klein, *supra* note 25, at 373; Hatchett, *supra* note 69, at 85 (suggesting that transferring juveniles to adult court gives up on them before trying to help them).

the fact that children are more at promise for success than they are for failure.²⁸²

We must turn back to when § 51.01 of the Texas Family Code was first enacted in 1973.²⁸³ Its first purpose was “to provide for the care, the protection, and the wholesome moral, mental, and physical development of children. . . .”²⁸⁴ Also on the list of purposes, was “. . . to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior, and to substitute a program of treatment, training, and rehabilitation.”²⁸⁵

These purposes, which focused on the individual offender, have been shuffled down on the list, subordinate to the primary purpose of protecting the public and safety.²⁸⁶ No longer is society viewing the needs of the child as the primary focus, nor is society investing the time in treatment to make an investment in the future of a child. Society has in a sense turned its back on the children of our future, but if we are to see positive change in these children, we must stop inciting the negative self-images that children see,²⁸⁷ and replace them with positive hope for a brighter future.

282. As a society, we must make every effort to reach children and make positive and lasting impressions on them because children are more inclined to succeed (with some positive affirmation) than they are to fail.

283. See Hatchett, *supra* note 69, 84 (arguing that society cannot give up on the juvenile justice system and its traditional purpose which was to provide treatment for youthful offenders).

284. TEX. FAM. CODE ANN §51.01(1) (West 2d ed. 1977).

285. TEX. FAM. CODE ANN. § 51.01(2) (West 2d ed. 1977); see also Hatchett, *supra* note 69, at 84 (asserting that the juvenile system “was created specifically to provide individualized treatment and services for troubled children”).

286. See TEX. FAM. CODE ANN. § 51.01(1)(2)(3) (Vernon 1996)

Section 51.01 – “This title shall be construed to effectuate the following. . . purposes:

- (1) to provide for the protection of the public and public safety;
- (2) consistent with the protection of the public and public safety:
 - (A) to promote the concept of punishment for criminal acts
 - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
 - (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child’s conduct;
- (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions.

Id.

287. See Gaynes, *supra* note 178, at 621 (referring to the negative self-image that young African-American men have of themselves and that society has of minority youth). “We live in a culture where most adults would cross the street rather than come in contact with a group of minority youth, and where most minority youth see a future that has no place for them.” *Id.* These negative self-images are reinforced by family and friends, and

All children, no matter what their race or socio-economic background, should be given the same opportunities by the juvenile justice system. The juvenile system should be utilized to its fullest potential in ALL cases before the child is turned over to the adult criminal court. One accomplished commentator summed it up best when he said, "if care and concern is what the system would mete out to my children, who are white, it should do no less for the sons and daughters of African-American parents."²⁸⁸

are a reality for minority children who daily combat a feeling of mediocrity, substandard living, and no opportunity. *See id.* at 622. This negative image is especially prevalent in the African-American community where young black men believe ". . . they have no future beyond jail and the grave. . ." *Id.*

288. Schiraldi, *supra* note 1, at 3.