Juvenile Transfer: From "Get Better" to "Get Tough" and Where We Go from Here

Emily A. Polachek
JUVENILE TRANSFER: FROM “GET BETTER” TO “GET TOUGH” AND WHERE WE GO FROM HERE

Emily A. Polachek†

I. INTRODUCTION ................................................................. 1163

II. THE CHANGING JUVENILE JUSTICE SYSTEM ..................... 1165
   A. History of the Juvenile Justice System ......................... 1165
   B. From Rehabilitation to Retribution .............................. 1167
      1. Procedural Changes ............................................. 1167
      2. The Mythical Youth Violence Epidemic .................... 1169

III. JUVENILE TRANSFER TO ADULT COURT ............................ 1170
   A. “Get Tough” Measures .............................................. 1170
      1. Judicial Waiver ................................................... 1171
      2. Statutory Exclusion ............................................. 1172
      3. Prosecutorial Discretion ...................................... 1172
      4. Blended Sentencing ............................................. 1173
   B. Minnesota Transfer Laws .......................................... 1174
      1. Certification to District Courts ......................... 1174
      2. Statutory Exclusion ............................................. 1176
      3. Extended Jurisdiction ......................................... 1177

IV. PROBLEMS WITH THE CURRENT STATE OF JUVENILE TRANSFER .................................................. 1178
   A. Current Trends in Juvenile Transfer ............................ 1178
   B. Juvenile Transfer Does Not Deter Delinquency ............... 1179
   C. Anti-Therapeutic Effects of Juvenile Transfer ............... 1181
      1. Procedural Disenfranchisement ................................ 1182
      2. Victimization and Rehabilitation ............................. 1182
      3. Post-Release Consequences of Incarceration ............... 1183

V. PSYCHOLOGY’S POTENTIAL ROLE AND OTHER RECOMMENDATIONS ................................................. 1183
   A. Psychology Should Aid Juvenile Waiver Decisions ............ 1183
      1. Clarification of Kent Criteria ................................ 1184

† J.D. Candidate 2010, William Mitchell College of Law; B.A., Psychology, summa cum laude, Creighton University, 2007. The author thanks Jill Kingsbury, Dr. Matthew Huss, and the William Mitchell Law Review staff for their insight and assistance in editing this article.
On October 15, 2005, Matthew Niedere murdered his parents, Peter and Patricia Niedere, at their auto glass store in Hastings, Minnesota.\(^1\) Niedere planned and committed the murders with his friend, Clayton Keister.\(^2\) Both Niedere and Keister were seventeen years old when they killed Niedere’s parents.\(^3\) According to Niedere’s testimony, he shot his father multiple times with a semiautomatic pistol until the gun ran out of bullets.\(^4\) Niedere’s mother attempted to escape the fray, but Keister chased her back into the store and murdered her.\(^5\) The boys planned the attack two weeks in advance during whispered conversations in physics class at Concordia Academy, a private Lutheran school in Roseville, Minnesota.\(^6\) After the murders, Niedere and Keister ran errands

---

3. **WCCO, supra note 1.**
4. **See Adams, supra note 2 (“If there were more bullets would you have fired again?’ Backstrom asked. ‘Yes,’ Niedere replied quietly.”).**
5. **Id. According to reports, Mrs. Niedere initially attempted to save herself, but returned to the shop to drag her husband’s body from the melee. Id. Despite the apparent brutality of the slaying, Keister claimed he initially refused to aid Niedere, but relented after Niedere promised to pay Keister $15,000 and threatened to kill Keister’s family if the other boy did not join in the plot. Id. During his testimony, Keister claimed that it was the threat against his family, rather than the monetary incentive, that convinced him to go through with the plan. Id. Keister also testified that money inspired Niedere’s plan to kill his parents; after reading his parents’ will, Niedere believed they had assets exceeding one million dollars. Id.**
6. **Id.; WCCO, supra note 1.** At one point, eighteen-year-old Jamie C. Patton joined in the plan, but he was not present at the time of the shootings. Adams,
and dressed for the homecoming dance.\footnote{7}

The adolescents faced several criminal charges, including premeditated murder, which carries a mandatory life sentence without the possibility of parole.\footnote{8} In accordance with Minnesota law,\footnote{9} Dakota County Attorney James Backstrom brought the case in criminal court.\footnote{10} The State of Minnesota watched with bated breath\footnote{11} to discover whether the prosecutor would lock Niedere and Keister up and throw away the key, or further exercise his discretion and offer a more lenient plea.\footnote{12} Despite protest from some members of the Niedere family, Niedere and Keister each pled guilty to two counts of aiding first-degree murder while attempting to commit aggravated robbery.\footnote{13} They will be eligible for parole in 2035, thirty years from the date of sentencing.\footnote{14}

The Niedere family’s conflicting views are unsurprising given the current state of juvenile justice and punishment. This article

\footnote{supra note 2. Patton was charged with two counts of conspiracy to commit first-degree murder. WCCO, \textit{supra} note 1.}

\footnote{7. \textit{WCCO, supra} note 1.}

\footnote{8. \textit{Adams, supra} note 2.}


\footnote{12. \textit{See} Cohen, \textit{supra} note 10 (“‘I had to make a very difficult decision whether to put these young men away for their natural lives, or give them a chance,’ Backstrom says.”).}

\footnote{13. Adams, \textit{supra} note 2.}

\footnote{14. Cohen, \textit{supra} note 10. However, Backstrom did not seem optimistic about the teens’ prospects for achieving parole. \textit{See id.} (“‘As I told them at sentencing, they’re going to have to show more remorse than they did when they pled guilty,’ [Backstrom] says. ‘If that’s the case 30 years from now, then we’ll give them a chance in society.’’’).}
explores the evolution of the juvenile justice system and the corresponding implications for youthful offenders and society at large. The article begins with an overview of both the historical and current development of the juvenile justice system. Part III discusses the current juvenile transfer laws, exploring Minnesota law as an example of current legislative trends in juvenile transfer. Next, the article highlights several factors that make current transfer provisions ineffective, including the weight of transfer decisions and the effects of criminal incarceration on adolescents and society. Finally, Part V looks at the current state of transfer and suggests methods for reducing the anti-therapeutic consequences of juvenile transfer, the most important of which is the adoption of psychological risk assessments.

II. THE CHANGING JUVENILE JUSTICE SYSTEM

A. History of the Juvenile Justice System

Beginning with the inception of English common law in the Middle Ages, the law recognized that juvenile offenders are a unique population. However, in the early history of this country’s criminal justice system, child offenders did not receive separate adjudicative proceedings. The law treated all offenders the same, regardless of their age. Exceptions to this presumption of

15. See infra Part II.
16. See infra Part III.
17. See infra Part IV.
18. See infra Part V.
19. Charles W. Thomas & Shay Bilchik, Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis, 76 J. CRIM. L. & CRIMINOLOGY 439, 443 (1985). The authors trace juvenile punishment to Hebrew Law as written in the Old Testament. Id. at 442–43 (“Hebrew law, as reflected in Exodus, Deuteronomy, and Leviticus, reflects a willingness to deal harshly with juveniles, including those who engaged in conduct for which no adult would have been liable.”). Somewhat more recently, the famous jurist Sir William Blackstone addressed the punishment of juvenile offenders in capital cases in his commentaries, setting forth a system that attached criminal responsibility to all offenders over the age of seven. See David S. Tanenhaus, The Evolution of Transfer Out of Juvenile Court, in THE CHANGING BORDERS OF JUVENILE JUSTICE 13, 13–14 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
culpability applied only to children under the age of seven, who were considered “incapable of criminal intent or distinguishing right from wrong.”

Scholars trace creation of the first American juvenile courts, and the institution of a separate juvenile justice system, to the Illinois Juvenile Court Act of 1899. The Act established separate courts having jurisdiction over delinquents under the ages of either fourteen or sixteen, and exclusive jurisdiction over children under the age of seven. This system caught lawmakers’ attention, and by 1917, all but three states had established juvenile courts. In 1945, juvenile courts existed in every jurisdiction in the country, including the federal court system.

During the growth of the juvenile courts, a new theory of the etiology of crime emerged, which viewed deviant behavior as a “symptom of an underlying condition that required treatment” instead of an act of evil that deserved to be punished. This jurisprudential shift coincided with the rise of developmental psychology at the start of the twentieth century. Developmental psychologists postulated that the “condition” underlying delinquent juvenile behavior was poor parenting and other social ills. This desire to “cure” social ills gave rise to the parens patriae

21. Angell, supra note 20, at 127 (quoting R. Barri Flowers, Kids Who Commit Adult Crimes: Serious Criminality by Juvenile Offenders 7 (Nathaniel J. Pallone ed., 2002)). Juvenile offenders could also assert a defense of incapacity, claiming that they did not have the capacity to commit the alleged criminal act. Id. If the juvenile was successful, the court dismissed all charges and released the child. Id. See also Gail B. Goodman, Note, Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado, 78 U. COLO. L. REV. 1059, 1064 (2007) (explaining several rebuttable presumptions as to guilt and innocence that were based on the offender’s age).

22. Goodman, supra note 21, at 1065. Some scholars contend that Massachusetts and New York were the first states to usher in juvenile courts with laws passed in 1874 and 1892, respectively, which allowed separate trials for minor defendants. Anthony M. Platt, The Child Savers: The Invention of Delinquency 9 (Univ. Chicago Press 1969).

23. Goodman, supra note 21, at 1065.


27. Id. Developmental psychology studies the “physiological and cognitive changes across the life span, and how these are affected by culture, circumstance, and experience.” Carole Wade & Carol Tavris, Psychology 502 (7th ed. 2003).

28. Scott & Grisso, supra note 26, at 142. In response to this theory, New York instituted the House of Refuge in 1824. Goodman, supra note 21, at 1064. The
principle toward juveniles. Therefore, the original juvenile courts aimed to rehabilitate juvenile offenders through individualized inquiry into the crime and the criminal, a goal that closely paralleled research in developmental psychology. This ideal of individual assessment and treatment served as the basis of the rehabilitative model of the newly established juvenile courts.

B. From Rehabilitation to Retribution

1. Procedural Changes

In an effort to emphasize the unique characteristics of the juvenile offender, juvenile court hearings were originally intended to be less formal and have different dispositional outcomes than criminal courts. Judges exercised wide discretion in sentencing with an aim to sentence youth to a punishment that fit the offender rather than the offense. In the 1960s, concern over liberal use of discretion led the Supreme Court to hand down a number of landmark decisions setting out procedural safeguards for delinquents tried in juvenile courts.

The first seminal juvenile justice case was Kent v. United States. Morris Kent appealed the juvenile court’s decision to waive jurisdiction of his trial. Reviewing the case, the Supreme Court said that transfer provisions meant “the child receives the worst of both worlds [because] he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” The Supreme Court held that it was improper to transfer a juvenile “without ceremony—without hearing, without effective assistance of counsel, without a statement

House of Refuge was a residential facility for children who were “committed as vagrants [and] were convicted of crimes by authorities.” Shefi, supra note 20, at 657.

29. Goodman, supra note 21, at 1065. Parens patriae literally translates to “father of the country,” and refers to the doctrine that the sovereign state, in its capacity as protector, provides assistance to those citizens who are unable to protect themselves. BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).
30. Goodman, supra note 21, at 1065.
31. Scott & Grisso, supra note 26, at 143.
33. Thomas & Bilchik, supra note 19, at 453.
35. Id. at 548.
36. Id. at 556.
of reasons.”

In an appendix to the decision, the Court set forth eight factors to serve as guidelines for transfer determinations. The determinative factors can be summarized as: (1) the seriousness of the offense; (2) whether it was a violent, premeditated crime; (3) whether it was a crime against people or property; (4) the strength of the case; (5) whether the offender’s cohorts were adults; (6) the sophistication and maturity of the youth; (7) the offender’s prior history; and (8) the probability that the delinquent could be treated.

As discussed below, the weight afforded to these factors varies widely by jurisdiction.

A year after the Supreme Court ruled in Kent, it decided In re Gault. In Gault, the Court reviewed the juvenile court’s non-adversarial proceedings and rejected them as less than satisfactory. The Court determined that “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” The Supreme Court ultimately held that juvenile offenders had a constitutional right to the same procedural safeguards that adult offenders enjoyed.

Although these Supreme Court decisions afforded juveniles more procedural rights in the courtroom, juvenile proceedings also became more adversarial. As Justice Blackmun wrote in McKiever v. Pennsylvania, “[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.”

37. Id. at 554.
38. Id. at 566–67.
39. Id.
40. 387 U.S. 1 (1967).
41. Id. at 14–18.
42. Id. at 18.
43. Id. at 19–55. These rights include the right to advance notice of charges, the right to counsel, the right to confront accusers, and the right against self-incrimination. Id.
44. Goodman, supra note 21, at 1070.
45. 403 U.S. 528 (1971) (holding that juveniles charged with unlawful conduct are not entitled to trial by jury).
46. Id. at 551. Commentators interpret Justice Blackmun’s words in one of two ways, depending on their personal views of the juvenile system. Some critics call for the abolishment of the juvenile system, while others advocate a return to less formal juvenile hearings. See infra note 95 (discussing how Professor Barry Feld of the University of Minnesota advocates to abolish the juvenile justice system).
2. The Mythical Youth Violence Epidemic

In addition to the changing procedural grounds, an increase in juvenile crime levels sparked a shift from *parens patriae* to a crime control model, which considers the protection of the public as most important.\(^{47}\) These increases were both real and imagined. In the 1960s and 1970s, there was an unsubstantiated belief that juvenile crime became more commonplace.\(^{48}\) In fact, overall juvenile delinquency rates did rise between 1974 and 1981.\(^{49}\) This increase continued steadily through the 1980s and the first half of the 1990s.\(^{50}\) By the middle of the 1990s, the level and severity of youth violence were major societal and political issues.\(^{51}\)

Beginning in 1994, just as the nation began to fear an epidemic of youth violence, juvenile crime rates started to decrease.\(^{52}\) Rather than reassuring the public that juvenile crime was rapidly falling, the topic received even more media attention. The nation’s preoccupation with juvenile delinquency stems from a small percentage of truly horrific crimes that occurred in the 1990s.\(^{53}\) Driven by public outrage, crime control advocates adopted a campaign against the juvenile “super-predator.”\(^{54}\) The public view of the juvenile offender as a dangerous super-predator did not

---


\(^{48}\) See O’Connor & Treat, supra note 47, at 1304–05; see also DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 4 (2005) (explaining that during the 1960s and 1970s the baby boomer population reached its “crime-prone” years).

\(^{49}\) See Goodman, supra note 21, at 1072.

\(^{50}\) Beresford, supra note 11, at 785 (“From 1987 to 1994, the juvenile population increased only 7%, but juvenile arrests for delinquency increased 79%.”).

\(^{51}\) MYERS, supra note 48, at 127.

\(^{52}\) Beresford, supra note 11, at 786.

\(^{53}\) See MYERS, supra note 48, at 5–6. Furthermore, the school shootings at Jonesboro (1998) and Columbine (1999) occurred during this period, receiving unprecedented publicity.

\(^{54}\) Shook, supra note 47, at 461–62. The pejorative term “super-predators” refers to juveniles who commit violent and dangerous crimes. *Id.* The image of the adolescent super-predator is one that politicians often use to highlight and justify the murky line between adolescence and adulthood. *Id.* See also FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 11 (1998) (citing several lawmakers’ statements that 2010 will see “270,000 juvenile superpredators coming at us in waves”).
jive with the juvenile justice system’s goals of rehabilitation.\textsuperscript{55} In 1993, a Gallup Poll reported that approximately 73% of surveyed adults favored harsher penalties for juvenile offenders.\textsuperscript{56} In response, public figures and politicians adopted a “get tough” policy towards juvenile crime.\textsuperscript{57}

III. JUVENILE TRANSFER TO ADULT COURT

A. “GET TOUGH” MEASURES

One of the major planks of the “get tough” platform is the proposition that juveniles who commit an “adult crime” should do “adult time.”\textsuperscript{58} This now infamous slogan refers to the practice of juvenile transfer to criminal court, or “the transfer of youth to the jurisdiction of the adult criminal court.”\textsuperscript{59} Transfer is a severe sanction that can result in extended sentences, longer trials, and felony convictions.

Juvenile transfer has always been a mechanism of the juvenile justice system in the United States.\textsuperscript{60} Since 1978, every state has enacted new legislation to ease juvenile transfer.\textsuperscript{61} These new laws

\begin{footnotesize}
\footnote{55. Klein, supra note 32, at 373–74 (citing former Attorney General John Ashcroft’s statement that the juvenile justice system “reprimands the crime victim for being at the wrong place at the wrong time, and then turns around and hugs the juvenile terrorist, whispering ever so softly into his ear, ‘Don’t worry, the State will cure you.’”).}
\footnote{57. See Thomas & Bilchik, supra note 19, at 455; Scott & Grisso, supra note 26, at 148; Klein, supra note 32, at 384.}
\footnote{60. Fagan & Deschenes (1990), supra note 59, at 325.}
\footnote{61. See id. at 324.}
\footnote{62. See id.; Goodman, supra note 21, at 1060.}
\end{footnotesize}
increased the number and variety of crimes eligible for transfer, lowered or eliminated age restrictions on transfer, and gave transfer authority to prosecutors and state legislatures.\textsuperscript{63} Expanded transfer laws shifted the focus of the juvenile court from rehabilitation towards “the goals of deterrence, retribution, and incapacitation.”\textsuperscript{64} Currently, three methods exist for transferring juveniles to criminal court: (1) judicial waiver; (2) statutory exclusion; and (3) prosecutorial discretion.\textsuperscript{65}

\textit{1. Judicial Waiver}

When prosecuting a juvenile offender, a juvenile court judge may decide that it is in society’s best interest to prosecute a serious offense in criminal court.\textsuperscript{66} Judicial waiver is the most common path for transfer, and juvenile court judges in forty-eight states and the District of Columbia have the option of waiving youth offenders to criminal court.\textsuperscript{67} In the states that allow judicial waiver, statutes usually require that the juvenile receives a hearing prior to transfer.\textsuperscript{68} During this hearing to determine an offender’s suitability for transfer, judges must consider the guidelines set forth in \textit{Kent},\textsuperscript{69} as well as any other criteria stated in the jurisdiction’s own transfer provisions.\textsuperscript{70} Legal and psychological scholars disagree about the amount of discretion these provisions allow judges during transfer determinations.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{63} Shook, \textit{supra} note 47, at 461.
\item \textsuperscript{64} Goodman, \textit{supra} note 21, at 1070.
\item \textsuperscript{65} Randall T. Salekin, Richard Rogers & Karen L. Ustad, \textit{Juvenile Waiver to Adult Criminal Courts: Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment}, 7 PSYCHOL. PUB. POL’Y & L. 381, 382 (2001) [hereinafter Salekin et al. (2001)].
\item \textsuperscript{67} Fagan & Deschenes (1990), \textit{supra} note 59, at 326.
\item \textsuperscript{68} Beresford, \textit{supra} note 11, at 795.
\item \textsuperscript{69} See \textit{supra} Part II.B.I (outlining the \textit{Kent} guidelines).
\item \textsuperscript{70} Salekin et al. (2001), \textit{supra} note 65, at 383.
\item \textsuperscript{71} Compare Klein, \textit{supra} note 92, at 386 (“As a result of \textit{Kent} and the factors listed and incorporated into state statutes, judges do not possess unfettered discretion . . . [but] must make explicit findings based on the described criteria.”), with Salekin et al. (2001), \textit{supra} note 65, at 383 (discussing the ambiguity of the \textit{Kent} criteria and the lack of research on how and to what degree courts apply the factors).
\end{itemize}
2. Statutory Exclusion

Another way juvenile offenders enter the criminal courts is through statutory exclusion. In states exercising statutory exclusion, juveniles of a certain age who commit certain crimes fall outside the juvenile court’s jurisdiction. Therefore, the juvenile is automatically charged in the criminal court without any judicial input and without a transfer hearing.

Currently, thirty-six states and the District of Columbia allow statutory exclusion in juvenile transfer. This process is more expedient and results in an increased number of transfers. Furthermore, automatically sending adolescents to criminal court based on singular factors, such as age or type of offense, makes it easier for state legislatures to further increase the number of transfers through simple criterion manipulation.

3. Prosecutorial Discretion

The third method for juvenile transfer is prosecutorial discretion, which allows prosecutors to file directly in either juvenile or criminal court. Like statutory exclusion, there is no transfer hearing, leading proponents of prosecutorial discretion to promote its efficiency. Fifteen states allow prosecutors to file juvenile cases directly in criminal court.

Some states that allow statutory exclusion or prosecutorial direct file also have a process called reverse waiver (or decertification) whereby a juvenile court judge can reverse the transfer decision and send the adolescent back to the juvenile

73. Id.
74. Klein, supra note 32, at 390. In 1975, only four states and the District of Columbia had statutes excluding juveniles from the juvenile justice system as compared to the thirty-six states currently exercising statutory exclusion. Id.
75. Id. at 390, 395.
76. Allen, supra note 11, at 51–52. Scholars argue that this characteristic of statutory exclusion and the possibility of harsher criminal penalties are “more effective at achieving the popular goals of retribution, deterrence, and selective incapacitation.” Klein, supra note 32, at 391.
77. Brannen et al., supra note 72, at 334. Prosecutorial discretion is also known as “prosecutorial direct file.” See id.
78. Klein, supra note 32, at 395.
79. Brannen et al., supra note 72, at 334.
court. This procedure provides a safety net for juvenile offenders but requires a pretrial hearing on suitability for transfer to be subject to judicial review.

4. Blended Sentencing

Waiver provisions apply to the legal proceedings a juvenile faces. Blended sentencing deals with the offender’s ultimate disposition. Blended sentencing laws allow juvenile courts to sentence offenders to adult criminal sanctions. These laws function in one of two ways. First, in juvenile blended sentencing, the juvenile court can impose a juvenile sentence as well as a suspended criminal sentence. If the adolescent offender complies with the juvenile disposition and exercises good behavior, he or she will remain in the juvenile justice system. If, however, the offender is uncooperative, the criminal sanctions take effect. Fifteen states have juvenile blended sentencing laws. Although these provisions appear more lenient because they allow young offenders to remain in the juvenile system, the practical application of blended sentencing laws may increase offenders’ risk of serving adult time. For example, Arkansas and Ohio apply juvenile blended sentencing laws to youth who would otherwise be ineligible for transfer under state law.

Second, in criminal blended sentencing laws, criminal courts may sentence transferred offenders to dispositions traditionally reserved to the juvenile courts. Like juvenile blended sentences, the juvenile disposition in criminal blended sentencing is conditional on the offender’s cooperative behavior. Seventeen

80. Id. Only twenty-five states have reverse transfer proceedings. Id.
81. Id. Reverse transfer is rare because judges are hesitant to overrule another judge’s transfer determination. Id. at 334 n.2.
82. NCJJ STATE REPORT, supra note 59, at 1.
83. Id. at 2.
84. Id.
85. Id.
86. Id.
87. Id. The exact mechanics of this process vary by jurisdiction. This article discusses the Minnesota blended sentencing laws. See infra Part III.B.
88. NCJJ STATE REPORT, supra note 59, at 2.
89. Id. at 12.
90. Id.
91. Id. at 2. Therefore, juveniles who left the juvenile courts for adjudicatory proceedings may nonetheless receive a juvenile sentence. Id.
92. Id. Criminal blended sentencing laws fall into two categories. Id. at 16.
states have criminal blended sentencing laws.\textsuperscript{95} Compared to juvenile blended sentencing laws, criminal blended sentencing seems more lenient because transferred youths may receive a juvenile sentence, which is arguably more rehabilitative.\textsuperscript{94}

B. Minnesota Transfer Laws

1. Certification to District Courts

In 1994, the Minnesota Legislature enacted the first version of the modern transfer laws.\textsuperscript{95} Minnesota Statutes section 260B.125 lays out the current transfer, or certification, rules.\textsuperscript{96} Juvenile courts may certify offenders for prosecution in criminal court through discretionary judicial waiver or presumptive judicial waiver, depending on the age of the offender and the offense.\textsuperscript{97}

Certification at the court’s discretion is an option if: (1) the offender was fourteen years of age or older at the time he or she committed the offense, and (2) the offense would be a felony if committed by an adult.\textsuperscript{98} In such instances, “the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.”\textsuperscript{99}

Exclusive blended sentencing “give[s] courts an either/or choice between juvenile and adult sanctions.”\textsuperscript{Id.} Ten states have this type of sentencing, making it the most common version of criminal blended sentencing.\textsuperscript{Id.} Inclusive blended sentencing laws allow the courts to impose both sentences in some sort of combination.\textsuperscript{Id.}


97. Id. See also NCJJ STATE REPORT, supra note 59, at 3 (providing a chart of states’ avenues for sending juvenile offenders to criminal court, including waiver laws, statutory exclusion, direct file, blended sentencing, and “once an adult, always an adult” statutes).

98. § 260B.125, subdiv. 1.

99. Id.
the prosecutor moves for certification under section 260B.125, the court must hold a hearing to determine the offender’s suitability for transfer within thirty days of the motion’s filing. To obtain an order for certification, the prosecution must demonstrate probable cause that the juvenile actually committed the alleged offense, and must show by clear and convincing evidence that “retaining the proceeding in juvenile court does not serve public safety.”

At first glance, this provision appears to ignore the Supreme Court’s guiding factors from Kent. However, the statute defines “public safety” more broadly than the vernacular. When considering whether certification will serve the public safety, the court must weigh the following factors: (1) the seriousness of the alleged offense; (2) the juvenile’s culpability for the crime as evidenced by the child’s level of participation and planning; (3) any prior record; (4) the juvenile’s prior history of treatment, including willingness to participate in treatment programs; (5) the “adequacy of the punishment or programming available in the juvenile justice system;” and (6) the dispositions available to the individual offender.

Two aspects of these factors provide evidence of the punitive nature of Minnesota’s certification laws. First, when weighing the certification factors, the statute calls for the court to give the most weight to the seriousness of the charge and the juvenile’s prior record. Second, although the statute conceptualizes “public safety,” this definition lacks reference to the individual characteristics of the offender. Noticeably absent from the Minnesota factors is the Kent factor of the sophistication and maturity of the offender. The court may, on its own initiative or upon request of counsel, order “social, psychiatric, or psychological studies” relevant to the juvenile’s certification. But the only requirement for the content of these studies is that they reference the public safety factors listed in section 260B.125, subdivision 4, and address the dispositional options available to the

100. Id., subdiv. 2.
101. Id.
103. § 260B.125, subdiv. 4.
104. Id.
105. See id. Noticeably absent from the Minnesota factors is the Kent factor of the sophistication and maturity of the offender. See Kent, 383 U.S. at 567.
106. Minn. R. Juv. P. 18.04, subdiv. 1 (2007). Although the statute does not require that the court order a psychological evaluation, almost all juveniles undergo some form of evaluation as part of the discretionary certification process. Telephone interview with Catherine McPherson, Head of Operations, Anoka County Attorney’s Office, in Anoka, Minn. (Jan. 16, 2009).
In addition to certification through judicial discretion, there is a presumption that the court will certify certain individuals for adjudication in the district courts. Presumptive certification applies if the juvenile was sixteen or seventeen years old at the time he or she committed the crime, and the alleged offense would result in either a prison sentence under the sentencing guidelines or a felony conviction if an adult had committed the offense.\(^{108}\) If presumptive certification applies and there is probable cause that the juvenile committed the alleged offense, the juvenile court will waive jurisdiction unless the juvenile rebuts, by clear and convincing evidence, the presumption that certification serves the public safety.\(^{109}\)

2. **Statutory Exclusion**

Although Minnesota does not allow prosecutorial direct file, the legislature did enact a limited provision for statutory exclusion.\(^{110}\) Rather than enacting a law that explicitly certified certain adolescents for prosecution in criminal court, the legislature excluded specific offenders from the definition of a “delinquent child.”\(^{111}\) After reaching the age of sixteen, adolescents who allegedly committed murder in the first degree are not considered delinquent children.\(^{112}\) This is a very narrow exception, however, as the statute still considers offenders charged with committing attempted murder in the first degree after reaching sixteen years of age to be delinquent children for the purposes of certification.\(^{113}\)
3. **Extended Jurisdiction**

In ordinary juvenile prosecutions, the juvenile justice system loses jurisdiction to incarcerate offenders over the age of nineteen.\footnote{Feld (2007), supra note 58, at 242.} In 1995, Minnesota adopted its own version of juvenile blended sentencing called extended jurisdiction juvenile ("EJJ") prosecutions.\footnote{See id. at 241; MINN. STAT. § 260B.130 (2006).} EJJ gives juvenile courts dispositional jurisdiction until the offender turns twenty-one.\footnote{Feld (2007), supra note 58, at 242.} In EJJ prosecutions, the court may also impose a stayed criminal sentence that may be executed if the juvenile violates any conditions of the juvenile sentence.\footnote{See id.; see also § 260B.130, subdiv. 4(a).} The court may impose EJJ prosecutions on juveniles who qualify for presumptive certification.\footnote{§ 260B.130, subdiv. 1. An example of EJJ with a juvenile who qualifies for presumptive certification occurred in the October 10, 2008 kidnapping and brutal beating of Justin Hamilton, a twenty-four-year-old man with developmental disabilities. See Frederick Melo, After Cruel Beating, Victim Lives in Terror, ST. PAUL PIONEER PRESS (Minn.), Oct. 17, 2008, at A1 [hereinafter Cruel Beating]; Frederick Melo, On MySpace, They’re So Boyishly Ordinary, ST. PAUL PIONEER PRESS (Minn.), Oct. 18, 2008, at B1. Natasha Dahn, a sixteen-year-old who purported to be Justin’s friend, lured Hamilton to the kidnappers after telling them that Hamilton sexually assaulted her. Cruel Beating, at A7. Because Dahn was sixteen years old at the time she committed felonious crimes, she was eligible for presumptive certification. See MINN. STAT. § 260B.125, subdiv. 3 (2006). Dakota County Attorney James Backstrom, who prosecuted the Niedere case, described supra notes 2–14, initially filed a motion to certify Dahn as an adult. News Release, Office of Dakota County Attorney, Juvenile Pleads Guilty in Attack Upon Vulnerable Adult (Nov. 26, 2008), http://www.co.dakota.mn.us/ NR/rdonlyres/00002790/gwvwyxgqyosaexmljwrgvkmotc/DahnCertPlea.pdf. Dahn pled guilty to two counts of kidnapping, assault in the third degree, and aggravated robbery. Id. Dahn received a stayed adult sentence of ninety-six months, and will remain in the custody of the juvenile court until she reaches the age of twenty-one. Id. Backstrom cites Dahn’s troubled childhood, mental state, and previous victimization as reasons not to certify Dahn. Id. at 2–3.} The court may also grant EJJ for a juvenile aged fourteen to seventeen upon the prosecution’s request and subsequent showing, by clear and convincing evidence, that EJJ serves public safety.\footnote{Id., subdivs. 1–2. Again, the statute refers to the same public safety factors laid out in Minnesota Statutes section 260B.125, subdiv. 4 (2006).} Although Minnesota lawmakers intended EJJ prosecutions to be an intermediate measure between retention in the juvenile system and
certification, they have not proved as successful as child advocates expected.  

IV. PROBLEMS WITH THE CURRENT STATE OF JUVENILE TRANSFER

States enacted juvenile transfer laws as a response to the public perception that violent juvenile crime was growing at an alarming rate. Legislators assumed that imposing criminal sanctions on youthful offenders would deter other juveniles from committing similarly violent crimes and would punish the offenders themselves in a manner that better fit the severity of the crime. But the effectiveness of these laws is questionable for several reasons. First, current trends in juvenile transfers show that courts do not reserve transfer solely for the most violent offenders. Second, developmental psychologists showed that a clear factor in juvenile crime is impulsive behavior that leads to a delinquent act, which means juvenile offenders do not consider the potential consequences of their actions when they commit an offense. Finally, incarcerating children in adult prisons has devastating effects on the juvenile offenders well beyond the realm of just punishment.

A. Current Trends in Juvenile Transfer

A sociological study in 1996 estimated that 210,000 to 260,000 children under the age of eighteen are tried in criminal court every year as a result of the new transfer procedures. These numbers are staggering when viewed in comparison with the 12,600 transfers that occurred nationwide in 1978. Although the new methods for transfer send more juveniles to criminal court, studies suggest these adolescents are not the most serious offenders. Rather


123. See id. at 260–61.


126. See Shook, supra note 47, at 466; see also Bishop (2000), supra note 124, at 98.
than transferring juveniles who committed violent crimes against
persons, at least 40% of the waived cases were property crimes. 127
In Florida, only 29% of delinquents transferred in the late 1970s
committed crimes against another person. 128 Current transfer
statistics also show a secondary effect on race and gender. 129 At
present, “[o]lder, male, nonwhite, and poor juveniles from urban
areas continue to represent the majority of waived adolescents.” 130
This statistic prompted many critics of transfer laws to question
whether waiver is simply the latest form of racial profiling and
discrimination. 131

Additionally, the increased rate in juvenile crime in the early
1990s does not necessarily mean more children became criminals.
Several longitudinal studies established that approximately 6% of
childhood offenders matured into criminals responsible for 50% of
all crime. 132 Therefore, it is unnecessary to lock up more children
to quell the public’s perception that more kids are becoming killers.

B. Juvenile Transfer Does Not Deter Delinquency

Lawmakers intended juvenile transfer to have a deterrent
effect on youths who learned of their peers serving time in adult
prisons. 133 This goal directly contradicts the literature on child and
adolescent development. Developmental psychology research
shows minors to be “more impulsive, to have less capacity for self-
control, and to be more inclined to focus on immediate rather

127. Shook, supra note 47, at 466; see also Bishop (2000), supra note 124, at 98
(“Historically, more juveniles were waived for property offenses than for crimes
against persons. Since 1993, more person than property crimes have been waived,
but person offenses still make up fewer than half of judicial waivers.”). Other
studies show that 46% to 55% of transferred cases involved property offenses.
Beresford, supra note 11, at 794.
128. DAVID BRANDT, DELINQUENCY, DEVELOPMENT, AND SOCIAL POLICY 77–78
129. See generally Barry C. Feld, The Transformation of the Juvenile Court—Part II:
Race and the “Crack Down” on Youth Crime, 84 MINN. L. REV. 327 (1999) [hereinafter
Feld (1999)] (discussing the effects of “get tough” crime policies on race).
130. Myers, supra note 48, at 127.
131. See generally Feld (1999), supra note 129 (questioning the staggering
statistics on transferred minorities).
132. Gina M. Vincent, Psychopathy and Violence Risk Assessment in Youth, 15
133. RICHARD E. REDDING, OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION,
JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 2 (2008),
than long-term consequences of their choices.\textsuperscript{134} The American justice system often considers the amount of control a defendant had over his or her actions when assigning criminal responsibility.\textsuperscript{135} Adolescent traits such as impulsivity and susceptibility to peer pressure suggest that juvenile offenders have a diminished capacity to understand and control their actions.\textsuperscript{136}

The Supreme Court recognized this issue in the recent case of \textit{Roper v. Simmons}.\textsuperscript{137} The court refused to impose the death penalty on a juvenile offender based on research from several prominent psychologists that demonstrated children’s lack of maturity, susceptibility to negative influences, and malleable personality.\textsuperscript{138} These traits account for a lack of control over one’s actions, and therefore prevent punitive measures from serving as a deterrent. Delinquent behavior stemming from impulsive acts will not cease due to the availability of harsher penalties. A juvenile on the cusp of committing a crime will not pause to consider the possibility that he or she may serve an adult prison sentence as a result of his or her behavior. Therefore, juvenile transfer laws are ineffective deterrent measures.

Recent juvenile crime statistics are unclear on the deterrent effect of transfer laws. As discussed above, juvenile crime rates rose in the 1980s and early 1990s.\textsuperscript{139} A sharp decrease in youth violence followed from 1994 until 2004.\textsuperscript{140} Proponents of juvenile transfer may attribute this decrease to the enactment and improvement of transfer provisions; however, the decade-long decline in juvenile crime ended in 2004.\textsuperscript{141} The juvenile arrest rate for violent crimes increased by 2\% in 2005 and an additional 4\% in 2006.\textsuperscript{142} Despite the recent increases, the juvenile crime rates for all offense types
remain well below the levels seen in the 1990s. It is therefore unclear whether juvenile transfer laws had a marked effect on juvenile crime rates.

C. Anti-Therapeutic Effects of Juvenile Transfer

The most recent psychological research shows that transfer laws do not even deter those juveniles who do serve criminal sentences. Criminal incarceration is the final blow in the “get tough” policy towards juvenile crime. As of 1998, forty-four states incarcerated juveniles in adult facilities, and only eighteen of these states housed the youth offenders in separate facilities. However, many studies show that imprisoning juvenile and adult offenders together leads to greater youth recidivism, thereby frustrating the original goal of public safety. This recidivism may be a result of procedural disenfranchisement, a lack of rehabilitative resources in prison, and victimization in prison.

143. Id. at 6–7.
144. MYERS, supra note 48, at 99–100.
145. See Bishop (2000), supra note 124, at 130. Bishop and her colleagues conducted several studies of juveniles in adult correctional facilities that gained worldwide notoriety. See id.; Donna M. Bishop, Lonn Lanza-Kaduce & Charles E. Frazier, Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms, 10 U. FLA. J. L. & PUB. POL’Y 129 (1998); Charles E. Frazier, Donna M. Bishop, Lonn Lanza-Kaduce & Amir Marvasti, Juveniles in Criminal Court: Past and Current Research from Florida, 18 QLR 573 (1999); Lonn Lanza-Kaduce, Charles E. Frazier & Donna M. Bishop, Juvenile Transfers in Florida: The Worst of the Worst?, 10 U. FLA. J. L. & PUB. POL’Y 277 (1999). Cumulatively, the researchers interviewed hundreds of male offenders in Florida who were prosecuted in juvenile court, as well as those transferred to criminal courts. Bishop (2000), supra note 124, at 152. Much of the information in this section comes from the researchers’ comparisons between the responses of each population. Although these studies reflect solely the views of male offenders, it is important to remember that over 90% of transferred youths are male. See infra note 175 (indicating a 93.3% of male juvenile offenders).
146. MYERS, supra note 48, at 100; Bishop (2000), supra note 124, at 141–47; Shefi, supra note 20, at 664. Additionally, it is important to note that there may be a sample selection problem when discussing the recidivism rates of transferred youth. Assuming arguendo that juvenile transfer laws send the most dangerous offenders to criminal court, these juveniles may be more likely to recidivate regardless of where they serve their sentence. However, at least one study found that for juveniles who committed the same crime but served different sentences, a greater period of time elapsed between release and re-arrest for the offenders who remained in the juvenile system. Howard Snyder & Melissa Sickmund, Transfer, in READINGS IN JUVENILE JUSTICE ADMINISTRATION 172, 183 (Barry C. Feld ed., 1999).
1. Procedural Disenfranchisement

Juvenile offenders transferred to adult courts reported different experiences than their counterparts in juvenile court during the adjudication process. Transferred youth felt the criminal court was formal, rushed, and that the court had no interest in the offender as a person. Youths also found the criminal proceeding more difficult to understand and expressed distrust towards appointed counsel. These perceptions resulted in the offenders’ belief that they did not receive a fair trial and left the adolescents frustrated and angry with the justice system.

2. Victimization and Rehabilitation

Once they arrive in prison, juvenile offenders face more aggravation. Paramount is a high level of victimization and psychological distress. Juveniles in adult facilities reported more weapons assaults, sexual violence, and physical altercations than their counterparts in juvenile detention centers. Juveniles live in constant fear of harm, causing many youths to report poor psychological health, including greater anxiety and depression.

Unlike juvenile detention facilities, prisons have less, if any, treatment options, counseling services, or educational and professional opportunities. This presents a distinct problem for incarcerated youth, who will more than likely reenter society at some point and be expected to live as productive members of their communities. Rather than learning essential skills for life after prison, juvenile inmates reported learning new crime techniques.

148. Id. at 136. In comparison, juvenile offenders who remained in juvenile court reported that “judges had interacted with them personally during court proceedings and expressed interest in their problems and concern for their well-being.” Id. These individuals believed the juvenile court had each youth’s best interests at heart. Id.
149. Id.
150. Id. at 136–37.
151. Id. at 145–46.
152. Id. Juvenile offenders face a greater risk for institutional violence in prisons because not only are the juveniles obvious targets, but sexual and physical abuse occurs more frequently in adult facilities. Shefi, supra note 20, at 664.
153. Bishop (2000), supra note 124, at 146. Juveniles in prisons experience greater mental health issues than the adult population; juvenile inmates are eight times more likely to commit suicide. Shefi, supra note 20, at 664.
154. Shefi, supra note 20, at 664.
155. Id.
3. Post-Release Consequences of Incarceration

When the prisons become too crowded, as they are today, juvenile convicts are among the first released because they are considered less dangerous than the adults; therefore, these juveniles may actually serve shorter and less punitive sentences as a result of transfer. Juvenile offenders reenter society as semi-citizens. Unlike juvenile court records, which are sealed, criminal convictions are a matter of public record and youth must report them on all academic and employment applications. The more difficult it is for a juvenile to find a stable job, the more likely he will recidivate. Additionally, individuals with criminal records lose many civil liberties such as the right to vote, hold office, join the military, or even to sit on a jury.

Given these harsh restrictions and stigmatization, it is not surprising that transferred offenders are more likely to reoffend more quickly, frequently, and severely than their peers held in juvenile court. This higher rate of recidivism suggests that transferring juveniles may increase juvenile crime, which is directly opposite to the effect that policymakers intended.

V. PSYCHOLOGY’S POTENTIAL ROLE AND OTHER RECOMMENDATIONS

A. Psychology Should Aid Juvenile Waiver Decisions

Violence risk assessments are probabilistic estimates of violence based on individual and situational factors. Risk assessments take the form of clinical interviews, structured interviews, or actuarial measures. In these interviews or actuarial

---

156. Id.
157. Id. at 665.
159. Id. There is a negative correlation between stable employment and criminal activity. Id.
160. Id. Ironically, juvenile ex-convicts lose these liberties before they ever had an opportunity to exercise these privileges. Shook, supra note 47, at 472–73.
162. See Myers, supra note 48, at 100.
164. John Monahan, Actuarial Support for the Clinical Assessment of Violence Risk, 9
tools, mental health professionals analyze the presence or absence of factors that make it more or less likely that the subject will engage in violent conduct in the future. These evaluations differ from traditional clinical instruments because they attempt to describe an individual’s behavior rather than simply present a diagnosis.

1. Clarification of Kent Criteria

In order to create a risk assessment instrument, psychologists must know what factors are indicative of violence. Although the factors the Supreme Court set out in Kent provided guidelines for judges and even prosecutors, when making decisions about which cases to transfer to adult court, many courts remain unclear on the application of these factors. Researchers conducted several studies to clarify these constructs.

First, scholars grouped the Kent factors into three main constructs: (1) potential dangerousness; (2) sophistication and maturity of the juvenile; and (3) the individual’s amenability to treatment. Next, another study further explored these constructs by asking clinical psychologists to rate the prototypicality of items related to each of the three constructs. Participating psychologists reported that items relating to antisocial behavior and leadership roles in crime best characterized the dangerousness construct. Criminal sophistication, premeditation of the crime, and an understanding of social norms and alternatives to crime were the highest rated items relating to the sophistication-maturity


165. Id.

167. Salekin et al. (2001), supra note 65, at 383. For example, many state statutes concerning the dangerousness criteria “do not define the standard beyond a brief phrase that identifies it, such as ‘protection of the community,’ ‘danger to public,’ or ‘public safety.’” Thomas Grisso, Forensic Evaluation of Juveniles 201 (1998). As discussed in Part III.B.1., Minnesota certification statutes repeatedly use the term “public safety,” but this phrase is not present in the definitions relating to the statute. See MINN. STAT. § 260B.007 (2006).

169. Salekin et al. (2001), supra note 65, at 387.
170. Id. at 397.
Lastly, items relating to motivation to change and familial support defined the amenability to treatment construct. When these psychologists made mock transfer decisions using these constructs, they were more likely to transfer individuals rated moderately high in dangerousness, and moderately low in both sophistication-maturity and amenability to treatment.

After clarifying the Kent constructs, the researchers turned their attention to the legal system’s use of the Supreme Court’s transfer guidelines. One study asked juvenile court judges to describe an actual youth each judge personally waived to criminal court whom the judge believed to be representative of most transfer cases. Judges reported that transferred juveniles tended to rate high in dangerousness and low in amenability to treatment. Typical traits of the transferred youth included the use of weapons, behavioral problems in multiple settings, knowledge of the consequences of deviancy, crimes of extreme violence, premeditation, and failure to accept responsibility for the crime.

2. Risk Assessments

Clarifying the Kent criteria and their application in transfer decisions may provide psychologists with insight in another important area related to juvenile waiver to criminal court. When an individual receives a transfer hearing, judicial officers often rely on experts to identify juveniles who possess the constructs discussed above. Responding to the legal system’s call for assistance,

171. Id.
172. Id. at 397–98.
173. Id. at 399.
175. Id. at 401–02. Additionally, the average age of the transferred youth was 15.98 years (standard deviation (SD) = 1.10 years) and the average education level was 9.13 years (SD = 1.12 years). Id. at 394–95. The vast majority (93.3%) of the juvenile offenders were male. Id. at 395. Thirty percent of juvenile offenders were white, and 70% were minorities. Id.
176. Id. at 396.
177. Salekin et al. (2001), supra note 65, at 381. See also THE WORKSHOP ON PSYCHIATRIC PRACTICE IN THE JUVENILE COURT, HANDBOOK OF PSYCHIATRIC PRACTICE IN THE JUVENILE COURT (1992) (providing a comprehensive guide to the various roles psychology and psychiatry play in the juvenile court system).
psychologists developed several juvenile risk assessments. 178

a. Psychopathy Checklist: Youth Version (PCL:YV)

Traditionally, psychologists assessed juvenile risk using adult scales that were revised for use with adolescents. 179 One such measure is the Psychopathy Checklist: Youth Version (PCL:YV). 180 The PCL:YV assesses psychopathic traits associated with adolescent risk and amenability to treatment. 181 It is therefore unsurprising that high PCL:YV scores have a statistically significant correlation with criminal versatility, violent and aggressive behavior, increased recidivism rates, and treatment noncompliance. 182 The predictive validity of the PCL:YV makes it a useful tool in identifying violent juvenile offenders. 183

It is important to consider psychopathy instruments because juvenile court judges consider this factor demonstrative of dangerousness. 184 Furthermore, several psychological studies found statistically significant correlations between scores on adult psychopathy measures and violent recidivism. 185 In fact, compared

178. The assessments described infra are only a sample of the numerous instruments available to measure risk in juveniles. There is no standard evaluation; therefore, there is no single correct way to assess risk. Grisso (2000), supra note 166, at 331–32. Risk assessments vary widely, but usually incorporate general risk factors such as past aggressive behavior, family conflict, and mental disorders. Id. at 338–40.
179. Vincent, supra note 132, at 408.
180. Adelle E. Forth, David S. Kosson & Robert D. Hare, The Hare Psychopathy Checklist: Youth Version (PCL:YV)—Rating Guide (1997). Psychopathy is a personality disorder marked by various interpersonal, affective, and behavioral traits. Zina Lee et al., The Validity of the Antisocial Process Screening Device as a Self-Report Measure of Psychopathy in Adolescent Offenders, 21 BEHAV. SCI. & L. 771, 771 (2003). The PCL:YV is a version of the Psychopathy Checklist—Revised (PCL-R), the most popular and validated psychopathy instrument, revised for youth ages 12 to 17. Id. at 772. It is important to note that the PCL and its adaptations are not risk assessments. Professionals use the instrument to diagnose psychopathy, which happens to correlate with violent behavior. See infra note 181 (explaining why violence correlates with psychopathy). Although this is a subtle distinction, it plays an important role in psychological literature.
182. Id. at 18; Lee et al., supra note 180, at 773; Vincent, supra note 132, at 420.
183. Id.
185. See generally Stephen D. Hart, Robert D. Hare & Adelle E. Forth, Psychopathy as a Risk Marker for Violence: Development and Validation of a Screening
to other risk factors, psychopathy is the single best predictor of violence in male offenders. Nevertheless, many researchers caution that adolescent personalities are not static enough to support a psychopathy diagnosis. Furthermore, psychopathy is only one factor in assessing dangerousness in juvenile offenders. Other scales are available to assess a juvenile’s risk of generalized violence.

b. Structured Assessment of Violence Risk in Youth (SAVRY)

The Structured Assessment of Violence Risk in Youth (SAVRY) is a structured professional judgment risk assessment created for an offender population. The SAVRY is an empirically based interview that uses professional judgment to assess the applicability and importance of various factors. After completing a structured interview, the forensic evaluator gives the offender an ultimate risk assessment score of low, medium, or high. The SAVRY examines both risk and protective factors and allows for professional discretion. These features of the assessment allow for an individualized evaluation of the offender, which aligns with the goals of the juvenile justice system.

c. Risk-Sophistication-Treatment Inventory (RST-I)

Like the instruments discussed above, most risk assessments fail to examine juvenile offenders’ maturity levels or amenability to

---

Version of the Revised Psychopathy Checklist, in VIOLENCE AND MENTAL DISORDER 81, 81–100 (John Monahan & Henry J. Steadman eds., 1994) (outlining the findings in several studies with various versions of the Psychopathy Checklist, the Psychopathy Checklist Revised, and the Psychopathy Checklist: Screening Version).


187. Lee et al., supra note 180, at 772 (“Adolescence is a developmental time marked by changes in cognition, identity, and socialization.”).


189. Vincent, supra note 132, at 422.

190. Borum et al., supra note 188, at 313.

191. Id. at 313–15.

192. Id. Risk factors are static and dynamic variables that make an individual’s propensity for violence more likely, such as a history of violence, stress, and impulsivity. Id. at 313–14. In contrast, protective factors are static variables that decrease an individual’s probability of committing future violent acts, such as prosocial involvement, strong support systems, and academic achievement. Id.

193. Id. at 320.
treatment. Those assessments that do address the constructs were not designed for use with a delinquent population. The Risk-Sophistication-Treatment Inventory (RST-I) fills this gap in the available instruments. Randall T. Salekin and his colleagues created the RST-I specifically to aid the juvenile court system in decisions concerning juvenile transfer to criminal court. The RST-I uses the transfer guidelines from Kent to measure an individual’s risk of future violence, cognitive and emotional maturity, and amenability to treatment. When comparing the RST-I scores of offenders retained in the juvenile court and those waived to the criminal system, transferred juveniles consistently scored higher on the Risk for Dangerousness and Sophistication-Maturity scales, and lower on the Amenability to Treatment scale.

3. Areas of Improvement for Risk Assessments

Although the above risk assessments have high predictive and internal validities, they do have some limitations. The most blatant limitation is the dearth of information on validity in minority and female populations. Other than the RST-I, the risk assessments discussed above refer to modified adult scales. Some researchers question whether these risk assessments adequately address the malleability of children and the developmental factors that may affect the predictive validity of long-term risk assessments.

194. Salekin et al. (2001), supra note 65, at 401–02.
195. Id.
197. Id. at 342.
198. Id. The instrument measures each of these three constructs with three scales of fifteen items. Id. at 343. Raw scores for each of the nine clusters relate to a normative sample and the individual receives a rating of low, medium, or high for each of the three constructs. Id. Despite the novelty of the RST-I, the instrument received high reliability and validity scores. Id. at 348–50.
199. Id. at 350.
200. See generally Grisso (2000), supra note 166 (providing extensive statistical information on transferred youths). The lack of research on minority populations is especially concerning given the large number of transferred minority youth. See Myers, supra note 48, at 127.
201. Vincent, supra note 132, at 410.
202. Id. at 423–24. These researchers are also hesitant to label a juvenile with loaded terms, such as “psychopath,” when theories of developmental psychology stress the malleability of youth. Id. at 423.
Because both transfer laws and the clarification of Kent criteria are recent developments, researchers have not tracked recidivism into adulthood, which may also affect the instruments’ predictive validities.

In addition to the issues inherent in the risk assessments themselves, it is questionable whether the law accepts psychology’s input. One study asked judges from the National Council of Juvenile and Family Court Judges to make transfer decisions for juveniles in hypothetical cases with differing levels of dangerousness, sophistication-maturity, and amenability to treatment. The study revealed that the level of dangerousness and sophistication-maturity influenced transfer decisions, but the juvenile’s potential responsiveness to treatment did not. This finding is puzzling because, at another point in the study, the same judges cited the court’s goal of rehabilitation as a reason to keep youths in juvenile court. Additionally, several judges expressed frustration with psychologists’ transfer reports, raising doubts as to whether the courts used these reports in their decision.

Just as psychology and juvenile justice evolved simultaneously, there was a correlation between the improvement of risk assessments and the amount of use they received in court. The Supreme Court first addressed the use of risk assessments in Barefoot v. Estelle, when the court expressed both skepticism of the validity of risk assessments and a hope for their future improvement. In a prompt response to the Court’s decision, mental health professionals conducted extensive research to increase the predictive validity of risk assessments. Since that time, risk assessments underwent several generational evolutions, becoming increasingly predictive. Undoubtedly, with more

203. Id. at 417.
204. Brannen et al., supra note 72, at 338–39.
205. Id. at 347.
206. Id. at 348.
207. Id. at 345. The judges’ comments included that the reports “[d]o not provide rehabilitation and treatment options” but “should be comprehensive and extensive” and “[s]ome are pretty vague.” Id.
209. Id. at 898.
211. Id. at 103–04. Research on “first generation” risk assessments showed that “psychiatrists and psychologists [were] accurate in no more than one out of three
direction and encouragement from the courts, this trend will continue.

B. Abolish Statutory Exclusion and Prosecutorial Direct File

Criminal incarceration produces harsh results for both the transferred youth and society. Statistics show that property offenses comprise a majority of transferred cases. Clearly, transfer provisions are not reserved solely for the worst offenders, and transferring more juveniles than originally intended only increases the number of released convicts who will later recidivate. Psychological risk assessments can aid courts in transferring only those juveniles who present a serious risk to the community and are not amenable to treatment. In addition to improving the validity of risk assessments, pervasive implementation of risk assessments requires mandatory transfer hearings and education for members of the legal and psychological fields. The following measures may achieve these goals.

First, the legal system must decide whether the goal of the practice is to transfer juveniles with adult qualities or to transfer offenders with the aim that they will receive adult punishments. As long as the answer is not exclusively the latter, it seems reasonable to abolish statutory exclusion and prosecutorial direct file. Statutory exclusion and prosecutorial direct file make transfer decisions based solely on the offender’s age and crime committed without considering biographical or contextual information. These methods of waiver reduce adulthood to a single act. Such a simplification flies in the face of decades of psychological research relating to child and adolescent development, as well as the fundamental principle of the juvenile justice system, which sees youth as highly malleable individuals.

predictions of violent behavior over a several-year period.” John Monahan, Nat’l Inst. of Mental Health, The Clinical Prediction of Violent Behavior, 47–49 (1981). In “second generation” risk assessments, predictive validity increased to at least 50% accuracy. Otto, supra note 210, at 121. Psychologists are now in the third generation of risk assessments and validity is still increasing. Id.

212. See supra Part IV.
213. See supra Part IV.
214. See Shook, supra note 47, at 468 (summarizing the shift from the rehabilitative model of juvenile justice to the current crime control model).
215. Id. at 465.
216. Id. at 473.
217. Id. at 463. See also Klein, supra note 32, at 393 (“Statutory exclusion is a
Furthermore, juveniles transferred to adult court through statutory exclusion or prosecutorial direct file may not appeal these decisions. Commentators also question the constitutionality of statutory exclusion and direct file, saying that every juvenile should be afforded “the same due process guarantee to a [transfer] hearing before the state can charge him as an adult.” The abolishment of statutory exclusion and direct file would achieve this guarantee, as well as the certainty that a juvenile judge would preside over the hearing.

The latter guarantee addresses concerns about the propriety of prosecutorial direct file given that a prosecutor’s duty is to the state and its security. This obligation may encourage prosecutors to overcharge juveniles in an effort to appear tough on crime. Rather than focusing solely on the state’s interests, it is the job of the juvenile court judges to rule in the best interests of the child. Additionally, judges are likely familiar with the needs of the individual and can make more informed transfer determinations. When asked about the various methods of transfer, a vast majority of judges from the National Council of Juvenile and Family Court Judges believed a return to case-by-case judicial transfers would have positive implications for youth. Therefore, many legal professionals, judicial officers, and psychologists call for an complete abandonment of an offender-based, treatment-oriented system in favor of one that is offense-based and punishment-oriented.

220. Id. at 1009.
221. Id. at 998.
222. Id. at 1008.
223. Id. at 1002.
224. See id.
225. Seventy-two percent of judges polled advocated a return to judicial waiver. Brannen et al., supra note 72, at 346.
226. Id. These judges cited the “checks and balances” built into the system to counter arguments of arbitrary judicial transfer decisions. Id.
228. See, e.g., Brannen et al., supra note 72, at 345 (quoting a judge’s answer to an open-ended question that “[t]rained and experienced judges know more than the legislature and the public regarding which youths should be transferred to adult courts.”).
229. See Salekin et al. (2001), supra note 65, at 403.
abolition of statutory exclusion and prosecutorial direct file.

C. Improve Communication Between Psychology and the Law

Dr. Randall Salekin, creator of the RST-I, suggests the adoption of a national transfer standard, made up of the Kent factors and a method for balancing them.\(^{230}\) Although this may be impractical on such a large scale, the Minnesota certification laws provide a fair example\(^ {231}\) of how to incorporate the Kent factors and a balancing test into state legislation.\(^ {232}\) States could also require that a mental health professional assess the juvenile offender as a part of the transfer hearing.\(^ {233}\) Incorporating such laws will require court officials to pay attention to the latest psychological research on child and adolescent development, risk assessment, and treatment options in order to make well informed decisions in transfer hearings.

In tandem, psychologists must continue to develop and validate risk assessments, particularly with young minority and female populations.\(^ {234}\) Clinicians need to deviate from a purely academic track and infiltrate the legal and political forces. Such action requires that researchers become familiar with the legal standards at issue in the law.\(^ {235}\) Social scientists should attempt to publish relevant articles in a wider range of publications. Additionally, judges, attorneys, and psychologists need to be on the same page about the transfer process.\(^ {236}\) To achieve this goal, psychologists should provide training for individuals in the legal profession with reference to applicable research.\(^ {237}\) Along the same lines, mental health professionals should educate judges about the mechanics of the risk assessments and the significance of certain

\(^{230}\) Brannen et al., supra note 72, at 349 (“[S]cientists, legal scholars, and legislators should (a) further develop definitions of the criteria for transfer, (b) know something about how to weigh them, and (c) refine transfer mechanisms to reflect fairness.”).

\(^{231}\) As previously mentioned, the statute does not include consideration of the juveniles’ sophistication and maturity. See supra Part III.B.1; Minn. Stat. § 260B.125, subdiv. 4 (2006).

\(^{232}\) See Salekin et al. (2002), supra note 174, at 404; § 260B.125, subdiv. 4.

\(^{233}\) Admittedly, it is unknown among social scientists how often and in what capacity courts use transfer evaluations. See Grisso (2000), supra note 166, at 331–32.

\(^{234}\) Vincent, supra note 132, at 411.

\(^{235}\) Grisso (2000), supra note 166, at 323.

\(^{236}\) Brannen et al., supra note 72, at 349.

\(^{237}\) Salekin et al. (2002), supra note 174, at 405.
measures.\textsuperscript{238} Most importantly, those who prepare reports for the court must use layman’s terms.\textsuperscript{239} If legal and mental health professionals take these, or similar steps, the two fields may be able to mutually improve the treatment of juveniles in the justice system.

VI. CONCLUSION

The juvenile justice system experienced a dramatic evolution from its origins in rehabilitative ideals to “get tough” policies. As part of this shift, legislators in almost every jurisdiction enacted new laws to increase the number of juvenile offenders transferred to criminal court. Although these laws are more retributive, they also present several problems and ignore the relevant psychological literature. In order to combat these potential inefficiencies, the juvenile justice system should require the use of risk assessments in transfer hearings, eliminate direct file and statutory exclusion, and educate the legal and psychological communities on the needs and abilities of each field.

\textsuperscript{238} Brannen et al., supra note 72, at 345. Such education should be undertaken as a response to judges’ beliefs that “[m]any reports simply ‘parrot back’ the social history of which we are already aware” and that some of the reports are “pretty vague.” Id.

\textsuperscript{239} Judges reported that test results “do not explain in layman terms” and “do not explain numbers or scores and often are written for other psychological experts . . . . and not for juvenile court judges.” Id.