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## *Chapter 6*

# **Effects of Waivers**

Peter S. Lehmann and Addison Kobie

Even in the early days of the juvenile court, the option to waive youth offenders to the adult justice system was available to judges, though there were alternative rationales underlying this practice. On one hand, in light of jurisdictional issues that had yet to be clarified, juvenile court officials were reluctant to challenge decisions made by state's attorneys to prosecute the most serious cases in the adult court (Feld, 2019; Myers, 2005; Tanenhaus, 2004). As a result, although states had begun to set clear age limits on juvenile court jurisdiction, transfer to the adult system "served as a built-in safety valve which a judge could use to relieve political pressure on his court by expelling a controversial case" (Tanenhaus, 2000, p. 21). In contrast, judges also sometimes justified the use of transfer as a means of protecting the welfare of children housed in reform schools, which were intended for youth who would most benefit from individualized, lenient, and non-stigmatizing forms of sanctioning (Bishop, 2000; Platt, 1977). Further, there were criticisms of juvenile courts arising in the 1920s and 1930s, which characterized them as soft on crime, and even Progressive supporters of the new juvenile justice system embraced the practice of transfer as essential for the proper functioning of youth courts (Tanenhaus, 2004).

By the 1950s, much of the rhetoric surrounding transfer emphasized the enhanced procedural fairness and the incapacitative and deterrence benefits that processing and punishment by the adult court ostensibly could provide (Bernard & Kurlychek, 2010; Feld, 2019). Indeed, mid-century legal scholars were concerned that the informality and rehabilitative focus of the juvenile court were ineffective at deterring youth crime (e.g., see: Tappan, 1946), and some advocated for a more formalized juvenile court and increased use of waiver, which previously had been a relatively rare and largely symbolic occurrence (Feld, 1999a; Manfredi, 1998). Consequently, as a report

by the Advisory Council of Judges of the National Council on Crime and Delinquency (1962) revealed, when justifying transfer decisions, judges frequently considered such factors as the “hopeless” nature of a case, the presumed “advantage in resources for treatment and public safety” offered by the criminal court, and a perceived need to punish a youth especially severely “for his attitude” (p. 5). Then, in a series of landmark decisions during the 1960s and 1970s, the U.S. Supreme Court effectively brought an end to traditional juvenile justice through the imposition of formal procedures and due process protections (Feld, 2003, 2019), thereby ushering in a new era in which “‘just deserts’ replaced ‘justice for the child’ as the rallying cry of reformers” (Tanenhaus, 2000, p. 33).

An overtly punitive rationale for transfer became even more prominent during the “get tough” era of the 1980s and 1990s. In response to public fears surrounding a predicted increase in youth crime and the rise of a new class of “juvenile superpredators” (DiIulio, 1995), legislatures enacted a wide range of measures designed to expand the practice of transfer (Bernard & Kurlychek, 2010; Mears, 2002). The first strategy involved expanding modes of transfer beyond discretionary waiver to include prosecutorial direct-file and statutory exclusions, both of which bypass the juvenile court entirely and shift discretion over the transfer decision from juvenile court judges to other criminal justice actors (Bishop, 2000; Feld, 2018; Myers, 2005). Some states also lowered the age of juvenile court exclusion from eighteen years old to fifteen or sixteen (Griffin Addie, Adams, & Firestine, 2011), and others reduced or eliminated entirely the minimum age of transfer (Siennick, 2017). Many scholars expressed concerns that these policy changes reflected a further abandonment of the juvenile court’s founding principles and represented a shift in focus from the protection of youths’ best interests to retribution, “just deserts,” and the protection of public safety (Butts & Mitchell, 2000; Feld, 1999b, 2003; Shook, 2005; Singer, 1997).

As American juvenile justice has transitioned from the “get tough” era to the “kids are different” era (Feld, 2019), much scholarship has explored the legal, ethical, and empirical dimensions of juvenile transfer policy and practice. For instance, a vast body of work from developmental psychology has found striking differences in moral decision-making between youths and adults, with adolescents far less able to thoughtfully consider the consequences of criminal acts (e.g., Cauffman & Steinberg, 2000; Fried & Reppucci, 2001; Steinberg & Cauffman, 1996; Sullivan, 2019). Other research has shown that transfer to the adult court largely fails to provide any specific deterrence benefits (Jordan & Myers, 2011; Redding, 2003; Zane, Welsh, & Mears, 2016), but instead can have a wide range of negative consequences on employment, earning potential, social capital, and the likelihood of recidivism (e.g., Augustyn & Loughran, 2017; Augustyn & McGloin, 2018; Bishop, Frazier,

Lanza-Kaduce, & Winner, 1996; Myers, 2003b; Sharlein, 2018; Taylor, 2015; Winner, Lanza-Kaduce, Bishop, & Frazier, 1997). Further, when examining incarceration experiences, scholars have found that juvenile transfer status is associated with increased institutional misconduct (Haerle, 2019; Kolivoski & Shook, 2016), worsened health outcomes (Valentine, Restivo, & Wright, 2019), and a heightened risk of victimization (Gaarder & Belknap, 2002; Reddington & Sapp, 1997).

While the literature on these issues surrounding transfer has been informative, another broad line of inquiry that also has received much scholarly attention is the punishments that transferred youth receive in the adult court. This latter body of work has provided crucial insights in several areas. First, some of this research has tested the existence of a “juvenile justice model” and a “criminal justice model” of sanctioning in the juvenile and adult courts, respectively (Kupchik, 2003), and some of the reported findings challenge the notion that transfer to the adult court necessarily results in more certain and severe punishment outcomes (Bortner, 1986; Jordan & Myers, 2011; Kupchik, 2006; Myers, 2003a). Second, scholars have explored whether a “juvenile penalty” exists in adult court sentencing, suggesting that there may be attributions connected to culpability and dangerousness that criminal court actors can assign to transferred youth (Johnson & Kurlychek, 2012; Jordan & McNeal, 2016; Kurlychek & Johnson, 2004, 2010). Finally, some research has attempted to explain variability in the sentencing of transferred youth as a unique defendant population, thus investigating the defendant- and contextual-level factors that might inform court actors’ perceptions of transferred juveniles and influence the adult court sentencing outcomes that they give to them (Carmichael, 2010; Jordan & Freiburger, 2010; Lehmann, Chiricos, & Bales, 2017; Zane, 2018).

By exploring these interrelated lines of inquiry, this multi-dimensional body of research helps to clarify the ambiguity surrounding how justice system actors understand the meaning of juvenile transfer itself. For instance, it is plausible that, as in the early days of the juvenile court, judges in the contemporary justice system context may consider juvenile transfer status to be largely symbolic, and they reluctantly sentence large numbers of youth transferred to adult court to avoid political conflict and public scrutiny (Bortner, 1986). Alternatively, since “get tough” era juvenile court reforms have effectively “dismantle[d] the legal and procedural border between juvenile justice and criminal justice” (Butts & Mitchell, 2000, p. 178), it may be that court actors do not conceptually distinguish transferred youth from either their retained peers or their adult counterparts. However, it also is possible the retributive ethic of punitive juvenile justice has infiltrated adult court sentencing practices, thus resulting in the characterization of transferred youth as especially dangerous, threatening, and deserving of “adult time” for

“adult crime” (Miller & Applegate, 2015; Myers, 2003a). Further, since it is likely that court actors do not perceive transferred youth as a homogenous defendant population, these processes may be conditional upon a variety of other factors that might make court actors more or less likely to view transfer status as signaling increased culpability and threat. Thus, it may be these other variables that ultimately lead justice system personnel to distinguish “our children” from “other people’s children” (Feld, 1999b; Lehmann, 2018; Pickett & Chiricos, 2012).

In this chapter, we review three bodies of literature on the punishment of transferred juveniles. First, we assess the state of the research comparing the punishment of youth in the juvenile and adult justice systems, focusing particularly on the notion of separate “models of justice,” the promise of increased certainty and severity of punishment that is presumed to be offered by the criminal court, and the possible existence of a “leniency gap” in sanctioning between these two systems. Second, we examine the literature exploring a “juvenile penalty” versus a “youth discount” in adult court sentencing that might be experienced by transfers relative to adult offenders. Then, we review the work on the legal and extralegal factors, which may inform the sentences that transferred youth can receive. Finally, we conclude by highlighting several promising lines of future inquiry.

### **MODELS OF JUSTICE AND THE VANISHING “LENIENCY GAP”**

As states began to expand transfer policies during the “get tough” era, policymakers implicitly made several key assumptions about the distinctions between the juvenile and adult justice systems. These assumptions in large part relate to presumed differences in punishment structures and sanctioning options available to judges in juvenile and adult courts, with the former primarily interested in assigning lenient, restorative, and protective sanctions and the latter better able to mete out severe punishment outcomes to the serious and chronic youth offenders who most deserve them (Singer, 1997; Zimring, 1998). Notably, however, scholars consistently have demonstrated that the “tough on crime” juvenile justice policy shifts during the 1980s and thereafter (e.g., the adoption of offense-based sanctioning guidelines and the loosening of confidentiality protections) may compromise this assumption, ultimately producing a juvenile court system that largely mirrors the functioning of the adult criminal court (Bernard & Kurlychek, 2010; Butts & Mears, 2001; Zimring, 2005). Nonetheless, the logic of transfer follows from the belief that the juvenile and criminal courts are organized under different “models of justice” and that, as a result, the adult system is better equipped

to assign certain, swift, and severe sanctions that are theoretically expected to reduce individual youths' likelihood of reoffending as well as juvenile delinquency rates in general.

It has long been assumed that the juvenile and criminal justice systems operate under fundamentally distinct sets of principles, with "juvenile and adult courts . . . representing rehabilitative and punitive orientations, respectively" (Mears & Field, 2000, p. 1009). Thus, the "juvenile justice model" (Kupchik, 2003, 2006) expects that, in general, retained youth will experience the informal, non-adversarial, and flexible processing and sanctioning that are characteristic of the juvenile justice system (Emerson, 1969; Feld, 1997; Krisberg, 2005). Indeed, at the disposition stage, juveniles can expect to receive interventions that are designed to direct youth to individualized treatment-based services, even if judges adhere to formalized guidelines structures when making these decisions (Baglivio, Greenwald, & Russell, 2015; Howell, 2009; Lehmann, Meldrum, & Greenwald, 2020). These priorities in large part reflect the founding principles of the juvenile court itself, which was explicitly intended to ensure that youth receive non-stigmatizing forms of sanctioning that suit the needs of youth (Platt, 1977; Tanenhaus, 2004). Additionally, punishment under the juvenile justice model involves the intentional consideration of youths' extralegal characteristics, including family circumstances, maturity, cognitive development, future welfare and life opportunities, and amenability to specific forms of treatment (Horwitz & Wasserman, 1980). While this enhanced discretion afforded to court actors can result in unwarranted disparities in punishment (e.g., see Bishop, Leiber, & Johnson, 2010; Bridges & Steen, 1998; Engen, Steen, & Bridges, 2002), the primary goal of the juvenile justice model remains the imposition of lenient and individualized sanctions.

The juvenile justice model stands in stark contrast to the criminal justice model, which is expected to guide the sentencing of offenders within the criminal court (Kupchik, 2003, 2006). Theoretical frameworks attempting to explain this model often have emphasized tensions in court actors' decision-making between the goals of "formal rationality" and "substantive rationality" (Savelsberg, 1992; Ulmer, 1997; Ulmer & Kramer, 1996). Formal rationality involves a consideration of the legal factors most relevant for sentencing (e.g., offense type, criminal history, and sentencing guideline recommendations), while substantively rational criteria include the wide range of extralegal factors and practical concerns that court actors also might take into account. Though prior research consistently has revealed that extralegal factors influence criminal sentencing outcomes, it remains the case that "criminal court actors often take into account fewer social and substantive factors than juvenile court actors, instead restricting their evaluations to considerations of offense severity and prior offending history" (Kupchik,

2006, p. 312). Thus, while criminal court judges retain some discretion even under guidelines systems (Johnson, 2005; Kramer & Ulmer, 2002) and priorities and practices can vary across court communities (Hester, 2017; Ulmer, 2019), much of the sentencing process remains formal, adversarial, and directed by the goals of uniformity, proportionality, “just deserts,” and the protection of the community.

Given the distinctions between these two models of justice, the practice of transferring youth to the adult court has implications for the prospect of deterrence. Indeed, the rhetoric surrounding the expansion of transfer in the “get tough” era emphasized the potential reduction in delinquency that transfer policies could produce for the juveniles transferred as well as for the entire population of potential youth offenders (Bishop, 2006; Mears, 2003; Redding & Fuller, 2004; Sanborn, 2003). Although a vast body of work has demonstrated that these anticipated specific and general deterrent effects are weak or nonexistent (e.g., Jordan, 2012; Loughran et al., 2010; Myers, 2003b; Singer & McDowall, 1988; Steiner & Wright, 2006; Steiner, Hemmens, & Bell, 2006; Zane et al., 2016; Zimring & Rushin, 2013), an important question that must be addressed concerns whether, compared to the juvenile court, the criminal justice system actually delivers sanctions that are more swift, certain, and severe—key attributes needed for a punishment to deter offending (Jordan & Myers, 2011; Nagin, Cullen, & Jonson, 2009). Of particular interest is the severity of the sentences, as the retributive and incapacitative goals of the criminal justice model, combined with criminal court judges’ ability to assign lengthy incarceration terms in adult jails and prisons, might suggest that juvenile transfer indeed can ensure that youth are given “adult time” for “adult crime.”

There are several competing theoretical possibilities regarding how transferred youth might be sanctioned relative to their peers retained in the juvenile court. On one hand, it may be the case that transfer laws work as intended and deliver on the promise of assigning sentences harsher than those available for retained youth. Indeed, this possibility would suggest that transfers are subject to punishment under the criminal justice model, while their juvenile court counterparts are sanctioned in light of the juvenile justice model (Kupchik, 2006; Lehmann, Pickett, Ryon, & Kosloski, 2019). A second possibility, however, is that actors in the criminal court make sharp distinctions between transferred juveniles and other defendants, working to ensure that the sentences they give to transfers are comparatively lenient even to what the youth would have received had they been retained (Bortner, 1986; Podkopacz & Feld, 1996). Further, such a pattern also might emerge as a result of the juvenile justice system’s growing reliance on more punitive forms of sanctioning (Butts & Mitchell, 2000; Feld, 1999a), which, rather ironically, would indicate that the juvenile court has been “implementing the deterrence

model more effectively than the criminal justice system” (Lemmon, Austin, Verrecchia, & Fetzer, 2005, p. 218). Finally, as a consequence of either a shift in juvenile justice toward a criminal justice model or adult court judges’ extensions of leniency to transferred youth, it is plausible that few differences might emerge in the punishment of transferred versus retained youth.

The bulk of the evidence from early studies on differences in punishment severity between transferred and retained juveniles pointed to what scholars termed a “leniency gap” (Bortner, 1986; Champion, 1989; Emerson, 1981; Fritsch, Caeti, & Hemmens, 1996; Gillespie & Norman, 1984; Kinder, Veneziano, Fichter, & Azuma, 1995; Podkopacz & Feld, 1996; Royscher & Edelman, 1981; Sagatun, McCollum, & Edwards, 1985). These studies observed that youth who were transferred to the adult court experienced relative leniency compared to similar youth who were retained in the juvenile court, and these advantages were observed in the decision to incarcerate as well as in the length of the period of confinement (Eigen, 1981; Fagan, 1995; Rudman, Hartstone, Fagan, & Moore, 1986). In contrast, though, some of this research reported more nuanced findings, with the leniency gap observed more notably for property offenders than those convicted of person offenses, with the latter subgroup sometimes receiving lengthy sentences in local jail or state prison (Barnes & Franz, 1989; Bishop, Frazier, & Henretta, 1989; Bishop et al., 1996; Fagan, 1990; Lemmon, Sontheimer, & Saylor, 1991; Podkopacz & Feld, 1996; Thomas & Bilchik, 1985). Notably, however, these findings might be misleading, as Fritsch and colleagues (1996) observed that transferred youth tended not to serve their full sentences, thus eliminating any real differences in incarceration lengths between transferred and retained youth (see also Fagan, 1995).

Theoretically, the pattern of evidence pointing to a leniency gap—much of which emerged at the dawn of the “get tough” era—may be explained in several ways. For instance, Bortner’s (1986) quantitative and qualitative analysis of court actors’ attitudes and perceptions surrounding transfer revealed that despite the traditional rationale of waiver emphasizing deterrence and incapacitation, prosecutors and judges mostly were concerned with confronting political pressures and placating a fearful and punitive public. Indeed, adult court judges typically sentenced transfers to probation or short incarceration terms in light of these defendants’ “youthfulness and resulting vulnerability to the harshness of prison life, the lack of facilities and programs oriented toward young offenders, and the overcrowding of the adult system” (Bortner, 1986, p. 57). Another possibility is that adult court judges may have been inclined to sentence transferred youth offenders to community supervision due to their often-limited criminal histories, whereas otherwise similar retained youth were typically housed in secure facilities by the juvenile court (Lemmon et al., 2005). Unfortunately, however, data limitations prevented



many researchers from directly assessing what factors might explain sanctioning disparities between the two systems. More importantly, few of these studies provided methodologically rigorous comparisons between samples of transferred and retained youth, and some failed to use multivariate analyses to account for potential confounders (Jordan & Myers, 2011; Myers, 2003a).

In the past two decades, several studies have further explored the disparities in juvenile offender punishment severity between the two systems, and this work generally has provided support for the notion that adult courts assign harsher sanctions. For instance, using data from Pennsylvania, Myers (2003a) found that transferred juveniles were substantially more likely to receive incarceration sentences as well as longer sentences than similar retained youth. Lemmon and colleagues (2005) reported a similar set of findings, observing that the differences in the probability of incarceration remained even after accounting for offense seriousness, juvenile court history, and weapon use. Kupchik's (2006) analysis of data from two states likewise revealed that there indeed is "a punishment tariff to prosecution in criminal court" such that "transfer to criminal court meets its legislatively prescribed goal of punishing adolescents more severely than juvenile courts do" (p. 327). Interestingly, however, in this latter study, no differences emerged in the effects of other legal and extralegal factors on punishment between retained and transferred youth, thus calling into question the existence of distinct juvenile and criminal justice models in the "get tough" era. In a more recent study, Jordan and Myers (2011) observed that, despite mixed effects of transfer status on the likelihood of incarceration, decertified youth (i.e., those remanded back to the juvenile court following waiver) received shorter terms of confinement than youth sentenced in the adult system.

In summary, the bulk of the more recent evidence suggests that, in some sense, juvenile transfer produces its intended effect. Indeed, while the studies by Lemmon et al. (2005) and Jordan and Myers (2011) mentioned earlier found mixed support for the notion that the adult court guarantees other key elements of deterrence, including greater swiftness (i.e., time to disposition) and certainty (i.e., likelihood of conviction), this body of work consistently indicates that the expansion of transfer in the "get tough" era has accomplished its retributive and incapacitative goals. Moreover, this pattern might suggest that justice system actors view the practice in an explicitly punitive light, with transfer status serving as a sign that conveys information about youth's increased blameworthiness, culpability, and risk of recidivism. In fact, recent studies directly assessing the perceptions and behaviors of justice system actors have indicated that prosecutors, judges, and probation officers make notable distinctions between offenders processed in the adult system and those sanctioned by the juvenile court (Bolin & Applegate, 2018; Lehmann et al., 2019). Thus, even as "get tough" juvenile justice policies

in many ways have eroded differences in the goals, priorities, and practices between the two systems (Benekos & Merlo, 2008; Kupchik, 2006; Mears, 2002), transfer status in the modern era appears to be a punitive mechanism used to guarantee harsher punishments for the youth who are believed to deserve them.

### **ASSESSING THE “JUVENILE PENALTY” OR “YOUTH DISCOUNT”**

In the eyes of the public, the distinction between youth transferred to the adult court and those retained in the juvenile court is complex. Studies conducted on public attitudes toward youth offenders suggest that, while transfer to the adult court can be a signal of enhanced culpability or dangerousness (Greene, Duke, & Woody, 2017; Semple & Woody, 2011), people generally express substantially more lenient responses to the offending of youth than to that of adults (e.g., Cullen, Fisher, & Applegate, 2000; Mears, Pickett, & Mancini, 2015; Pickett, Welch, Chiricos, & Gertz, 2014; Piquero, Cullen, Unnever, Piquero, & Gordon, 2010; Welch, Butler, & Gertz, 2019). Indeed, while the American public on the whole is in favor of transfer under certain circumstances (Applegate, Davis, & Cullen, 2009; Feiler & Sheley, 1999; Mears, 2001; Miller & Applegate, 2015; Schwartz, Guo, & Kerbs, 1993; Steinberg & Piquero, 2010; Wu, 2000), the public so overwhelmingly supports the notion of “child saving” that optimism surrounding the rehabilitation of youth offenders “can be considered a core cultural belief” (Cullen, Vose, Johnson, & Unnever, 2007, p. 111; see also Mears, Hay, Gertz, & Mancini, 2007; Moon, Sundt, Cullen, & Wright, 2000; Pickett, Chiricos, & Gertz, 2014).

Sympathetic public attitudes toward juvenile offending mirror the findings from a vast body of developmental psychology research, which consistently has demonstrated that “kids are different” (Feld, 2019) by virtue of their reduced cognitive abilities and capacity to properly judge right from wrong (e.g., Cauffman & Steinberg, 2000; Fried & Reppucci, 2001; Grisso & Schwartz, 2000; Steinberg & Cauffman, 1996). As a result, while transfer might be perceived as acceptable in cases that are especially serious or violent, this sanction is commonly viewed as exceptional and to be reserved only for those who are unlikely to be amenable to the rehabilitative influence of juvenile justice system intervention (Miller & Applegate, 2015; Schwartz et al., 1993; Steinberg & Piquero, 2010). Thus, while juvenile lawbreakers in general are viewed as “savable” to an extent that adults are not, transferred youth can be identified as undeserving of special forms of youth court sanctioning and thus are distinguished from “true” juveniles (Mears et al., 2014). Indeed, youth who are transferred often are viewed as unlike those under the

care of the juvenile court because their crimes are serious enough that their otherwise limited culpability is no longer in question or the harm done by their offenses is extraordinarily great (Greene et al., 2017; Lehmann et al., 2019). In this way, through the characteristics of their cases or the stigma of transfer itself, youth in the criminal justice system become de facto adults.

Some scholars have argued that, because youth who have been transferred are assigned legal status as adults, it is conceptually inappropriate to equate the adult court sentences that they receive with the interventions given to youth retained in the juvenile court (Kurlychek & Johnson, 2004, 2010; Steiner, 2009). Further, the legal distinction between transferred and retained status reflects dissimilarities in the goals, priorities, and functioning of the two systems. As discussed earlier, even as the juvenile court moved away from its founding principles in recent decades, the two justice systems never became truly identical in these key respects (Butts & Mears, 2001; Feld, 2018; Hay, Ladwig, & Campion, 2018). An important dimension of these differences relates to the characteristics of the sanctions assigned, and prior work clearly has demonstrated that confinement in a juvenile facility is fundamentally dissimilar to an incarceration experience in an adult jail or prison, even for an equal amount of time (Gaarder & Belknap, 2002; Lane, Lanza-Kaduce, Frazier, & Bishop, 2002; Woolard, Odgers, Lanza-Kaduce, & Daglis, 2005). In light of these philosophical and practical distinctions, investigating whether transferred youth are punished more or less harshly than those retained might be less informative than assessing how transfers are sentenced in the adult system relative to adult offenders who are beyond the age of exclusion. Legally and conceptually, these latter defendants arguably more closely represent transferred juveniles' peers.

Several prominent theories of criminal court actors' decision-making can provide insights into how juvenile transfer status might be interpreted by criminal court personnel. For instance, Albonetti's (1991) causal attributions perspective posits that court actors operate in a sentencing context of "bounded rationality" (p. 249) in which limited time, resources, and information about offenders are available. Consequently, as judges attempt to make assessments about defendants' risk of recidivism, they can rely on "patterned responses" that are informed by the extralegal characteristics of the offenders as well as any attendant "stereotypes, prejudices, and highly particularized views" (Clegg & Dunkerley, 1980, p. 265; see also Bridges & Steen, 1998). A similar framework is presented by Steffensmeier, Ulmer, and Kramer (1998), who theorize that sentencing decisions are guided by three broad "focal concerns": blameworthiness, the protection of the community, and the practical constraints and considerations associated with sentencing decisions. As court actors weigh these often-competing priorities in a context characterized by uncertainty and complexity, they can use "perceptual shorthand"

(Steffensmeier et al., 1998, p. 767) or “cognitive heuristics” (Kahneman, 2011) which can involve stereotypes, typescripts, and attributions associated with defendants’ membership in various social groups (Farrell & Holmes, 1991; Steffensmeier, Painter-Davis, & Ulmer, 1997). Thus, such factors as an offender’s juvenile transfer status might inform sentencing decision-making by providing information that judges use to infer defendants’ relative blameworthiness, culpability, dangerousness, or suitability for certain punishments.

While there are strong theoretical reasons to expect that juvenile status could influence judicial actors’ perceptions, attitudes, and sentencing decisions, how exactly the unique subpopulation of transferred youth might be understood relative to adults is rather ambiguous. On one hand, it might be reasonable to expect that there could be a “youth discount” (Feld, 2013) such that juvenility acts as a mitigating factor in sentencing. Criminal court actors are likely well aware of developmental differences between juveniles and adults, and the issue of diminished capacity has important implications not only for the legal culpability of youth offenders and the sentences that they deserve (Cauffman & Steinberg, 2000; Kupchik, 2006) but also for any possible deterrence benefits that punitive sentences might confer (Bishop et al., 1996; Jordan, 2012; Loughran et al., 2010; Myers, 2003b). Thus, the especially harsh treatment of youth might be seen by adult court judges as counterproductive and “contrary to the public safety intentions of ‘get tough’ legislation” (Rainville, 2008, p. 310). Indeed, the potentially harmful effects of lengthy jail or prison terms for youth can be further amplified by a number of practical concerns, including their reduced ability to “do time” in adult facilities (Haerle, 2019; Kolivoski & Shook, 2016) and the long-term negative consequences for youths’ educational attainment, employment, and social capital (Augustyn & Loughran, 2017; Augustyn & McGloin, 2018; Sharlein, 2018; Taylor, 2015). Finally, the practice of transfer itself might be viewed as overly punitive, and many court actors may be inclined to sentence juvenile lawbreakers more leniently than adults as a way to correct for legislative and prosecutorial practices that they view as problematic (Kurlychek & Johnson, 2010; Zane, 2018).

In contrast with these possibilities, it may be the case instead that a “juvenile penalty” might emerge in sentencing such that transferred youth are sentenced to harsher outcomes than otherwise similar adult defendants. For instance, given the stigma associated with transfer status, judges might be inclined to view transferred youth defendants as special in ways that make them more threatening to the community. Indeed, rather than entering into the adult court system by default in the same way as offenders beyond the age of exclusion, juvenile transfers may be marked by a unique defendant status that identifies them as “superpredators” (DiIulio, 1995) whose “violent, compunctionless, or incorrigible” (Johnson & Kurlychek, 2012, p. 532) nature

distinguishes them as deserving of especially harsh treatment at sentencing. Thus, rather than denoting that the offense at hand was a youthful indiscretion produced by diminished capacity and factors outside the individual's control—key characteristics attributed to delinquency since the early days of the juvenile court (Bernard & Kurlychek, 2010; Platt, 1977), the label of “transferred juvenile” instead might be “an important decision-making cue for identifying the most dangerous, most culpable, or most intractable young offenders” (Kurlychek & Johnson, 2010, p. 731). Consequently, even if criminal court actors support the notion of “child saving” and believe that “kids are different,” those sympathies may not extend to transferred youth (Lehmann et al., 2019; Miller & Applegate, 2015).

Perhaps surprisingly, little extant research has assessed whether youth in the adult court are sentenced comparably to older offenders, are extended leniency relative to adults, or are subjected to a “juvenile penalty.” Within this body of literature, the bulk of the evidence seems to point to the existence of some kind of “juvenile penalty,” though other work has suggested that these effects are likely nuanced. For instance, three studies by Megan Kurlychek and Brian Johnson using data from Pennsylvania and Maryland revealed that transferred youth were more likely to be incarcerated, receive longer sentences, and experience punitive guideline departures than young adults of various ages (Kurlychek & Johnson, 2004, 2010; Johnson & Kurlychek, 2012). Further, in their two more recent studies, these authors made use of matching procedures to limit selection bias that might artificially inflate the effect of juvenile status, but even in their most precise estimates (i.e., between seventeen- and eighteen-year-olds only), the aggravating effect of juvenility on sentencing remained consistent. Steiner (2009) contributed to this line of inquiry by analyzing national data and considering initial detention outcomes in addition to imprisonment, and his study showed that transfers were more likely to be denied bail as well as receive prison sentences than defendants ages eighteen to twenty-nine.

Despite the seemingly clear pattern documented in this research, in several other recent studies more complex patterns have emerged, and these findings have suggested that the juvenile penalty might vary according to the outcome under analysis as well as the adult age group to which youth are compared. For example, Jordan (2014) made use of data from fifty-seven urban counties, and his findings indicated that transferred youth were more likely than older adults to receive sentences to prison, but juveniles were similarly likely to be sentenced to jail as adults of any age group. His analysis of sentence length also revealed mixed findings. In contrast, however, Jordan and McNeal (2016) engaged the same data as Steiner (2009) and observed that, while transferred juveniles received longer jail and prison sentences than adults, juveniles were similarly likely to be imprisoned and were less likely to be

sentenced to jail. Complex findings also were reported in a recent study using data from Florida (Lehmann, Chiricos, & Bales, 2018), which found that, while transferred youth were less likely than others to be sentenced to incarceration, the effect of juvenility on sentence length was consistently positive. However, a subsequent study showed that, when these sentencing outcomes were disaggregated, the juvenile penalty most strongly emerged in sentencing to prison (Lehmann, 2018). Finally, one recent study by Kurlychek (2018) using data from New York found that youth ages sixteen and seventeen were consistently sentenced more leniently than others, though these benefits were small relative to those extended to all offenders ages twenty-one and younger as required by state statute.

In short, then, the question of how transferred youth are understood in the criminal court in relation to adult offenders processed by the criminal justice system by default remains unclear. While some evidence indicates that juveniles experience disparately severe punishment outcomes compared to at least some older offenders, other recent studies suggest that this pattern is present in the incarceration decision only, the sentence-length decision only, or neither outcome. Consequently, a key takeaway from this body of research is that juvenile status likely does not carry with it a single meaning in the minds of sentencing judges. Indeed, being a transferred youth defendant is neither a consistent indicator of dangerousness and threat nor clear evidence of immaturity and reduced culpability (Kupchik, 2006; Lehmann et al., 2019). Thus, for scholars to consider all transferred juveniles as belonging to a homogenous defendant subpopulation that criminal court actors evaluate and punish uniformly overlooks the important influence that other legal, extralegal, and contextual factors can have on these perceptions. These additional variables are likely to inform how judges interpret juvenile status, and researchers' exploration of them can help better understand why the "juvenile penalty" might emerge in some circumstances but a "youth discount" can be observed in others.

## **THE ROLE OF LEGAL AND EXTRALEGAL FACTORS**

Transferred juveniles are, on average, far from perfectly comparable to adults, and there are notable distinctions between these two offender subpopulations in several respects. For example, transfers are more likely to be sentenced in the adult court for person offenses than adults (Johnson & Kurlychek, 2012; Kurlychek & Johnson, 2004; Steiner, 2009), and they also tend to have more extensive offending histories as juveniles (Kurlychek & Johnson, 2010). This is not surprising, as transfers do not represent a random subset of youth offenders but rather, on the whole, have cases that are exceptionally

serious enough to warrant discretionary waiver or legislative exclusion in the first place. Additionally, simply due to their young age, transferred youth typically have less extensive criminal histories than adults, which is important, given the relevance of criminal history for sentencing outcomes under guidelines systems (Johnson & Kurlychek, 2012; Kurlychek & Johnson, 2010). It is these key differences that have motivated scholars to use matching procedures or other methods to account for selection bias when assessing the “juvenile penalty” versus the “youth discount.” However, the legal and extralegal characteristics of cases, as well as the contexts in which criminal courts are situated, are crucial for understanding and explaining variations in the sentencing of transferred youth as a unique defendant subgroup.

The legal attributes of cases generally are the most robust predictors of punishment outcomes for adult criminal defendants, and this remains true for transferred juveniles as well. For instance, McNulty’s (1996) analysis of transferred youth sentenced in Arizona found that, in addition to a prior transfer, a violent offense type was the strongest predictor of an incarceration sentence. Other studies of transfers examining data from a wide range of jurisdictions have reported similar findings regarding the prominent role of crime type (Clement, 1997; Houghtalin & Mays, 1991; Jordan & Freiburger, 2010; Rainville, 2008; Steiner, 2005; Zane, 2017). In fact, Kurlychek and Johnson (2004) found that person offenses were sentenced more harshly among transfers than adults, though they later observed a larger “juvenile penalty” among drug cases than violent cases (Kurlychek & Johnson, 2010). Only a few studies have examined the effects of different violent crime types on sentencing outcomes among transfers, and unsurprisingly those convicted of murder receive harsher sentences than those sentenced for rape, robbery, and aggravated assault (Carmichael, 2010; Zane, Singer, & Welsh, 2020). Additionally, while the effects of a juvenile court record and previous arrests are mixed, prior adult criminal convictions and other dimensions of case seriousness consistently produce more severe punishments (Jordan & Freiburger, 2010; Kupchik, 2006; Lehmann et al., 2017; Steiner, 2005, 2009).

While the findings regarding offense type and prior record are informative, scholars generally are more interested in the “substantively rational” dimensions of cases that are outside the domain of the legal factors articulated in statutes and guidelines (Savelsberg, 1992; Ulmer & Kramer, 1996). One such dimension is mode of transfer, and researchers have explored how those who are direct-filed or judicially waived to the adult court are punished relative to youth transferred via statutory exclusion. Theoretically, it is possible that only under some circumstances does transfer symbolize “a prior decision-making juncture in the overall case processing context” (Rainville, 2008, p. 303), and an active exercise of prosecutorial or judicial discretion in particular might “stigmatize the youth as an ‘atypical’ criminal” (Kurlychek, 2010, p. 7) and

signal increased deservingness of punitive treatment. Alternatively, adult court judges may view statutory exclusion laws as representing the political will of the public, and they may believe that the sentencing of these transfers should closely mirror such sentiments (Rainville, 2008; Zane, 2017). The body of work testing these competing theoretical possibilities has produced inconsistent findings, with some research suggesting that those judicially waived are disadvantaged at sentencing (Kurlychek, 2010; Kurlychek & Johnson, 2010; Verrecchia, 2003; Zane, 2017) but others finding a substantial penalty associated with legislative exclusion (Jordan & Freiburger, 2010; Rainville, 2008; Zane et al., 2020). Though these disparate findings might reflect jurisdictional variations in sentencing practices, it is also possible that notable differences between waived and excluded cases were inadequately accounted for, thus producing misleading estimates of the effects of method of transfer (Verrecchia, 2003; Zane, 2017).

Another line of inquiry that scholars have explored is mode of conviction, and some research has found that a conviction at trial can exert direct or interactive effects on the sentencing of transferred youth. Substantial work on adult court sentencing has observed robust evidence of so-called trial penalties, and scholars typically have explained these patterns by pointing to the enhanced negative information about defendants (i.e., “bad facts”) that trials can bring to light (Johnson, 2019; Ulmer, 1997; Ulmer & Bradley, 2006). Trials also allow judges greater discretion over the sentencing process, freeing them to rely more heavily on “perceptual shorthand” and “causal attributions” connected to defendants’ extralegal characteristics (Johnson, 2003). Given the rare nature of trials, many studies of transferred youth are unable to estimate the effects of mode of conviction (Carmichael, 2010; Jordan & Freiburger, 2010; Kupchik, 2006; Kurlychek, 2010); however, those that do tend to find that juvenile defendants convicted at trial are given harsher sentences than similarly situated transfers who plead guilty (Lehmann et al., 2017; Rainville, 2008; Zane et al., 2020). Additionally, Kurlychek and Johnson (2004) reported that certain trial-plea disparities in sentence severity were larger for juveniles than young adults, but, in contrast, Steiner’s (2009) analyses showed larger trial penalties among adults. Lehmann et al. (2018) also observed an interactive relationship between juvenility and mode of conviction, demonstrating that sentencing disparities between adults and juveniles were weaker among trial cases than plea cases.

A key extralegal factor that is theoretically expected to inform the sentencing of transfers is race/ethnicity. The issue of race has been connected to youth sanctioning since the founding of the juvenile court, as judges in the early twentieth century typically intervened only in the lives of poor white youth and immigrants of European ancestry (Bellingham, 1983; Bush, 2010; Platt, 1977). In contrast, black youth were commonly considered to be



incorrigible and developmentally stagnant, and for these reasons, the newly defined concepts of “childhood” and “adolescence” were “never extensive enough to include African American children” (Nunn, 2002, p. 679). Thus, as Feld (1999b) has argued, “the Progressive ‘child-savers’ deliberately designed the juvenile court to discriminate—to ‘Americanize’ immigrants, to control the poor, and to provide a coercive mechanism to distinguish between ‘our children’ and ‘other people’s children’ ” (p. 339). Although the lobbying efforts of the “black child-savers” in the twentieth century helped to integrate the American juvenile court (Ward, 2012), minority youth since have become overrepresented in juvenile justice institutions (Bishop et al., 2010; Engen et al., 2002; Feld, 1999a). In fact, it has long been argued that the expansion of transfer and other punitive “get tough”-era changes to juvenile justice policy were driven in part by racialized perceptions of juvenile delinquency (Feld, 2003; Jackson & Pabon, 2000; Metcalfe, Pickett, & Mancini, 2015; Pickett & Chiricos, 2012).

Several scholars have explored the ways in which race and ethnicity might affect sentencing outcomes among transferred youth; however, these research findings have been far from conclusive. On one hand, the studies by Jordan and Freiburger (2010) and Howell and Hutto (2012) using the same data from large U.S. counties found rather consistent disadvantages associated with being black on sentence severity, though the effects of Hispanic ethnicity were found to be somewhat less robust. A study from Florida showed a very similar pattern, and black males ages eight to fifteen emerged as a particularly disadvantaged subgroup across several sentencing outcomes (Lehmann et al., 2017). In contrast with these studies, however, McNulty (1996) observed that black and Hispanic transfers in Arizona were not more likely than white youth to receive an incarceration sentence. Other studies likewise found no effects of race or Hispanic ethnicity in Idaho (Steiner, 2005), Pennsylvania (Kurlychek & Johnson, 2004), or New York (Kupchik, 2006). Inconsistent findings were reported based on analyses of national data (Zane, 2017, 2018), though racial/ethnic disparities were found to be rather prominent in pretrial detention. Interestingly, Carmichael’s (2010) study showed that, while the direct effects of race/ethnicity were non-significant, black transfers actually received *shorter* sentences than white transfers among murder cases. Finally, though one study found that minority status can amplify juvenile-adult disparities in sentencing (Lehmann, 2018), two others revealed no such pattern (Kurlychek & Johnson, 2004, 2010).

A promising line of inquiry that has received some recent attention relates to the macro-level conditions under which the sentencing of transferred youth can occur. Carmichael (2010) used data collected over a twenty-year period, and he found that a conservative citizen ideology and Republican control of the state government were key for explaining variations in the

sentencing of transfers across jurisdictions. In a related study, Carmichael and Burgos (2012) observed that political conservative states as well as those with relatively large black populations handed out more juvenile life sentences—the harshest punishments available for youth offenders. This latter finding regarding macro-level racial/ethnic composition has been explored in depth in a few other studies as well, and some of this work demonstrates that transfers are sentenced especially harshly in counties with large or growing minority populations (Jordan & Maroun, 2016; Zane, 2018). Interestingly, while Steiner (2009) observed an interactive relationship between juvenile status and county-level racial inequality, he found that transferred youth and adults were sentenced more equitably in contexts of heightened racial income inequality.

In conclusion, many advancements in the study of the sentencing of transferred youth have been made in recent years, with scholars providing evidence that a multitude of factors can influence punishment outcomes. Additionally, as highlighted earlier, some research on the “juvenile penalty” has emphasized that this effect is highly conditional, with such variables as offense type, a trial conviction, and minority status amplifying disparities between adults and transferred youth (Kurlychek & Johnson, 2010; Lehmann, 2018; Lehmann et al., 2018). It is clear, then, that to theorize juvenile transfer as having simple and straightforward consequences for sentencing fails to take into account the vast diversity within this special subgroup of criminal cases. Additionally, this work has provided few definitive answers, with the rather inconsistent effects of method of transfer and race/ethnicity in particular sparking much debate. Thus, despite the notable development of this literature in recent years, many key questions surrounding the sentencing of transferred juveniles remain unanswered.

## FUTURE DIRECTIONS

From the research on the punishment of transferred youth in the adult criminal court, several broad conclusions can be drawn. First, it appears to be the case that the “leniency gap” observed in the sentencing of transferred versus retained youth during the 1970s and 1980s largely disappeared during the “get tough” era, even though transfer itself has minimal deterrent effects (Jordan & Myers, 2011; Lemmon et al., 2005; Myers, 2003a). Second, while there might be a “juvenile penalty” in the adult court sentencing of transferred youth relative to comparable adult offenders (Kurlychek & Johnson, 2004), this pattern is far from universal across adult comparison groups, sentencing outcomes, or jurisdictional contexts, and under certain circumstances, a “youth discount” can emerge instead (Jordan & McNeal, 2016; Kurlychek,

2018; Lehmann et al., 2018). Finally, as with adult offenders, the factors that inform the sentencing of transfers are largely legal in nature, though disparities in accordance with extralegal factors such as method of transfer, mode of conviction, and race/ethnicity have been observed in a number of studies as well. The empirical literature reviewed earlier is nowhere close to providing clear and consistent answers to the important questions posed by scholars and practitioners, and several lines of inquiry in this area are ripe for further research.

As Feld (2018, 2019) and others have described, the landscape of juvenile court has been undergoing substantial changes in recent years, as courts have begun to scale back their use of transfer and rely instead on various forms of evidence-based juvenile justice (Hay et al., 2018; Sullivan, 2019). In this evolving context, it remains unclear if the patterns observed in the vast body of work reviewed in this chapter will remain consistent or if, instead, the “kids are different” era will be attended by entirely new understandings of how transferred youth should be sentenced. Many of the studies summarized in this chapter—even those which have been published in the past several years—rely heavily on data from 1990s and early 2000s. Thus, it is incumbent on scholars to collect and analyze newly collected data on youth who have been transferred. For instance, it may be the case that the “leniency gap” advantaging transferred juveniles will reemerge or the “youth discount” in sentencing relative to adults will become more prominent. Juvenile justice scholars should be encouraged by the wide range of research questions that are heretofore untested in the modern era.

Beyond the pressing need to collect more recent data on transferred youths’ punishment outcomes, little research has been able to follow juvenile offenders from the early stages of case processing through conviction to sentencing. A promising area of research in recent years has involved exploring the effects of “cumulative disadvantage” (Kurlychek & Johnson, 2019) experienced by certain offender subgroups (e.g., racial/ethnic minorities) across multiple criminal justice decision-points (e.g., Kutateladze, Andiloro, Johnson, & Spohn, 2014; Sutton, 2013; Wooldredge, Frank, Goulette, & Travis, 2015). One explicit aim of this latter body of literature is to confront the issue of selection bias, as scholars who assess only a single court outcome can produce inaccurate estimates of the predictors of interest. To our knowledge, no prior work has explored in depth the “life course of criminal cases” (Johnson, 2015) among transferred youth. Instead, researchers often have access only to information on juveniles who already have been transferred, thus precluding a thorough analysis of case processing from arrest to adult court sentencing. Such an approach would provide valuable insights into how transferred youth are perceived by the many different criminal justice actors with whom they come into contact (Lehmann et al., 2019). Qualitative research documenting

the experiences of youth as well as the perceptions of court personnel could be especially informative.

A third important line of inquiry warranting further investigation concerns the relationship between race/ethnicity and the sentencing of transferred youth. Given the strong racial undertones of the political rhetoric justifying the expansion of transfer in the 1990s, it is not unexpected that at least some studies show that minority youth are sentenced disparately harshly in the adult court (Jordan & Freiburger, 2010; Lehmann, 2018; Lehmann et al., 2017). However, because the effects of race/ethnicity on the probability of transfer often cannot be accounted for using the data that are commonly available, it is perhaps also unsurprising that this body of work has reported rather inconclusive findings. Additionally, it is unclear the extent to which the practice of transfer will remain conflated with minority status in the “kids are different” era, and further work is needed to uncover whether these patterns have persisted, have been amplified, or have diminished in the past decade. Scholars also should give further consideration to the various offender- and contextual-level factors which might strengthen or mitigate racial and ethnic inequalities in the sentencing of transferred youth.

Finally, there is a clear need to assess the criminal court sentencing consequences of recent changes to juvenile transfer policy. Indeed, not only might the “raise the age” movement and other such reforms have complex effects on rates of juvenile delinquency (Fowler & Kurlychek, 2018; Loeffler & Chalfin, 2017), but these policy shifts also might signal to court actors in those jurisdictions that transferred youth should be perceived as distinct from other juvenile and adult offenders and, as such, must be sentenced under a “juvenile justice model” (Kupchik, 2003). Thus, while more research in this area in general is warranted, a focus on those states and locales that have begun implementing new practices and procedures can be especially enlightening. Indeed, as the practice of juvenile transfer itself continues to evolve, the meaning of youths’ transfer status for justice system actors remains dynamic, and researchers must strive to examine and reexamine questions about the punishment of transferred youth.

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