

JURIES FOR JUVENILES

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Widespread agreement exists that too many juveniles are being tried as adults. Agreement breaks down over what is to be done. Some propose abolition of adult court jurisdiction over juveniles; many others propose some combination of categorical limits on transferring juveniles to adult court. Still others propose abolishing juvenile court altogether and according juveniles special treatment within the adult system or replacing juvenile court with some sort of civil regime.

Discussion of juvenile justice reform has been stimulated by the Supreme Court's recent decisions in *Roper v. Simmons*¹ and *Miller v. Alabama*.² The Court's abolition of the death penalty for juveniles and its requirement of some measure of individualized consideration for the imposition of life sentences without the possibility of parole have expanded the sense of what may be possible in the foreseeable future.

The major obstacle to reform remains punitive attitudes about juvenile culpability that took root during a series of "moral panics" in the 1980s and 1990s that remain deeply entrenched among many of the state legislators who hold it in their power to change juvenile court transfer policies.³ Whatever the extent of the general softening in attitudes towards juveniles in society, many legislators remain afraid of being seen as soft on crime—a fear that is fortified each time a juvenile anywhere in this very populous society commits a heartless crime.

At such a time, the challenge for legal scholarship is to strike the right balance between idealism and realism. Reforms predicated upon a completely enlightened polity are too idealistic to be useful. Like the

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1. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

2. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (holding that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders).

3. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 9–10 (1972). Stanley Cohen coined the term "moral panic" and was probably the first sociologist to study and analyze moral panics in a study of British "Mods" and "Rockers" published in 1972. *Id.*

economist in the joke who is trapped on a desert island with only canned food, but no utensils, and tells his fellow survivors that they simply need to “assume a can opener,” reformers cannot simply assume the conditions necessary for their success. Likewise, reforms that simply tinker at the edges of what currently seems politically feasible fail to make the most of the emerging change in attitudes. Few would have predicted the emergence of Eighth Amendment limits on noncapital sentences for juveniles a few years ago. What might be possible five years from now?

The challenge, therefore, is to identify reforms that are sufficiently aspirational to be meaningful, but that are also sufficiently realistic to inspire political support today. Such reforms would be designed for the second-best world in which we live; but ideally, they should, themselves, serve as stepping stones to an even better world that might become possible farther down the road—a world that might, conceivably, be brought about by future Supreme Court decisions.

In this spirit, I propose a very different type of legislative reform for juvenile transfer: a legislatively created right to a jury trial on the issue of whether juveniles should be sentenced as juveniles or as adults. Part I will briefly sketch the outlines of my proposal.⁴ Part II will describe the prevailing political constraints on juvenile justice reform by describing the most salient features of recent moral panics about crime, in general, and juvenile crime in particular.⁵ Part III will explain the advantages of my proposal in responding to these constraints and a few possible objections.⁶ Part III will also briefly describe the ways in which such a practice might eventually lead to a constitutional right to such a jury trial at some point in the future.⁷

I. PART I

Juveniles should enjoy a jury trial “right of last resort” on the issue of whether they should be sentenced as juveniles or adults. This right would not preclude earlier determinations by judges or prosecutors as to whether the juvenile should be transferred to adult court in the first place, but those determinations notwithstanding, juveniles would still be allowed to demand a jury trial on the issue of whether they should be sentenced as adults or as juveniles. The jury would not determine the sentence itself, but it would have the last word as to which sentencing regime—adult or juvenile—would apply to the case at hand. The jury would, in essence, be entrusted with what might best be described as a threshold sentencing decision, although not with sentencing itself. Such a requirement would, in effect,

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part III.

function as a right of last resort for juveniles who have already been transferred to adult court for adjudication of guilt, but who wish to challenge the decision to sentence them as adults one final time.

The most logical way for such a right to operate would be in a bifurcated trial where the same jury that heard evidence of guilt and innocence would also hear, in a separate phase, evidence as to whether adult or juvenile sentencing would be most appropriate. Like the sentencing phase of a capital trial, the jury would hear evidence from both the prosecution and the defense that would, in effect, seek to aggravate or mitigate the sentence to be imposed. The criteria to be used for this threshold sentencing decision would be the same criteria currently used for transfer proceedings in the jurisdiction, with whatever modifications necessary to make the criteria more intelligible to laypersons. Likewise, during this phase, the jury would be privy to all of the same information available to a judge at a transfer hearing, including the range of available sentencing options in both juvenile and adult court.⁸ For this reason, however, the threshold sentencing decision by the jury would have to follow, not precede, the guilt phase of the trial—lest the impartiality of the jury be compromised in favor of either guilt or innocence. While all that the jury learned about the nature of the offense would be probative on the issue of sentencing, much of what the jury would learn during the sentencing phase would not be probative on guilt and might well be highly prejudicial on that issue. A juvenile's history of past abuse and neglect might arouse the sympathy of the jury and lead to an unjust acquittal. Similarly, a juvenile's history of multiple or serious prior criminal offenses might arouse the jury's hatred and fear and lead to an unjust conviction.

Such a right would obviously impose an additional burden on the prosecution. Proving guilt before a jury instead of a judge is more time consuming and possibly more difficult. Even after the greater effort and the increased risk of an acquittal, a prosecution might, nonetheless, result in a juvenile court sentence. As will be discussed at greater length in Part II, however, the greater burden is an appropriate safeguard to ensure that adult sentencing of juvenile offenders takes place only when appropriate.⁹

Moreover, the juvenile could waive this jury right of last resort. One could expect that prosecutors might charge or plea-bargain with a juvenile in order to receive such a waiver. Allowing this right to be subject to the prevailing practices of charge and plea bargaining is probably necessary to make the proposal politically feasible, given the great volume of juvenile cases where transfer has become an issue. For this reason, the right confers

8. See Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 344 (2005) (finding that in Virginia and Arkansas, sentences imposed during jury trials are typically stiffer for many offenses than sentences following either a guilty plea or bench trial).

9. See *infra* Part II.

additional leverage upon the juvenile in these negotiations. This additional leverage, however, would be distributed in a proportionate and desirable way. The greater the likelihood that—all things considered—a jury might convict a juvenile, yet only sentence him as a juvenile, the greater the pressure on the prosecutor to seek an agreement on a juvenile sentence in the first instance, or to insist only on an adult sentence that is truly proportionate to the offense and to the offender. The shadow of the jury would constrain the power of the prosecutor in a useful way.

Such a right might also influence judges in both good and bad ways. Judges who believe that a jury might ultimately reject adult court sentencing would have an incentive to save the judicial system the time and expense of a jury trial by keeping the case in juvenile court. On the other hand, judges who wish to avoid politically difficult decisions about transfers might simply “kick the can” to the jury in order to avoid responsibility for the outcome. Such can-kicking is also possible for prosecutors, but both prosecutors and judges would have good reason to kick only those cans that have a reasonable chance of being handled by the jury in a way favorable to their respective interests.

One might expect, therefore, that the mere prospect of the jury making this threshold sentencing decision might decrease somewhat the power both judges and prosecutors have to sentence juveniles as adults. Certainly, one might expect that fewer of the less serious property and drug offenses might be transferred. As to the serious and violent offenses that have largely driven the trend toward adult court transfer, juries could be expected to refuse adult court sentencing only in those cases where truly compelling mitigating circumstances exist. Whether limiting adult sentencing in such a way would be a good thing is the next question to be addressed.

II. PART II

It is beyond the scope of this short essay to make the case that too many juveniles are sentenced as adults. Numerous books and articles have made this argument at length and in depth.¹⁰ These works have also

10. See, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 1, 11 (2008) (arguing, as others also have, that “[a]fter more than a decade of steadily declining juvenile crime rates,” punitive legal reforms should be mitigated with more rehabilitative interventions); see also John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan’s Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL’Y 1, 41 (2005) (noting that “African-American juvenile offenders were disproportionately waived to adult court”); Sarah M. Greathouse et al., *The Potentially Biasing Effects of Voir Dire in Juvenile Waiver Cases*, 35 LAW & HUM. BEHAV. 427, 427 (2011) (noting that in the past twenty years, “concern with crime-control resulted in a growing number of laws designed to adjudicate juvenile offenses within the adult criminal justice system”); Elizabeth S. Scott, “*Children are Different: Constitutional Values and Justice Policy*,” 10 OHIO ST. J. CRIM. L. (forthcoming 2013) (manuscript at 27–30), available at <http://ssrn.com/abstract=2191711> (arguing that too many juveniles were tried as adults in the recent past); Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 537–41 (2013) (arguing that this is a result of the

discussed the political and social dynamics that have led to overly broad transfer practices—a chronic series of moral panics about juvenile crime in general and juvenile violence in particular.¹¹ These moral panics, however, have certain defining features that have not been sufficiently appreciated. A fuller understanding of the nature of our anxieties about juveniles and the crimes they commit provides us with both a realistic sense of the limits of what reforms one might expect to attract political support, as well as a better sense of what types of reforms would assuage, rather than exacerbate, the anxieties that have created the second-best world of juvenile-crime politics within which we must function.

Suffice it to say that, through a combination of practices, too many juveniles are being transferred to adult court. Statutory exclusion and direct filing provisions result in the mandatory transfer of juveniles charged with certain types of offenses, regardless of the circumstances of the offense or offender. In other jurisdictions, the creation of presumptions that transfer is appropriate in certain types of juvenile offenses produces the same result. Even in the absence of such practices, many judges are simply transferring too many juveniles after transfer hearings, many for offenses that are much less serious than the violent offenses that are the subject of the more mandatory mechanisms created by state legislatures. The net result is that a large number of juveniles have simply been returned to the bad old days of the pre-juvenile court era, in which no meaningful distinction was made between adults and juveniles for the purposes of criminal liability.

Understanding how we arrived at such transfer practices is essential to striking the optimal balance between realism and idealism in reforming them. The indiscriminate transfer of juveniles to adult court developed in response to a series of moral panics about juvenile crimes that have been

1990s’ “moral panics”); Prateek Shukla, *The Criminal Child and Its Potential for Change: A Presumption in Favor of Rehabilitation in Sentencing Juvenile Offenders*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 379, 382, 39–93 (2012) (internal quotation marks omitted) (citing CLEMENS F. BARTOLLAS, *JUVENILE DELINQUENCY* 185 (4th ed. 1997)) (arguing that fewer juveniles need to be sentenced as adults and that a presumption in favor of rehabilitating the juvenile offender would disrupt the juvenile’s “process of becoming deviant”); Benjamin Adams & Sean Addie, *Delinquency Cases Waived to Criminal Court, 2009*, U.S. DEP’T OF JUST. 1, 2 (2012), <http://www.ojjdp.gov/pubs/239080.pdf> (noting that the number of juveniles waived to criminal court “was greater in 2009 than in 1985 for person, drug, and public order offense cases”); Sarah Hockenberry, *Person Offenses Cases in Juvenile Court, 2008*, U.S. DEP’T OF JUST. 1, 2 (2011), <http://www.ojjdp.gov/pubs/236480.pdf> (showing that 4,400 of the petitioned cases were judicially waived to criminal court); Crystal Knoll & Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2008*, U.S. DEP’T OF JUST. 1, 3 (2011), <http://www.ojjdp.gov/pubs/236479.pdf> (showing that “[i]n 2008, juvenile court judges waived jurisdiction over an estimated 8,900 delinquency cases, sending them to criminal court”); Charles Puzzanhera et al., *Juvenile Court Statistics 2009*, U.S. DEP’T OF JUST. 1, 58 (2012), <http://www.ojjdp.gov/pubs/239114.pdf> (showing that 7,600 of all formally processed delinquency cases in 2009 were judicially transferred to criminal court). *But see, e.g.*, WILLIAM J. BENNETT, JOHN J. DI IULIO JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 11, 91 (1996) (rebutting the “unthinking assertions about ‘too many’ [juveniles] behind bars” by arguing that “virtually all of those in prison . . . are . . . deserving enough . . . to merit secure confinement”).

11. See sources cited *supra* note 10.

widely discussed.¹² Missing from that discussion, however, has been a clear understanding of how those moral panics influenced the crime politics of the era. The juvenile crime panics of the 1980s and 1990s constituted a morality play of sorts that the public never seemed to tire of seeing reenacted. This morality play involved three main characters: a monstrous offender, a neglected victim, and a soft-hearted judge. The monstrous offender was typically a sociopath who preyed upon innocent people without remorse. The soft-hearted judge was the government official—typically a judge, but sometimes a prosecutor or parole board—who was too caught up in sympathy for and understanding of the offender to recognize his obvious evil. The neglected victim was the blameless innocent who suffered at the hands of the monstrous offender who had been released by the soft-hearted judge.¹³

The juvenile-offender moral panics of the 1980s and 1990s fit perfectly into this larger narrative about crime and punishment in contemporary American society. Juvenile offenders during this time were seen as a “new breed”¹⁴ of remorseless “superpredators”¹⁵ who were not being held responsible for their crimes because judges—and sometimes prosecutors—were blinded to the juveniles’ obvious evil by the offenders’ tender age. Those who argued on the basis of neuroscience or developmental psychology that juveniles should not be held fully responsible for their crimes were simply scientific versions of the soft-hearted judges who were unable to recognize the obvious evil of this new breed of kids.

Like any good story, the morality play about juvenile crime drew its appeal from powerful emotions experienced by its audience. Two emotions, in particular, energized juvenile-justice punitivism: a fear of moral decline and a distrust of experts. The reason judges, legislators, and prosecutors did not see the obvious evil of juvenile offenders was that they were too caught up in the moral relativism of the times. Everyone had an excuse for everything because the rightness or wrongness of a particular

12. See FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* xi–xiii (1998) (arguing that there is no greater protection from the creation of “general policies toward children and adolescents permeated with fear and hostility” than reason and perspective); see also Burrow, *supra* note 10, at 12–13 (noting Zimring’s “belief that judicial waiver decisions are arbitrary, capricious, and not guided by normative legal standards”).

13. See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831, 905–07 (2000) (arguing that the “unprecedented increase in the severity of criminal punishment in the United States” reflects anxiety about social cohesion); see also Joseph E. Kennedy, *The Punitive Society* (forthcoming) (on file with author).

14. See David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 641 (2002); see also BENNETT ET AL., *supra* note 10, at 194.

15. The term “superpredator” was coined by John Dillulio, who sounded the alarm about a coming wave of violent dangerous youths growing up in moral poverty. BENNETT ET AL., *supra* note 10, at 28; John J. Dillulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

choice was seen as relative to the circumstances of the offense and offender. The abuse of excuses flowed from and contributed to an overall decline in moral responsibility. In the words of one bumper sticker, “[i]t’s not my fault that I never learned to accept responsibility.”¹⁶

Experts were seen as complicit in this moral decline because they substituted specialized knowledge for the simpler common sense that was seen as necessary to tell right from wrong. The unspoken assumption was that such experts came from a social and educational elite that had lost touch with the realities of crime. Their intellectualized view of morality and character blinded them to the simpler and more widely shared truths about human behavior that emerge from a more common experience of people and society. So far removed from the conditions under which crime occurs, they failed to see the ways in which diminished legal responsibility would make life unlivable in many communities. They also failed to appreciate the emotive side of punishment—the ways in which punishment gives meaning to the suffering of crime victims and the ways in which diminished criminal responsibility would rob those victims of a collective moral meaning that they need to make sense of their sufferings. Such experts are too blinded by theories about how someone might have behaved under more favorable circumstances to hold them accountable for how they did behave in the real world in which we all must live.

These two emotions combined powerfully in debates about juvenile justice. People who argued that juveniles should be punished less harshly on account of their tender age were bleeding hearts with soft heads and whose sentimental sympathies blinded them to the malevolence of the new breed. Developmental psychologists who argued that the brain of the juvenile offender was materially—but not permanently—different from the adult brain, or criminologists who questioned the empirical premise of the “new breed” were point-headed intellectuals out of touch with what was happening on the streets. In such an emotional landscape, punitivism wins either way.

The result of these rhetorical dynamics was what I have described elsewhere as “criminal justice fundamentalism.” Because judgment cannot be trusted to be sufficiently punitive, inflexible policies are put in place. At the enforcement level, zero tolerance polices mandate suspension or charging, regardless of context. With respect to charging, statutory exclusion and direct filing provisions ensure that the decision to adjudicate the juvenile as an adult is made solely by the prosecutor. Even in jurisdictions that require judges to decide whether transfer to adult court is appropriate, the list of charges that permit transfer was expanded. The idea in each case is to combat moral relativism by sending a clear message that

16. ZAZZLE, http://www.zazzle.com/its_not_my_fault_bumper_sticker-128535928762839729 (last visited Sept. 13, 2013) (emphasis omitted).

juveniles will be judged as adults and not relative to their age, and to entrust the decision to do so, either entirely, or as much as possible, to prosecutors.

III. PART III

The emotional and rhetorical dynamics described have abated somewhat, but remain powerful and continue to constrain juvenile justice reform. The simplest and most direct way to reduce transfers of juveniles to adult court would be to place categorical limits on what charges and circumstances could justify such a transfer and to abolish statutory exclusion and direct filing by prosecutors. That would, in essence, seem to be fighting fire with fire: opposing categorical rules mandating or expanding adult court jurisdiction over juveniles with categorical rules restricting transfer. It is particularly tempting to argue for such a categorical approach, given the growing expert consensus that juveniles are neurologically different from adults in significant and previously unappreciated ways and the general public's growing interest in neuroscience. Such an approach, while correct on the merits, would be a mistake. A categorical ban on transferring juveniles to adult court, for example, would fall in the wake of the next headline-grabbing case. In the days leading up to this Symposium, a juvenile offender threatened a mother pushing a baby carriage that he would shoot her baby in the face if she did not comply with the juvenile offender's demands during a robbery.¹⁷ When she failed to comply quickly enough, the juvenile shot and killed the baby.¹⁸ Even if the offender in the above-mentioned case does not deserve to be judged for his terrible actions by adult standards because of neurological immaturity, such an argument would exacerbate, not mitigate, the punitive energies that have been distorting our thinking about juvenile justice for the last few decades. Rather than fighting fire with fire, a flat rule banning transfer in such cases, justified on neuroscientific grounds, would be like pouring kerosene on a fire. Such reforms get the balance between aspiration and inspiration wrong by ignoring the continuing rhetorical realities of the second-best world in which we live.

Creating a jury trial right of last resort on the issue of transfer from juvenile court would better strike the balance between aspiration and inspiration that is necessary in our second-best world. Juries would not necessarily be the best decision-makers on this issue, but they would be the most legitimate. What better counterpoint to populist concerns about intellectual elites wrapped up in moral relativism than a jury drawn from the community? To the degree that one looks at the very existence of

17. Russ Bynum, *Police Arrest 2 Teens in Georgia Baby's Killing*, ASSOCIATED PRESS (Mar. 22, 2013, 8:27 PM), <http://bigstory.ap.org/article/police-ga-infant-killed-while-pushed-stroller-0>.

18. *Id.*

juvenile courts as an exercise in the mitigation of punishment, such a jury right would have conceptual precedents. Voluntary manslaughter doctrine mitigates liability for intentional killings by entrusting juries with the judgment of whether the defendant was in his right mind or caught up in the heat of passion at the time of the killing.¹⁹ To be sure, the judgment of the jury would not have to be an uninformed one. Juries could consider evidence from developmental psychologists and neuroscientists in the same way that some juries consider expert testimony on the issue of battered spouse syndrome.

My ambitions for such a reform are, concededly, modest. It would probably not make things any better with respect to the most heinous crimes that arouse the public's passions, but given the current state of affairs, it would not make things any worse, either. The baby-face-shooter would probably be transferred in either regime, although the possibility exists that a jury might not transfer if the juvenile's background provided some compelling explanation for such a terrible act. The biggest impact of the jury trial right proposed would be in the mid- or low-level offenses that are currently being transferred. More to the point, my proposal would have a chance of being adopted in that middle range of states where they are neither so liberal as to support more lenient measures, nor so punitive as to preclude any reform at all. It is a second-best measure for our second-best world.

A transfer jury trial right for juveniles might also serve as a stepping stone to a slightly better world, however. A perplexing, but pragmatic, aspect of the Court's Eighth Amendment jurisprudence is the chicken-or-egg quality of the role that emerging consensus plays. As more states excluded juveniles from the death penalty, the practice became more cruel and unusual, until a tipping point was reached where the practice became unconstitutional. The chicken-or-egg quality comes, of course, from the fact that the Court plays at least a modest role in the consensus that emerges. The ban on executing the mentally retarded gave support to the argument against executing juveniles. The consensus against executing juveniles and its subsequent judicial enshrinement in the Eighth Amendment stimulated a movement limiting the sentencing of juveniles to life without the possibility of parole. The juvenile jury trial right proposed would certainly satisfy *Miller's* requirement of an individualized process. More importantly, if enough states adopted it, a future court someday might recognize the sort of emerging consensus that would make punishing a juvenile as an adult in the absence of a jury cruel and unusual punishment. Arguably, such a requirement would draw support from the Court's Sixth Amendment decisions recognizing jury trial rights with respect to offense elements that had been considered the province of the sentencing judge.

19. See BLACK'S LAW DICTIONARY 446 (3d pocket ed. 2006).

Arguably, a right to a jury determination of the threshold issue of whether one is mature enough to be adjudicated as an adult is even more integral to one's right to trial than the elements of the offense. Such a prospect seems unlikely, perhaps, but it may not be more unlikely than the prospect ten years ago that the current Court would ban the execution of juveniles and limit the imposition of life without the possibility of parole.

I have no illusions about how juries might exercise such a right. But we live in a second-best world. Creating a role for juries in transfer decisions might be a useful step in moving us towards a better one.