

Should Juvenile Offenders Be Tried As Adults?

A Developmental Perspective on Changing Legal Policies

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I'd like to talk today about recent changes in juvenile justice policy that are being implemented despite a full consideration of what research on child development has to say about the wisdom of these changes. The changes that I am referring to are those that are resulting in more and more juvenile offenders being prosecuted and sentenced as if they were adults. I am interested in this both as someone who studies adolescent development and as the Director of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. This is a national initiative examining how knowledge about adolescent development can inform policy-making and practice in the justice system. Let me say a few words about the Network and its current activities.

Let me frame the issue in historical terms for those of you not familiar with American juvenile justice policy. The existence of a separate justice system within which offenders who have not yet reached the age of majority are adjudicated, sanctioned, and rehabilitated is predicated on the premise that there are significant psychological differences between adolescents and adults, and that these differences are provoked by the normal process of development, age-related, and legally relevant. For the past 100 years in the United States, the acceptance of this premise has guided juvenile justice policy and maintained a jurisdictional boundary between juvenile and criminal court. Historically, the boundary was violated only in extreme cases of dangerousness or recalcitrance, and only then when the age of the offender approached the upper bound of the juvenile court's jurisdiction.

Most reasonable people agree that a small number of offenders should be kept out of the juvenile system because they pose a genuine threat to the safety of other juveniles, because the severity of their offense merits a relatively more severe punishment, or because their history of repeated offending bodes poorly for their ultimate rehabilitation. But when the wholesale transfer to criminal court of various classes of juvenile offenders that are defined solely by the charged offense starts to become the rule rather than the exception, we need to stop and take stock of what we are doing. I say this because this represents a fundamental challenge to the developmental premise on which the juvenile court was founded: that adolescents and adults are different in ways that warrant their differential treatment under the law.

Let me briefly overview for those of you unacquainted with the law what "transfer" means and describe the different mechanisms that are used to shift the adjudication of juvenile offenders to the adult, or criminal, justice system. All states allow juveniles under certain conditions to be tried as if they were adults in criminal court. There are three broad mechanisms that can be used to accomplish this:

1. **Judicial Waiver.** A juvenile court judge may transfer the case to criminal court (called "waiving" jurisdiction), based on a variety of factors, including the seriousness of the offense, the maturity of the offender, and the likelihood of the offender's rehabilitation. Provisions for this exist in all but five states, although states vary with respect to the lower age limit for this (i.e., the age below which a judge may not transfer the case). In some states, a juvenile court judge must waive jurisdiction for certain offenses if probable cause exists that the juvenile committed the offense. In other states, a process called "presumptive waiver" exists, in which it is presumed appropriate to transfer a juvenile to criminal court unless the juvenile can prove that he/she is suited to juvenile rehabilitation. The judge makes the ultimate decision, but the burden of proof is on the juvenile.
2. **Direct File, sometimes called "Prosecutorial Discretion."** In jurisdictions in which this exists, a prosecutor has the discretion to file charges in either juvenile or criminal court. As of 1997, 15 states had direct file statutes.

3. Statutory Exclusion, sometimes called "Legislative Exclusion," "Mandatory Transfer," or "Automatic Transfer." Under statutory exclusion, certain categories of juveniles are automatically excluded from juvenile court. The categories are typically determined by some combination of age and offense (e.g., anyone accused of armed robbery who is 14 or older). As of 1997, 28 states provided for this. Some states permit what is called "reverse waiver," where a criminal court judge can waive a case to juvenile court based on various characteristics of the offender and the offense. As in cases of presumptive waiver within the juvenile court, the burden of proof in reverse waiver cases is on the offender.

It is difficult to estimate the number of juveniles whose cases are transferred to criminal court, because states vary considerably in their record-keeping, especially as it concerns direct file or statutory exclusion, and because states vary in the upper age boundary for the juvenile court. Thus, in some states, like New York, 16- and 17-year-olds are automatically processed as an adult regardless of the crime, because the juvenile court's jurisdiction ends at 15. Technically, this would not be considered a "transfer." We know that there has been a steady increase over the last 15 years in the number of cases waived by judicial discretion — the number has doubled — but that the rate of transfer by this method has not increased and is still very low. Less than 2% of cases are waived by judges.

There is still no national system of record-keeping about juvenile cases transferred through direct file or statutory exclusion, although we know that these mechanisms are replacing judicial waiver as a mechanism for transferring juveniles to criminal court. If we extrapolate from some regional studies of direct file, it appears that more juveniles are transferred by prosecutors than by judges. Rough estimates suggest that about 27,000 juveniles were prosecuted in criminal court in 1996, but this does not include adolescents who are under 18 but who are above the age of juvenile court jurisdiction in their state. Some estimates place this figure at about 180,000 per year. In other words, by one mechanism or another, more than 200,000 individuals under the age of 18 are prosecuted in criminal court each year. There are three trends in the data worth noting.

First, the proportion of juveniles prosecuted as adults is growing, primarily because states are adding more and more offenses to the list of crimes that are excluded from the juvenile court. Second, a very large number of these cases — about one-third — are for non-violent offenses, such as burglary or drug charges. Finally, Black and Hispanic offenders are more likely than White offenders to be transferred, even when they have committed the same crime. The greatest disparity is in the processing of drug charges.

I realize that there are many lenses through which one can view debates about transfer policy. As a developmental psychologist, I want to examine the evidence on the development of legally-relevant competencies, capacities, and capabilities and ask whether, on the basis of what we know about development, a jurisdictional boundary should be drawn between juveniles and adults, and if so, at what age it should be drawn.

Before I go any further, it is only fair to ask whether or why a developmental perspective on jurisdictional boundary is even relevant to contemporary discussions of transfer policy. After all, current discussions about transfer are typically not about the characteristics of the offender, but about the seriousness and harmfulness of the offense -- factors which are independent of the offender's age or maturity. The recent shift in juvenile justice policy from an offender-based focus to an offense-based focus explicitly seeks to remove developmental considerations from the discussion. "Adult time for

adult crime,” says nothing about the age of the offender, except for the fact that it ought to be considered irrelevant.

I believe that it is logically impossible to make the age of the offender irrelevant in discussions of criminal justice policy. Yes, there are moral, legal, political, and practical issues that enter into the transfer debate. But the fact that some crimes are committed by individuals who are not yet developmentally mature can not be ignored. A fair punishment for an adult is unfair when applied to a child who did not understand the consequences of his or her actions or who was unable to exert control over his or her behavior. The ways we interpret and apply laws should rightfully vary when the case at hand involves a defendant whose understanding of the law is limited by intellectual immaturity or whose judgment is impaired by emotional immaturity. And the implications and consequences of administering a long and harsh punishment are very different when the offender is young than when he or she is an adult. People may differ in their opinions about the extent to which, the ways in which, and the age period during which an offender’s age should be considered in decisions concerning transfer, adjudication, and sentencing, but ignoring this factor entirely is like trying to ignore an elephant that has wandered into the courtroom. In other words, if one is willing to acknowledge that the age of the offender does matter, a developmental perspective is needed to inform decisions about *how and at what points in the process* age ought to be taken into account. In my remarks today, I’d like to lay out for you what the relevant legal issues are, in light of what we know about child and adolescent development.

Transferring a juvenile to criminal court has three sets of implications that lend themselves to a developmental analysis. First, transfer to adult court alters the legal process by which a minor is tried. Criminal court is based on an adversarial model, while juvenile court is based, at least in theory, on a more cooperative model. This difference in the climates of juvenile versus adult courts is significant because it is unclear at what age individuals have sufficient understanding of the ramifications of the adversarial process and the different vested interests of prosecutors, defense attorneys, and judges.

Second, the legal standards applied in adult and juvenile courts are different. For example, competence to stand trial is presumed among adult defendants unless they suffer from a serious mental illness or substantial mental retardation. We do not know if the presumption of adjudicative competence holds for juveniles, who, even in the absence of mental retardation or mental illness, may lack sufficient competence to participate in the adjudicative process. Standards for judging culpability may be different in juvenile and adult courts as well. In the absence of mental illness or substantial deficiency, adults are presumed to be responsible for their own behavior. We do not know the extent to which this presumption applies to juveniles, or whether the validity of this presumption differs as a function of the juvenile’s age.

Finally, the choice of trying a young offender in adult versus juvenile court determines the possible outcomes of the adjudication. In adult court, the outcome of being found guilty of a serious crime is nearly always some sort of punishment; about 80% of juveniles who are convicted in criminal court are incarcerated. In juvenile court, the outcome of being found delinquent may be some sort of punishment, but juvenile courts typically retain the option of a rehabilitative disposition, in and of itself or in combination with some sort of punishment.

In essence, the juvenile court operates under the presumption that offenders are immature, in three different senses of the word: their development is incomplete, their judgment is less than mature, and their character is still developing. The adult court, in contrast, presumes

that defendants are mature: competent, responsible, and unlikely to change. Which of these presumptions best characterizes individuals between the ages of 12 and 17? Is there an approximate age at which the presumptions of the criminal court become more applicable to an offender than the presumptions of the juvenile court? One of the things I try to explain to judges, legal practitioners, and policy makers is that developmental research rarely yields the sorts of dichotomous boundaries that are customarily used to create bright-line age distinctions under the law. This is because development tends to be gradual rather than abrupt and highly variable among individuals of the same chronological age. Developmental research can not be used to establish a bright-line boundary between adolescence and adulthood, but it can point to age-related trends in certain legally-relevant attributes, such as the intellectual or emotional capabilities that affect decision-making in court and on the street.

I think the available evidence leads to the identification of *three*, not two, categories of individuals: *juveniles*, who should be categorically non-transferrable to criminal court; *adults*, who should automatically be charged in adult court; and, *youths*, whose transferability to criminal court should be determined not on the basis of the alleged offense, but through competence testing, clinical interviews, and so forth. This three-way classification scheme recognizes the variability in development among individuals who are in the midst of adolescence and the resulting difficulty in drawing bright-line distinctions on the basis of chronological age.

To address the issue of transfer from a developmental perspective, we must be more specific about the aspects of development in question. I think the most important questions are these:

First, when do individuals become competent to be adjudicated in an adversarial court context? At what age are adolescents likely to possess the skills necessary to protect their own interests in the courtroom and participate effectively in their own defense?

Second, when do individuals meet the criteria for adult blameworthiness? Is there an age before which individuals, by virtue of “normal” psychological immaturity, should be considered to be of “diminished culpability” and therefore held less accountable, and proportionately less punishable, for their actions?

Third, is there a point in development at which individuals cease to be good candidates for rehabilitation, by virtue of the diminished likelihood of change in the psychological and behavioral characteristics thought to affect criminal behavior or because of diminished amenability to treatment?

Let me begin with an examination of the development of adjudicative competence and the capabilities presumed to underlie it. Two specific types of competencies are needed to be tried in criminal court. The individual must be competent to assist counsel, and the individual must also demonstrate “decisional competence”: the ability to make decisions about waiving rights, entering pleas, etc

There are numerous intellectual competencies that change during adolescence which are likely to underlie the development of adjudicative competence. Among them are the ability to engage in hypothetical and logical decision-making, to demonstrate reliable episodic memory, to extend thinking into the future (in order to envision the consequences of different pleas, to be able to take the perspective of others, and to understand and articulate one’s own motives and psychological state. Although these abilities emerge at somewhat different ages, it would be highly unlikely that an individual would satisfy all of these criteria much before the age of 12. At

the other extreme, research suggests that the majority of individuals have these abilities by age 16.

There is ample evidence, therefore, to raise concerns regarding the competence of adolescents under age 15 to participate in criminal trials. Although the majority of 13-year-olds would likely meet the minimal competence criteria even at age 15, a significant fraction of adolescents should not be assumed competent to protect their own interests in adversarial legal settings. If an adolescent does not have the understanding, appreciation, or reasoning ability necessary to make such decisions, criminal court is an inappropriate venue for determining that adolescent's disposition.

It is my view, therefore, that no youngster under the age of 13 should be tried in adult court. On the other hand, although more research is needed — and, as I noted earlier, this research is underway — it is likely that the majority of individuals older than 16 would satisfy the broader criteria for adjudicative competence. Individuals who are between the ages of 13 and 16 should be evaluated to determine their adjudicative competence before a waiver decision is made.

Let me now turn to research on the culpability of youth. The adult justice system presumes that defendants who are found guilty are responsible for their own actions, and should be held accountable and punished accordingly. Historically, those who are guilty but less responsible for their actions receive proportionately less punishment. It is therefore worth considering whether, because of the relative immaturity of minors, it may be justified to view them as being less blameworthy than adults for the very same infractions — that is, whether developmental immaturity should be viewed as a relevant mitigating factor. If, for example, adolescents below a certain age cannot foresee the consequences of their actions, or cannot control their impulses, one should not hold them as culpable for their actions as one would hold an adult.

I am using the term “culpability” as a shorthand for several interrelated phenomena, including responsibility, accountability, blameworthiness, and punishability. In theory, these notions are relevant both to the adjudication of an individual's guilt or innocence and to the determination of a disposition or sentence. In reality, though, the threshold for culpability in the context of an adjudication is so minimal that this is not an issue in the determination of the guilt or innocence of any normal individual older than 8 or 9. In the absence of some sort of mental illness or retardation, anyone who is 9 can form criminal intent and appreciate the wrongfulness of an action. Diminished responsibility as a result of normative developmental immaturity is therefore not a reasonable claim in the adjudicatory phase of a hearing for any mentally normal individual who is 10 or older. Because the criteria for taking into account diminished culpability in the context of a sentencing or dispositional decision are less clear, however, whether adolescents should receive proportionately less punishment by virtue of inherently diminished responsibility is a legitimate question to ask when deciding how much and in what ways a juvenile should be punished.

The extent to which culpability is relevant to the transfer issue concerns the presumptions about culpability that operate within each venue and, more specifically, whether or how, during the sentencing phase of a criminal trial, a juvenile's developmental immaturity is taken into account. The rehabilitative ideal of the juvenile court argues against adjudicating a

juvenile who is characterized by sufficiently diminished responsibility in a criminal court whose only response can be punitive. The argument for keeping juveniles in the juvenile system is that rehabilitation is a more reasonable disposition than punishment for a less than fully accountable juvenile. We then need to ask if there an age below which we can presume sufficiently diminished responsibility to argue that it is a mitigating factor, and is there an age beyond which we can presume sufficient maturity of judgment to hold an individual fully accountable?

Some of the capabilities that are potentially relevant to the assessment of blameworthiness are the same as those that are relevant to the assessment of adjudicative competence. For example, logical decision-making and the ability to foresee the future ramifications of one's decisions are important to determinations of blameworthiness, just as they are to determinations of adjudicative competence. In addition to these cognitive abilities, however, blameworthiness also presumes certain capabilities that are more interpersonal or emotional than cognitive in nature. Among these, for example, are the ability to control one's impulses, to manage one's behavior in the face of pressure from others to violate the law, or to extricate oneself from a potentially problematic situation. Many of these capabilities have been examined in research on what might broadly be called "judgment."

It is clear from the little research that does exist in this area that few individuals would consistently demonstrate adult-like judgment much before age 12, and that many individuals have difficulty demonstrating adult-like judgment even at age 17. The fact that many of the psychosocial capabilities that affect judgment in antisocial situations continue to develop over the course of adolescence is one reason for the difficulty we have in predicting adult offending from adolescent delinquency. Because at least some adolescent offending is likely the result of normative immaturity, rather than moral turpitude, most adolescents "age out" of antisocial behavior as they become more mature.

Now, as I noted, children as young as 9 have the capacity for intentional behavior and know the difference between right and wrong; as such, there is no reason why children of this age must unequivocally be held blameless for their conduct. At the same time, it is also clear that the vast majority of individuals below the age of 13 lack certain intellectual and psychosocial capabilities that need to be present in order to hold someone *fully* accountable for his or her actions *under certain circumstances*. These circumstances include situations that call for logical decision-making, situations in which the ultimate consequences of one's actions are not evident unless one has actually tried to foresee them, and situations in which sound judgment may be compromised by competing stimuli, such as very strong peer pressure to violate the law. Once individuals have reached a certain age – 17 or so – it is reasonable to expect that they possess the intellectual and psychosocial capacities that permit the exercise of good judgment, even under difficult circumstances. Thus, while pressure from one's friends to violate the law may be a reasonable mitigating factor in the case of a 12-year-old, it is unlikely to be so in the case of a 17-year-old.

When the individual under consideration is younger than 17, however, developmentally-normative immaturity should be added to the list of possible mitigating factors, along with the more typical ones of self-defense, mental state, and extenuating circumstances. More importantly, the need for this additional information argues for a more individualized approach to

both transfer and sentencing of juveniles, and argues against policies that do not permit such flexibility, such as transfer via legislative exclusion.

Let me now turn to research on amenability to treatment. I noted earlier that one of the reasons that young people's offenses historically have been adjudicated in juvenile court is that adolescents are presumed to be more amenable to treatment than adults and, consequently, better candidates for rehabilitation. Conversely, adults have been seen as relatively more hardened and, accordingly, less likely to profit from rehabilitation.

In theory, amenability is perhaps the most practical basis on which to make decisions about where to draw the jurisdictional boundary, because it makes little sense to invest the rehabilitative resources of the juvenile justice system in individuals who are unlikely to change and a great deal of sense to target such resources at those individuals most likely to respond to intervention or treatment. In practice, though, judgments about amenability are made on an individualized basis, with decision-makers taking into account a juvenile's current circumstances, psychological profile, and responses to prior interventions, if any. The age of the offender, generally speaking, is less important than his or her particular history.

From the perspective of developmental psychology, however, one might ask whether there is an age below which one can presume that most individuals have the capacity to change and an age above which most people's amenability has diminished enough that they are unlikely to respond effectively to rehabilitation. If these questions could be answered definitively, at least some of the decision-making about an individual's amenability to treatment could be done on the basis of age.

Unfortunately, developmental research does not provide a satisfactory answer to these questions. Any judgment of amenability presumes not only individual malleability but at least some change in the juvenile's environment. It is impossible to evaluate an individual's amenability without considering the nature of the intervention to which the individual is going to be exposed and whether there is reason to believe that this particular intervention will be effective for this particular individual. Rather than make amenability judgments on the basis of an offender's age, therefore, developmental research would indicate that such judgments should be made on the basis of the offender's past experience. A youngster who has been exposed to certain types of interventions in the past and who has not responded to them effectively is relatively unlikely to respond to them in the future. Without such evidence, however, one would presume malleability in response to intervention.

Overall, there is no basis in the developmental literature from which to draw generalizations about differences in amenability purely as a function of age. It is incorrect to suggest that there is an age below which individuals should remain treated as juveniles because they are especially likely to be amenable to change, but it is also incorrect to assume that there is an age beyond which individuals should be categorically assumed to be too hardened to be helped. Amenability decisions should be made on a case-by-case basis and should focus on the prior history, rather than the chronological age, of the offender.

I want to conclude with a bit of humility. A developmental perspective can inform, but can not answer, the transfer debate. Even setting aside the political, practical, and moral questions that impinge on the discussion, developmental research does not point to any one age that politicians and practitioners should use in formulating transfer policies or practices.

Having said this, it appears appropriate to raise serious concerns based on developmental evidence about the transfer of individuals younger than 13 to adult court. For this reason, I believe that individuals under the age of 13 should be viewed as juveniles, regardless of the nature of their offense. At the other end of the continuum, I think it is appropriate to conclude that the vast majority of individuals older than 16 are not appreciably different from adults in ways that would prohibit their fair adjudication within the criminal justice system. My view is that variability among individuals between 13 and 16 requires that some sort of individualized assessment of an offender's competence to stand trial, blameworthiness, and likely amenability to treatment be made before reaching a transfer decision.

Regardless of the ages one uses to draw boundaries, though, research on development argues strongly against transfer policies that are solely offense-based and argues instead for a return to offender-based policies that permit decision-makers to exercise judgment about individual offenders' maturity and eligibility for transfer. To the extent that transfer via legislative exclusion is solely offense-based, however, it is a bad policy from a developmental perspective. And, as I noted earlier, this is a bad policy that is becoming increasingly widespread.

The irony of employing a developmental perspective in the analysis of transfer policy is that the exercise reveals the inherent inadequacy of policies that draw bright-line distinctions between adolescence and adulthood. Indeed, an analysis of the developmental literature indicates that variability among adolescents of a given chronological age is the rule, not the exception. In order to be true to what we know about development, a fair transfer policy must be able to accommodate this variability. One way to do this is to make sure that judges have solid information about child and adolescent development and the flexibility to use this information when making decisions about youngsters' fates that may have life-long consequences. Developmental psychologists can help with the facts. As for the flexibility, for better or for worse, we can only appeal to the wisdom of policy-makers.