

Turning Back the Tide: Juvenile Justice “Reform” in Colorado

Position Paper

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Introduction

In the early 1900s, Denver Judge Benjamin Lindsey emerged as a national leader in juvenile justice and established a juvenile court system that was a model for many other states. The juvenile court system in Colorado was designed and implemented with the mission to protect children and rehabilitate juvenile offenders. It has long been recognized that juveniles are different from adults in that their impulsivity, immaturity, and incomplete development necessitate different treatment by society and the courts. In recent decades, neuroscientists and psychologists have lent a wealth of scientific evidence to support the special treatment of juveniles and the unique purpose of the juvenile justice system (Goodman, 2007). But, the wave of punitive measures that overtook the country at all levels of criminal law from the 1960s through the 1990s also impacted the juvenile courts and resulted in laws and procedures that systematically removed juvenile offenders from the protection and rehabilitative focus of the juvenile courts and placed them in adult criminal courts where mandatory prison sentences are meted down, sometimes without regard to the age or culpability of the offender (Bishop, 2000; Steiner & Wright, 2006).

In Colorado, the age at which a juvenile offender could be tried as an adult dropped from 18 to 12 between 1967 and 1987, coinciding with changes in how charges were filed and an increase in the number of offenses eligible for prosecution in criminal court. Before 1973, juvenile courts judges made the decision whether or not to send a case to adult court, known as judicial waiver, after a hearing that took into consideration the juvenile’s background and potential for rehabilitation (Bishop, 2000). From 1973 through 1997 the decision was increasingly put in the hands of the district attorney, culminating in the prosecutorial waiver, or direct file, legislation that gave prosecutors broad discretion to file charges against a juvenile in adult criminal court without a hearing in juvenile court (Bishop, 2000; Steiner & Wright, 2006). Similar changes happened quickly in several states across the country, resulting in a dramatic increase of the number of juveniles being sent to criminal court (Bishop, 2000; Steiner & Wright, 2006). For juveniles in Colorado, being sentenced in a criminal court means being exposed to a mandatory sentencing scheme that severely limits judiciary discretion. Judges in Colorado are not allowed to consider maturity, delinquency history, or potential for rehabilitation when sentencing juveniles convicted of class 1 or 2 felonies (Goodman, 2007).

These changes to the treatment of juvenile crime were viewed as positive reforms by many who were concerned about rising crime rates and wanted to ensure harsh punishment of the worst offenders, without regard to the purpose and intent of the juvenile court system or the special nature of juvenile offenders: “While commission of a repugnant act neither transforms a young offender into a fully responsible adult nor makes her a poor candidate for juvenile intervention, such considerations are largely irrelevant. The community will not tolerate mild responses to heinous offenses. Removal to the criminal court makes possible the imposition of harsh punishments believed to be more justly deserved” (Bishop, 2000, p.82). As Bishop explained in her comprehensive review of juvenile offenders, expedited transfer strategies like direct file replace the individualized, offender-oriented decision making of the independent judiciary with legislative or executive branch decision makers who are more focused on the seriousness of the offense (2000). Prosecutors are more often inclined to put the interests of the

state above that of the juvenile and to take advantage of political gains that come from being “tough on crime” (Bishop, Frazier, & Henretta, 1989).

Fortunately, the State of Colorado has slowly started turning back the tide of punitive reforms in juvenile justice by being one of the first states to ban the sentence of life without parole for juveniles in 2006, and by placing limits on prosecutorial discretion in direct-file cases in legislation recently passed in April 2012. Allowing any juvenile to be direct-filed on and imposing mandatory sentences on juvenile offenders, however, still fails to “adequately address the unique legal status or protect the special rights of adolescent offenders” (Goldman, 2007). This paper argues that for several reasons, including the treatment of juveniles in adult facilities, the lack of deterrent effect, and the increased recidivism rate of juveniles who are direct-filed, the state has not yet gone far enough to restore a rehabilitative focus on juvenile offenders. Four things still need to happen. The Colorado legislature must 1) completely eliminate direct filing by prosecutors, ensuring that only judicial transfers can send a juvenile to adult court, 2) give judges more flexibility when sentencing juveniles in adult court, 3) increase the number of available juvenile beds in the Department of Corrections, and 4) pass legislation guaranteeing that all juvenile offenders, regardless of offense, will have access to the Youthful Offender System or the Closed Adolescent Treatment Center.

Impact of waiver laws on deterrence and recidivism

The assumption behind waiver laws focuses on the potential for deterring juvenile crime with the threat of the more severe punishment delivered by the criminal courts (Bishop, 2000; Steiner & Wright, 2006). There are not many studies that examine the impact of transferring juveniles to criminal court, but the work that has been done has conclusively determined that the prospect of criminal prosecution via either judicial or prosecutorial waiver fails to serve as a deterrent to juvenile offenders. Singer and McDowall (1988) and Jensen and Metsger (1994) both found that mandatory transfer laws had no general deterrent effect. Jensen and Metsger (1994) even noted an increased arrest rate in Idaho following the implementation of that state’s mandatory transfer law for violent offenses.

Colorado is one of only fifteen jurisdictions, including Washington, D.C., that allows prosecutorial waiver, also known as direct filing (Goodman, 2007). Steiner and Wright (2006) examined the impact of direct-file laws on juvenile crime deterrence in the fourteen states that have direct-file, or concurrent jurisdiction, laws. They found evidence of a deterrent effect in only one state, Michigan. Nine states were unaffected by the implementation of a direct file law, while Arkansas and Montana had an increase, rather than the expected decrease, in arrests for violent juvenile crime after their direct file law went into effect. Colorado also had an increase, but the researchers concluded that it could possibly be attributed to a history effect as one of control states, Nevada, had a similar increase. Louisiana exhibited only a short-term increase. The authors were “confident in inferring from our results that direct file waiver laws have had little effect on violent juvenile crime” (2006, p.1467).

Additional attention has been paid to the recidivism rates of juveniles sent to criminal court, but again, the results do not lend empirical support for the efficacy of transfer laws. Fagan examined juvenile and criminal court processing in similar counties in New York and New

Jersey and published the results in several articles (1991, 1995, 1996). Fagan found that juveniles sent to criminal court fared worse than juveniles in juvenile court, even when accounting for the sentence imposed. Juveniles sentenced in criminal court were more likely to be rearrested and to be rearrested more quickly following release than those sentenced in juvenile court. Overall, juveniles sentenced to prison were more likely to reoffend than juveniles sentenced to probation, but juveniles sentenced to probation in criminal court were still more likely to reoffend than similar juveniles sentenced in criminal court. Similar studies have supported Fagan's results (e.g. Bishop, 1996; Winner, 1997). Bishop (1998) found that in both short and long-term follow-ups with juvenile offenders in Florida, those transferred to criminal court "fared worse" than those adjudicated in juvenile court (Bishop, 2000, p.133). Transferred offenders had higher re-arrest rates, were arrested for more serious offenses, and were arrested more frequently than their counterparts in the juvenile justice system.

If scientific evidence was relied upon, transfer laws would likely cease to exist because they have no proven effectiveness. The studies discussed here, though not all involving Colorado's laws specifically, provide a strong case for the extremely limited use of both judicial and prosecutorial waiver (Bishop, 2000).

Juveniles in adult prisons

In 2009, the Department of Justice reported that 43 adult state prison systems, including Colorado, held 2,778 inmates under the age of eighteen. Much larger numbers of juvenile offenders enter US prisons having just passed their eighteenth birthday (Human Rights Watch, 2012). It is very difficult to gather accurate data about juveniles in jail, however, as has been noted by scholars, journalists, legislators, and the Bureau of Justice Statistics (Bishop, 2000; Boven, 2010). Human Rights Watch's recent report included testimony from juvenile offenders in Colorado and ten other states. The report calls for the abolishment of "the automatic trial of youth in adult criminal courts and their mandatory incarceration in adult prisons" (p.5).

Juvenile offenders charged as adults in Colorado and 41 other states can be detained in adult facilities prior to trial. Adult jails in Colorado (and across the country) are not appropriate for juvenile detention as they are not designed to comply with Colorado's sight and sound regulations and fail to provide the educational, behavioral and mental health services that juvenile offenders need. County sheriffs have admitted that juveniles are often placed in solitary confinement in order to keep them sufficiently separated from adults, the effects of which have been linked to higher rates of suicide among juvenile inmates (Bishop, 2000; Boven, 2010). As Bishop noted, juveniles are "especially vulnerable to suicide in jail because they have fewer coping skills to deal with feelings of helplessness, isolation, and fear stemming from the uncertainty of the pretrial period, loss of contact with families, threats of victimization from other inmates, and other stressors associated with incarceration" (2000, p.138). The Department of Justice reported that the average annual suicide rate for inmates under 18 in prison between 2000 and 2002 was four times higher than the rate for all other age groups (Human Rights Watch, 2012).

Another unfortunate side effect of being placed in protective custody while incarcerated is the fact that inmates in solitary confinement do not participate in educational or behavioral programming and receive a maximum of one hour outside of their prison cell each day, which is

especially detrimental to youths who are in a critical period of development (Bishop, 2000). Juveniles are still developing mentally, emotionally, and physiologically; and need education, not just academics, but educational programs relating to growth and maturation as an individual. In juvenile detention centers, those programs are provided and staff are available to counsel and teach young offenders, which is likely related to the fact the youths processed in juvenile court have lower rates of recidivism than ones processed in criminal court. In adult facilities, the focus is on security rather than rehabilitation, so there are fewer programs available and typically no staff are available that are trained to work with juvenile (Bishop, 2000; Goodman, 2007). As the Human Rights Watch noted, “young people have great potential to respond to education, vocational training, and other rehabilitative services. Opportunities for intellectual, emotional, and social growth are essential for young people who are incarcerated when they are still developing into the adults they will become” (2012, p.12).

Conditions in prison for juvenile offenders post-sentencing can be even worse. Young offenders create problems for officials because they have high rates of suicide, increased medical, social, educational, and behavioral needs, and often require special protection from harm while in jail or prison with adult inmates. In thirty-one states, juvenile offenders are housed right alongside adult inmates who are typically physically larger, stronger, more experienced with incarceration, have longer criminal histories, and are more likely to have been convicted of a violent offense (Bishop, 2000). Along with disproportionately high suicide rates, research has also found that youth offenders are at the greatest risk of physical and sexual assault during their incarceration (Bishop, 2000; Human Rights Watch, 2012). Nearly every one of the 700 juvenile offenders contacted by Human Rights Watch reported being the victim of physical abuse, harassment, and/or sexual assault and rape (2012).

Juveniles are different

Arguably, politicians and legislators in Colorado and the U.S. have forgotten the purpose and genesis of the juvenile justice system when writing criminal laws and pushing for punitive measures that lack the rehabilitative intent of the juvenile courts and focus on the offense rather than the youthful offender. It is important to remember that the juvenile justice system exists because juveniles are *different* (Bishop, 2000; Goodman, 2007; Human Rights Watch, 2012). Regardless of the offense committed, juvenile offenders are markedly different from adults in several key facets. The U.S. Supreme Court noted the competency, culpability, and decision-making differences between juveniles and adults in its ruling in *Roper v. Simmons* that ended capital sentences for juvenile offenders (Goodman, 2007).

Psychologists and neuroscientists have documented that adolescent brains are not yet fully developed, resulting in impulsivity, risk-taking behavior, and an inability to think long-term or to fully consider the consequences of actions. Research on brain development also indicates that juveniles are highly capable of reformation and that even the most violent youth offenders can be successfully rehabilitated (Goodman, 2007). An amici curiae brief filed by twelve former juvenile judges for the combined and currently undecided Supreme Court cases of *Miller v. Alabama* and *Jackson v. Hobbs* emphasized that the “unique characteristics of juveniles make it impossible to predict at the time initial sentencing whether a juvenile might one day be ready to leave prison” (2012, p.4). The amici argued that juveniles who commit homicide offenses are no

different than juveniles who commit less serious offenses and are just as capable of rehabilitation, adding that the known differences between juveniles and adults are often contributing factors in juvenile criminal conduct. A separate amici curiae filed by the American Psychological Association, American Psychiatric Association, and the National Association of Social Workers emphasized the same points but added that it is impossible for expert psychologists to differentiate between a juvenile offender who will become a career criminal and a juvenile offender who will be successfully rehabilitated, regardless of the type of offense committed (2012). This point is especially important because juveniles who are sentenced in criminal court are often handed mandatory, long-term sentences and are placed in adult facilities that fail to provide them with the services needed for rehabilitation.

Why Colorado needs to do more

Recent legislation in Colorado has begun to turn the tide back but it has not yet gone far enough to restore the juvenile justice system to its rehabilitative mission. Prosecutorial waivers still “frequently require inexperienced assistant prosecutors to make quick decisions based on minimal information” and “invite subjective and inconsistent decision making and, thus, have prompted similar counterbalancing measures” (Bishop, 2000, p.125) and their continued use, in any capacity, is putting juveniles at risk and placing them in situations where they will not receive the developmental and educational services they need.

For example, C.R.S. § 22-32-141 (2011) now provides for the education of juveniles being held in adult facilities pending trial, but only requires 4 hours per week and allows educators to refuse if an “appropriate and safe environment” cannot be found or if the juvenile acts out or “refuses to accept or participate in educational services.” This statute requires local school districts to provide these educational services, provides minimal instructional time, and gives schools several ways to refuse service.

H.B. 1139 now ensures that juvenile offenders will remain in juvenile detention facilities while awaiting trial, unless the facility requests a transfer and a judge approves. This will help guarantee juvenile offenders access to the social and educational services they need. H.B. 1271 raised the minimum age of offenders that can be direct-filed upon to 16 and allows juveniles to request a reverse transfer hearing in which a judge will determine if the case should remain in adult court. This is an important improvement, but “reverse waiver and ‘transfer back’ options place the burden of correction on the criminal courts. But shifting the locus of decision making from juvenile court judges to criminal court judges makes little sense. Criminal court judges are already overworked and lack special expertise in dealing with young offenders” (Bishop, 2000, p.125).

H.B. 1271 will also result in a decrease of mandatory sentences for juvenile offenders because it limits those sentences to class 1, class 2, sex assault and crimes of violence, and states that youth convicted solely of misdemeanors must be tried in juvenile court. All other felony crimes are still eligible for transfer by judicial waiver. As previously discussed, juvenile offenders have special developmental concerns that adult prisons are unable to address and a unique ability to rehabilitate that the prison system does not support, so more measures need to

be taken to ensure that as many as juveniles as possible are kept in the juvenile system and out of adult courts and prisons.

Suggestions and solutions

There are four specific things that Colorado legislators can do to continue reforming the juvenile justice system and returning it to its intended purpose of protecting children and rehabilitating offenders.

1. Ban direct filing

As has been discussed, “legislative exclusion and prosecutorial waiver have overtaken judicial waiver as the primary vehicles by which transfers are made. The appeal of prosecutorial waiver lies largely in the fact that it expedites the transfer process by circumventing the juvenile court. To politicians with a “get tough” agenda, who perceive juvenile court judges as “too soft” on crime, prosecutorial waiver is an attractive option” (Bishop, 2000, p.124). Furthermore, direct filing bypasses the judicial system of checks and balances by placing the decision in the hands of one individual who is often inexperienced with juvenile offenders and removes the participation of the offender and his/her attorney as well as the expertise of a juvenile judge. Only thirteen other states currently allow direct filing so Colorado has foregone its role as a leader in juvenile justice. Research regarding its deterrent effect and impact on recidivism are not positive, indicating that juveniles processed in criminal court are less likely to be rehabilitated and more likely to reoffend.

2. Give criminal court judges more discretion when sentencing juvenile offenders

Even if a juvenile is transferred to criminal court through the judicial waiver process rather than direct filing, the criminal court judges are less experienced with juvenile offenders and are expressly forbidden to consider important factors like maturity, history, or potential for rehabilitation. Juveniles in criminal court are subject to mandatory minimum sentences for class 1 and 2 felonies that will land them in adult prison facilities for extended periods of time, pursuant to C.R.S. § 18-1.3-401 and 18-1.3-406 (2011) (Goldman, 2007). Juveniles in prison are subjected to physical, sexual and emotional abuse and are denied the opportunities they need to develop and grow into mature adults. They often are placed in solitary confinement and denied access to the educational and social services and programs they need (Human Rights Watch, 2012). Criminal court judges should not have their hands tied by mandatory sentencing schemes when dealing with juveniles and should be allowed to take into consideration any relevant factors.

3. Allow all juvenile offenders, regardless of offense, access to the Youth Offender System and/or Closed Adolescent Treatment Center

Current Colorado law forbids juveniles convicted of class 1 and most class 2 felonies from participating in the Youth Offender System (YOS). The YOS is a blended sentencing option that allows the court to suspend the adult sentence upon successful completion of the YOS program. The YOS provides important educational, vocational, and residential programs to juvenile offenders to assist them with reintegration into their community (Goldman, 2007).

All juvenile offenders should be able to participate in the YOS and be given a chance to develop and mature into adults before the courts determine that they require further incarceration in the adult prisons. Changing the law on this issue would also grant more discretion and flexibility to criminal court judges sentencing juvenile offenders.

The Closed Adolescent Treatment Center provides highly structured, intensive treatment and rehabilitation services for Colorado's most violent juvenile offenders and has been proven successful, but only juveniles processed in juvenile court have access to this program. If the Center can successfully rehabilitate violent offenders it should not matter where they were sentenced. All violent juvenile offenders need access to quality services like those provided by the CAT Center.

4. Increase the number of juvenile beds available

C.R.S. § 19-2-1201 (2011) decreased the cap on juvenile detention beds in the state from 479 to 422, limiting sentencing options and essentially forcing more juveniles into adult facilities. This decrease needs to be reversed so that more juveniles can be placed in the appropriate detention centers.

In sum, there is more than sufficient evidence that direct filing is ineffective and that juveniles in the adult courts and prisons are not getting the treatment and services they need to become successfully rehabilitated, despite their unique ability to do so. The State of Colorado was once a leader in juvenile justice and had a system designed to protect children and rehabilitate young offenders, but calls for more punitive measures have ignored the important differences between juveniles and adults that inform the purpose and intent of the juvenile justice system. Recent reforms have begun to take the state back to a more individualized and treatment-oriented system for juvenile offenders, but there is still much more that needs to be done.

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