

ARRESTED DEVELOPMENT: AN ALTERNATIVE TO JUVENILES SERVING LIFE WITHOUT PAROLE IN COLORADO

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More than 100 years ago, reformers established a separate juvenile court system meant to protect and rehabilitate delinquent children. However, several U.S. Supreme Court cases in the 1960s and 1970s slowly eroded the special features that distinguished the juvenile court from the criminal court. In addition, newly enacted legislation has facilitated the transfer of juvenile cases to the adult system. As a result, more juveniles are being tried in adult courts and the goals furthered by the juvenile court system are being ignored. Recent Supreme Court decisions and studies regarding adolescent brain development indicate that the current system for treating juvenile offenders does not adequately protect the special rights of adolescent offenders. Colorado needs to adopt a new process for dealing with violent juvenile offenders, one which adequately recognizes the unique needs of adolescents while simultaneously addressing the serious nature of the offenses. These goals can be achieved by allowing juveniles convicted of the most violent crimes to receive blended sentences, allowing courts to impose juvenile sentences and stayed adult sentences. This sentencing model holds juveniles accountable for their crimes, protects society, and provides young offenders with the resources and the motivation to rehabilitate themselves.

INTRODUCTION

On December 17, 1992, fifteen-year-old Jacob Ind of Woodland Park, Colorado, brutally murdered his mother and stepfather after enduring years of physical, sexual, and emotional abuse.¹ The next morning, Jacob was taken into police custody

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and subsequently charged as an adult.² Following a five-week trial, Jacob was convicted of murdering his abusers.³ At his sentencing, El Paso County District Judge Mary Jane Looney expressed her frustration with Colorado's mandatory sentencing scheme, which required sentencing the young defendant to life in prison without the possibility of parole ("LWOP").⁴

Unfortunately, Jacob's story is not unique. Every state, including Colorado, has made it easier to try juveniles⁵ in adult criminal courts. All fifty states, as well as the District of Columbia, permit the transfer of children to adult courts in certain situations.⁶ Additionally, between 1992 and 1997, forty-four states and the District of Columbia enacted statutes facilitating the transfer of juveniles to the adult criminal system.⁷ As a result of these new statutes, the transfer of young offenders to adult criminal courts has become more common. Between 1998 and 2004, direct filing by Colorado prosecutors led to the conviction of 1,244 juveniles in Colorado's adult courts.⁸

One of the problems with sentencing juveniles as adults is that judges in adult criminal court are not always required or permitted to consider the child's age or level of maturity as a factor during sentencing.⁹ Many states readily impose harsh adult sentences—including LWOP—on juvenile offenders con-

the Pendulum Foundation for their guidance and helpful suggestions.

1. Sue Lindsay, *Growing Up in Prison*, ROCKY MOUNTAIN NEWS, Sept. 19, 2005, at 6A.

2. *Id.*

3. *Id.*

4. *Id.* During the sentencing hearing, Looney expressed her belief that a teenage defendant such as Ind should have some hope of parole, stating, "[i]t seems to me that kind of change might be an appropriate change in the statute in many cases that I've seen—certainly this case." *Id.* at 20A.

5. In Colorado, a juvenile is defined as "a person under eighteen years of age." COLO. REV. STAT. § 19-1-103 (2000). This Comment will use the terms juvenile, adolescent, and child interchangeably.

6. See Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders Are Treated as Adults Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125 (2004).

7. R. BARRI FLOWERS, KIDS WHO COMMIT ADULT CRIMES: SERIOUS CRIMINALITY BY JUVENILE OFFENDERS 7 (Nathanial J. Pallone ed., 2002).

8. Miles Moffeit & Kevin Simpson, *Teen Crime, Adult Time: Laws Converge to Put Teens Away Forever*, DENVER POST, Feb. 19, 2006, at A1. Under Colorado law, direct filing provides prosecutors with the authority to charge juveniles over the age of fourteen as adults in certain circumstances. See § 19-2-517.

9. See *People v. Moya*, 899 P.2d 212, 219 (Colo. Ct. App. 1994) (stressing that age is not a relevant factor when conducting an Eighth Amendment proportionality review of a sentence for a juvenile tried as an adult).

victed in criminal court.¹⁰ Moreover, some states make LWOP mandatory for every person, including juveniles, convicted of certain crimes.¹¹ In Colorado, children as young as twelve who are charged as adults and convicted of first-degree murder or felony murder face a mandatory sentence of LWOP.¹²

Throughout the United States, more than 2,225 child offenders are serving sentences of LWOP for crimes they committed before the age of eighteen.¹³ Although the number of juveniles sentenced each year to LWOP has decreased from its peak of 152 in 1996, more than fifty juveniles received such sentences in 2004, adding to the ever-increasing population of children facing life behind bars.¹⁴ In 2006, at least forty-five Colorado prisoners were serving sentences of LWOP for crimes committed before they were eighteen.¹⁵

Originally, the goal of the juvenile justice system was to

10. HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 25 (2005), available at <http://hrw.org/english/docs/2005/10/12/usdom11835.htm> [hereinafter HRW *THE REST OF THEIR LIVES*] (noting that forty-two states allow courts to sentence juveniles to LWOP).

11. *Id.* See, e.g., COLO. REV. STAT. § 18-1-105(1)(a)(V)(A) (2000) (providing that the presumptive minimum sentence for any person convicted of a class 1 felony is life imprisonment); § 18-1-105(4) (“As to any person sentenced for a class 1 felony . . . life imprisonment shall mean imprisonment without the possibility of parole.”).

12. § 18-1.3-401(1)(a)(V)(A); HRW *THE REST OF THEIR LIVES*, *supra* note 10, at 18 tbl. 1.

13. HRW *THE REST OF THEIR LIVES*, *supra* note 10, at 1. In contrast, as of 2005 there were only twelve juveniles known to be serving such sentences outside of the United States. Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1. Only a small number of countries permit children to be sentenced to LWOP. *Id.* Throughout the world, juveniles are currently facing LWOP in South Africa (4), Israel (7), and Tanzania (1). *Id.*

14. *Id.* Even though the number of adolescents sentenced to LWOP has decreased in recent years, the percentage of juveniles receiving such sentences “has increased relative to the total number of youth arrested for or reliably implicated in murders nationwide.” HRW *THE REST OF THEIR LIVES*, *supra* note 10, at 31; see *id.* at 32 tbl. 4. Before 1980, few adolescents were sentenced to LWOP. *Id.* at 2.

15. There are conflicting reports as to whether there are forty-five or forty-six Colorado prisoners serving LWOP for crimes committed before they were eighteen. See Moffeit & Simpson, *supra* note 8 (reporting that forty-five such individuals are serving LWOP). But see HUMAN RIGHTS WATCH, *THROWN AWAY: CHILDREN SENTENCED TO LIFE WITHOUT PAROLE IN COLORADO* 15 (Feb. 2005), available at <http://hrw.org/reports/2005/us0205/> [hereinafter HRW *THROWN AWAY*], (noting that forty-six juveniles have been sentenced to LWOP). For this article, I will claim that there are forty-six individuals serving LWOP because I believe that statistic to be based on more accurate data.

benefit and rehabilitate adolescent offenders.¹⁶ However, the current system employed in Colorado is in direct conflict with these rehabilitative objectives. Furthermore, imposing a sentence of LWOP on juveniles violates the Eighth Amendment because it does not advance the state's sentencing goals.¹⁷ Current Colorado statutes, which allow prosecutors to directly file charges against juveniles in the adult criminal system and which impose mandatory sentences, do not adequately address the unique legal status or protect the special rights of adolescent offenders. In the interest of justice and to best advance the goals of the juvenile justice system, several changes are needed in Colorado. First, the Colorado legislature should eliminate direct filing by prosecutors,¹⁸ thereby leaving judicial transfer¹⁹ as the only method of transferring a juvenile case to criminal court. Second, the legislature should afford judges flexibility when sentencing juveniles who are tried and convicted in criminal courts, especially in cases involving class 1 felonies.

To understand the problems inherent in Colorado's current system, it is necessary to first consider the history of juvenile courts. To that end, Part I traces the history of the juvenile court system from the early treatment of young offenders through the establishment of the first juvenile court in the United States. It addresses the philosophical goals of the juvenile court and discusses the effects of significant Supreme Court decisions on the juvenile justice system. Part II describes the current methods for prosecuting and sentencing juvenile offenders in Colorado. Part III identifies problems arising from the existing system for treating young offenders in

16. Jennifer M. O'Connor & Lucinda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303 (1996).

17. Colorado's sentencing goals are:

(a) [t]o punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense; (b) [t]o assure the fair and consistent treatment of all convicted offenders; (c) [t]o prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses; and (d) [t]o promote rehabilitation.

COLO. REV. STAT. § 18-1-102.5 (2000).

18. See COLO. REV. STAT. § 19-2-517 (2000).

19. Colorado law provides that the juvenile court may order that a child as young as twelve be transferred to the criminal court following a hearing on whether transfer is appropriate. § 19-2-518.

Colorado. Part IV discusses recent attempts to reform the juvenile justice system in Colorado.²⁰ Part V proposes that the Colorado legislature eliminate direct filing as a means of placing juveniles in the adult court and recommends that Colorado judges adopt a presumption in favor of trying violent juvenile offenders in juvenile courts and imposing blended sentences.²¹ Part V further recommends that Colorado lawmakers enact legislation aimed at those offenders currently facing LWOP for crimes committed before the age of eighteen.

I. HISTORY OF THE JUVENILE COURT SYSTEM

From the House of Refuge, established in 1824, arose the concept of a separate court system for juvenile offenders. Juvenile courts, as opposed to adult courts, were designed to protect and rehabilitate delinquent children. However, several Supreme Court cases in the 1960s and 1970s changed the nature of the juvenile court system by making its procedures more similar to those in adult criminal court.

A. *Early Treatment of Juvenile Offenders*

Historically, the United States criminal justice system did not have separate adjudicatory proceedings for children accused of engaging in criminal behavior.²² Consequently, chil-

20. House Bill 03-1139, H.D. 03-1139, 64th Gen. Assem., 1st Reg. Sess. (Colo. 2003) "Concerning the Sentence Imposed on a Juvenile Who is Convicted as an Adult of a Class 1 Felony" ("H.B. 03-1139"), House Bill 05-1109, H.D. 05-1109, 65th Gen. Assem., 1st Reg. Sess. (Colo. 2005) "Concerning Juveniles Charged as Adults" ("H.B. 05-1109"), and House Bill 06-1315, H.D. 06-1315, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006) "Concerning Juveniles Who Are Convicted as Adults of Class 1 Felonies" ("H.B. 06-1315"), are available for viewing at <http://www.leg.state.co.us/Clics2006a/csl.nsf/BillFoldersAll>. Follow the "House Bills" link, then type in the bill number.

21. "Blended sentencing refers to the imposition of juvenile and/or adult correctional sanctions on serious and violent juvenile offenders who have been adjudicated in juvenile court or convicted in criminal court." Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, JUVENILE JUSTICE BULLETIN (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.), Nov. 1998, at 6, available at <http://www.ncjrs.gov/pdffiles/172835.pdf>. Blended sentencing provides judges with greater sentencing options.

22. Angell, *supra* note 6, at 127; see also Ellie D. Shefi, Note, *Waving Good-bye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653, 656 (2003).

dren as young as seven were tried as adults and, if convicted, sentenced to adult prisons.²³ Under this system, only the common law "infancy defense" allowed for deferential treatment of offenders under the age of fourteen.²⁴ According to the infancy doctrine, if a court determined that the juvenile did not have the capacity to commit the alleged offense, the juvenile was to be released without consequence.²⁵ Children over the age of fourteen were presumed to have an adult capacity to commit crimes and were held to the same standards as adults.²⁶ Although most courts presumed that children under fourteen did not have the capacity to commit crimes, this presumption could be rebutted.²⁷

Dismayed by a system that permitted children to be confined alongside adult offenders, social reformers began pushing for separate prisons for juvenile offenders.²⁸ These reformers objected to the punitive nature of the adult system of imprisonment and sentencing as it applied to juveniles.²⁹ As a result of their efforts, the first House of Refuge was established in New York in 1824 with the goal of rehabilitating rather than punishing juvenile offenders.³⁰ The House sheltered juveniles who would have otherwise been placed in the adult prison system.³¹ In the words of the authorizing legislation, the House of Refuge offered protection to children, "committed as vagrants or convicted of crimes by authorities" or "committed by administrative order or application of their parents."³² The primary functions of the House were twofold: (1) to separate children

23. Angell, *supra* note 6, at 127. "Only children under the age of seven, who were considered incapable of criminal intent or distinguishing right from wrong, were exempt from being prosecuted or receiving punishment." FLOWERS, *supra* note 7, at 150.

24. Anthony R. Holtzman, Comment, *Juvenile Justice? The Increased Propensity for Juvenile Transfer to the Criminal Court System in Pennsylvania and the Need for a Revised Approach to Juvenile Offenders*, 109 PENN ST. L. REV. 657, 661 (2004).

25. *Id.*

26. *Id.*

27. *Id.*

28. Shefi, *supra* note 22, at 657.

29. *Id.*

30. Sanford J. Fox, *A Contribution to the History of the American Juvenile Court*, 49 JUV. & FAM. CT. J. 1, 7-8 (1998).

31. *Id.*; Shefi, *supra* note 22, at 657.

32. Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 6 (2005) (citing Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190, 1205 n.9 (1970)).

from adult offenders; and (2) to rehabilitate juvenile offenders.³³ The creation of the House of Refuge marked the initial shift towards a justice system focused on treatment to help juvenile offenders lead more productive lives and ultimately inspired the creation of the juvenile court system.³⁴

B. Creation and Goals of Juvenile Courts

In 1899, Illinois passed the Juvenile Court Act, which effectively created the nation's first juvenile court.³⁵ The primary function of the juvenile court was to rehabilitate and protect dependent, neglected, and delinquent children.³⁶ The creation of the juvenile court system was rooted in the concept of *parens patriae*.³⁷ Under this doctrine, the state assumed responsibility for providing protection and guidance to any child appearing before the court.³⁸ The new juvenile court was based on the premise that a strict yet compassionate judge could help juvenile delinquents reform themselves and eventually become productive members of society.³⁹

Although Illinois established the first modern juvenile court, much of the "intimate, protective and informal character" of juvenile proceedings resulted from the approach taken by Judge Benjamin Barr Lindsey, appointed to the Denver bench in 1901.⁴⁰ Shortly after his appointment, Judge Lindsey created an informal "juvenile court" pursuant to his broad interpretation of Colorado's school truancy statute.⁴¹ Dissatis-

33. See Sanford J. Fox, *The Early History of the Court*, THE FUTURE OF CHILDREN, THE JUVENILE COURT 30, 1996, http://www.futureofchildren.org/usr_doc/vol6no3ART2.pdf.

34. Holtzman, *supra* note 24, at 662.

35. *Id.*

36. SAMUEL M. DAVIS ET. AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS, 857, 858 (Robert C. Clark et. al. eds., Foundation Press 3d ed. 2004).

37. *Id.* "*Parens patriae*" is Latin for "parent of his or her country" and is defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

38. Kelly Keiming Elsea, *The Juvenile Crime Debate; Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y, Fall 1995, at 135, 137.

39. JOHN HUBNER, LAST CHANCE IN TEXAS: THE REDEMPTION OF CRIMINAL YOUTH 83 (2005).

40. Bldg. Blocks for Youth, *The Juvenile Court: One Hundred Years in the Making*, http://www.buildingblocksforyouth.org/juvenile_court.htm (last visited Jan. 12, 2007).

41. BENJAMIN B. LINDSEY, THE ROLE OF PLUTOCRACY IN COLORADO: A RETROSPECT AND A WARNING 11 (1908).

fied with the current laws concerning children, Lindsey lobbied for comprehensive juvenile laws, which the Colorado legislature eventually adopted in 1903.⁴² In 1907, the Colorado General Assembly established a separate and independent juvenile court in Denver.⁴³

During his more than twenty-five years presiding over the Denver Juvenile Court, Judge Lindsey saw it as his responsibility to establish a relationship with each child who appeared before him and to take an active role in that child's reformation.⁴⁴ Because Lindsey's individualized approach embraced the juvenile court system's philosophy of rehabilitation as opposed to punishment, the formal rules of procedure and evidence did not apply in his courtroom.⁴⁵ Similarly, given the informal and non-adversarial nature of such proceedings, Lindsey believed that traditional counsel was generally considered unnecessary.⁴⁶ Over the next several years, Judge Lindsey traveled to other states and countries lobbying legislatures to adopt a rehabilitative approach towards delinquent children.⁴⁷ Lindsey's juvenile court model quickly gained acceptance throughout the nation. By 1915, forty-six states, three territories, and the District of Columbia had established a version of this juvenile court system.⁴⁸ Until the 1970s, juvenile courts in most states had jurisdiction over almost all cases involving juveniles, and cases were moved to the adult criminal system only if the juvenile court determined that transfer "served the best interests of the child and of the public."⁴⁹

42. H. Ted Rubin, *Celebrating the Juvenile Court's Centennial Year*, JUVENILE JUSTICE UPDATE 9 (Feb./Mar. 1999). Lindsey noted that unbeknownst to him, Illinois had enacted the Juvenile Court Law during that same year. LINDSEY, *supra* note 41, at 11.

43. Rubin, *supra* note 42, at 9.

44. Fox, *supra* note 30, at 10.

45. *Id.*

46. Ventrell, *supra* note 32, at 11-12.

47. Rubin, *supra* note 42, at 9.

48. DAVIS, *supra* note 36, at 860.

49. HRW THE REST OF THEIR LIVES, *supra* note 10, at 14 (citing *Kent v. United States*, 383 U.S. 541, 566-67 (1966) (identifying factors juvenile courts should consider during transfer hearings)).

C. *Changes in Juvenile Proceedings During the Twentieth Century*

Initially, juvenile courts made efforts to distinguish their "civil" delinquency proceedings from adult criminal proceedings.⁵⁰ Given the philosophical differences between the two systems, juvenile courts usually did not provide children who were facing a potential loss of liberty the procedural due process rights guaranteed by the Fifth and Fourteenth Amendments.⁵¹ However, during the late 1960s and early 1970s, the Supreme Court decided several landmark cases that required juvenile hearings to provide procedural protections similar to those required during criminal proceedings.⁵² As the Court imposed certain due process safeguards on the juvenile courts, the procedures of the juvenile justice system began to resemble those of the adult criminal system.

In 1966, the Supreme Court first addressed a juvenile's constitutional right to procedural safeguards in *Kent v. United States*.⁵³ Morris Kent, aged sixteen, was taken into police custody on charges including rape, housebreaking, and robbery.⁵⁴ Without conducting a hearing or providing a statement of reasons, the juvenile court waived its jurisdiction and transferred Kent's case to the criminal court pursuant to a District of Columbia statute.⁵⁵ Kent appealed the juvenile court's decision to waive jurisdiction, but the Municipal Court of Appeals affirmed the decision.⁵⁶ The Supreme Court granted *certiorari* and noted that under the current method for juvenile transfer to the adult court, "the child receives the worst of both worlds [because] he gets neither the protections accorded to adults nor

50. FLOWERS, *supra* note 7, at 152 (observing that the juvenile court system often uses different terminology to distinguish its philosophy from the adult court).

51. See Ventrell, *supra* note 32, at 11 (observing that "procedural safeguards" were considered neither necessary nor helpful to the juvenile judicial process).

52. Elsea, *supra* note 38, at 137.

53. 383 U.S. 541 (1966).

54. *Id.* at 543.

55. *Id.* at 546; D.C. CODE § 11-1553 (1965). The provision of the Juvenile Court Act governing waiver requires the juvenile court to conduct a "full investigation." *Kent*, 383 U.S. at 547. Although this provision describes circumstances under which a juvenile proceeding may be transferred to the adult court, it does not identify criteria to guide the juvenile court's decision. *Id.*

56. *Id.* at 548. Kent also applied to the District Court for a writ of *habeas corpus*, but was denied. *Id.*

the solicitous care and regenerative treatment postulated for children.”⁵⁷ The Court concluded that “there is no place in the American system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”⁵⁸ Ultimately, the Court concluded that the District of Columbia’s transfer provision entitled juveniles to a hearing with assistance of counsel, access to records, and a statement of reasons.⁵⁹ The Court also identified a number of factors that juvenile courts should consider when determining whether a juvenile should be transferred to the adult court system.⁶⁰

The following year, the Supreme Court established due process rights for juveniles in formal proceedings that closely paralleled those given to adult defendants.⁶¹ In *In re Gault*, fifteen-year-old Gerald Gault was taken into custody after a female neighbor complained of lewd phone calls.⁶² Gault’s parents did not receive notice that he was in police custody, and no formal notice of petition was properly served on the family.⁶³ Furthermore, Gault and his parents were not notified of his right to be represented by counsel, the neighbor was not called as a witness, the juvenile’s confession was obtained without the presence of his parents or counsel and without advising him of his right to remain silent, and the court did not make a record

57. *Id.* at 556.

58. *Id.* at 554.

59. *Id.* at 557.

60. *Id.* app. at 566–67. These factors include:

1. The seriousness of the alleged offense . . . and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property
4. The prosecutive merit of the complaint
5. The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults who will be charged with a crime
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense).

Id.

61. *See In re Gault*, 387 U.S. 1 (1967).

62. *Id.* at 4.

63. *Id.* at 5.

of the adjudicative process.⁶⁴ Following a hearing, the juvenile judge found Gault to be delinquent and sentenced him to the State Industrial School until he reached the age of majority.⁶⁵ Because juveniles were unable to appeal adjudications, Gault filed a petition for a writ of *habeas corpus* that asserted numerous constitutional violations.⁶⁶ The state court dismissed the writ.⁶⁷ On appeal the Supreme Court reversed the state court's decision to dismiss the petition, noting that children are entitled to many of the same constitutional protections as adults.⁶⁸ While the Court acknowledged that in most jurisdictions children do not receive the same procedural protections accorded to adults, it concluded that delinquency hearings were similar to adult criminal proceedings, and held that the Fourteenth Amendment entitles juveniles to the same procedural protections as adults.⁶⁹ Thus, the Court's decision in *Gault* effectively "constitutionalized" the procedures of the juvenile justice system.⁷⁰

Over the next several years, the Supreme Court addressed the issue of whether juveniles should be entitled to more procedural rights than those granted in *Gault*. In 1970, the Supreme Court held in *In re Winship* that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*."⁷¹ Consequently, *Winship* brought juvenile adjudicatory proceedings one step closer in form and appearance to adult criminal trials.

Ironically, the Supreme Court undermined the goals of the juvenile justice system by granting adolescent offenders more constitutional protections. Following these Court decisions, the juvenile court surrendered many of the features that distin-

64. *Id.*

65. *Id.* at 7–8. According to the juvenile court, Gault was to remain at the industrial school until the age of 21. *Id.*

66. *Id.* at 8.

67. *Id.* at 9.

68. *Id.* at 13.

69. *Id.* at 30–31. "Among the due process rights created by *Gault* for juveniles accused of delinquency acts were notice of charges, confrontation, cross-examination, and prohibition against self-incrimination. These . . . gave rise to . . . the right to legal counsel." Ventrell, *supra* note 32, at 13 (citing *Gault*, 387 U.S. 1, 33, 55–57).

70. DAVIS, *supra* note 36, at 861.

71. 397 U.S. at 368.

guished it from the criminal court.⁷² As the juvenile justice system extended the procedural protections offered to adolescent offenders, it increasingly adopted characteristics similar to the more adversarial adult system and, in turn, sacrificed some of the features unique to the juvenile court.⁷³ Similarly, the practices of the juvenile court gradually began to resemble the more punitive approach of the adult court. Rather than focusing on interventions aimed at reducing recidivism, promoting values, and educating young offenders, the juvenile court shifted towards the goals of deterrence, retribution, and incapacitation.⁷⁴ Partly due to this philosophical shift, the court system experienced a rise in the number of juvenile cases transferred to the adult criminal court for prosecution.⁷⁵ The increase in the number of adolescents in adult court has resulted in juvenile offenders facing harsh sentences, including LWOP, and placement in adult facilities.⁷⁶

II. CURRENT TREATMENT OF JUVENILE OFFENDERS IN COLORADO

Originally, Colorado Juvenile Courts had jurisdiction over children as young as ten who violated laws, ordinances, or orders of the court. However, over the years, Colorado has enacted legislation allowing the adult criminal court to assume jurisdiction in certain circumstances over children as young as fourteen through direct filing, and children as young as twelve through judicial transfer. Furthermore, Colorado law precludes a judge from considering factors such as the juvenile's

72. Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 514 (1995) ("As more due process rights were guaranteed to juveniles, the juvenile court began to resemble more closely the adult criminal court in terms of its formality.").

73. Deborah L. Mills, Note, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 903-04 (1996) (noting that many states have enacted laws which suggest that juvenile courts should shift their focus from rehabilitation to punishment). See generally Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 297-99 (Thomas Grisso & Robert G. Schwartz eds., 2000).

74. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 682-83 (1998).

75. *Id.* at 683.

76. *Id.* at 683-84.

maturity, delinquency history, or potential for rehabilitation when sentencing juveniles convicted of class 1 or 2 felonies in adult court.

A. *Juvenile Court Jurisdiction*

The Colorado court system's juvenile division has jurisdiction in proceedings involving children ten or older who have violated federal or state law, county or municipal ordinance, or any lawful order of the juvenile court.⁷⁷ Furthermore, the Colorado Children's Code provides that "[t]he juvenile court may retain jurisdiction over a juvenile until all orders have been fully complied with by such person, or any cases have been completed . . . regardless of whether such person has attained the age of eighteen."⁷⁸

In 1964, most of the state's juvenile courts became divisions of adult district courts as a result of a reorganization of the Colorado judiciary.⁷⁹ Despite this shift, the juvenile divisions maintained their separate jurisdiction and authority to impose sentences aimed at rehabilitating rather than punishing children convicted of crimes.⁸⁰

1. Transferring Procedures

Throughout the 1960s and 1970s, the national public became increasingly frustrated with the juvenile justice system and many believed the system had failed to achieve its rehabilitative goals.⁸¹ In response to this general dissatisfaction,

77. COLO. REV. STAT. § 19-2-104 (2000). Colorado statute section 18-1-801 provides that

[t]he responsibility of a person for his conduct is the same for persons between the ages of ten and eighteen as it is for persons over eighteen except to the extent that responsibility is modified by the provisions of the 'Colorado Children's Code'. . . . No child under ten years of age shall be found guilty of any offense.

COLO. REV. STAT. § 18-1-801 (2000).

78. § 19-2-104(6).

79. HRW THROWN AWAY, *supra* note 15, at 6. Denver was the only judicial district to maintain a separate and distinct juvenile court as "authorized by constitutional amendment." *Flakes v. People*, No. 05SC593, 2007 Colo. LEXIS 141, at *13 (Colo. Feb. 26, 2007) (citing COLO. CONST. art. VI, § 15).

80. *Id.*

81. Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV.

many state legislatures began to adopt a more retributive approach toward the treatment of juvenile offenders.⁸² To that effect, Colorado enacted legislation in 1967 which allowed prosecutors to directly file class 1 felony charges in adult courts against children age sixteen or older.⁸³ The following year, the state legislature reduced the age at which charges could be directly filed in adult court to fourteen.⁸⁴ Then, in 1973, the Colorado legislature expanded the list of enumerated crimes for which charges could be directly filed against juveniles in adult court.⁸⁵ This legislation also provided the district court with discretion to sentence a convicted juvenile as either a juvenile or an adult.⁸⁶

Furthermore, in response to the significant rise in juvenile crime throughout the United States during the 1980s,⁸⁷ the Colorado legislature again extended the authority of prosecutors to bypass the juvenile court system.⁸⁸ The legislature expanded the list of crimes for which juveniles could be directly charged in an adult court, and reduced the age at which a child could be transferred to the adult court to twelve.⁸⁹ These dramatic changes made it easier to prosecute adolescents in the adult criminal system.⁹⁰

In the early 1990s, the Colorado legislature again responded to the public's growing concern with juvenile crime and violence by adopting an even stronger approach towards the treatment of juvenile offenders.⁹¹ During the summer of

259, 266 (1999) (citing O'Connor & Treat, *supra* note 16, at 1303).

82. O'Connor & Treat, *supra* note 16, at 1305 ("Rehabilitation lost its importance in the public debate over how to process juvenile offenders, and state legislatures and courts began to ease the process by which juvenile offenders could be transferred to adult court for processing.").

83. COLO. REV. STAT. § 22-1-4(4)(b) (1967).

84. Act of Mar. 28, 1968, 1968 Colo. Sess. Laws 54.

85. Act of June 22, 1973, 1973 Colo. Sess. Laws 384, 385.

86. *Id.*

87. JEFFREY BUTTS & JEREMY TRAVIS, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2 (Urban Institute Justice Policy Center) Mar. 2002, available at <http://www.urban.org/UploadedPDF/410437.pdf>.

88. HRW THROWN AWAY, *supra* note 15, at 7.

89. *Id.* (noting that a 1987 amendment increased prosecutors' ability to directly file charges against juveniles in adult court).

90. *Id.* at 1 ("[A]s the Colorado legislature expanded adult prosecution of child offenders, it also expanded the possibility that life without parole would be imposed on children.").

91. Paul Colomy & Laura Greiner, *Making Youth Violence Visible: The News Media and the Summer of Violence*, 77 DENV. U. L. REV. 661, 662 (2000).

1993, the local media significantly increased its coverage of violent crimes committed by juveniles in Colorado.⁹² Journalists, dubbing it the "Summer of Violence," focused on several exceptional murders committed in the Denver metro area.⁹³ Although the number of articles and photographs devoted to youth crime increased dramatically during the summer of 1993, this extensive coverage "was not due to a dramatic rise in the incidence of serious offenses."⁹⁴ The expansive media coverage amplified the public's concern regarding juvenile crime and fueled the belief that changes were needed in the juvenile justice system.⁹⁵ Following a special session of the state legislature during which the issue of youth violence was addressed, Governor Roy Romer signed into law a number of bills targeting juvenile offenders.⁹⁶ In 1996, the Colorado legislature amended the direct file statute to require that the district court impose an adult sentence on a juvenile convicted as an adult, thus eliminating the court's discretion to recommend a juvenile sentence.⁹⁷

Currently, the Colorado Children's Code allows juveniles to be prosecuted in adult criminal court either by judicial transfer⁹⁸ or direct filing.⁹⁹ Colorado's transfer statute provides juvenile court judges with the authority to transfer juveniles as young as twelve to adult courts for prosecution.¹⁰⁰ Such waiver requires the juvenile judge to make an individualized determination of "[w]hether the interests of the juvenile or of the community would be better served by the juvenile court's waiving its jurisdiction over the juvenile and transferring [the case] to

92. HRW THROWN AWAY, *supra* note 15, at 10. See generally Colomy & Greiner, *supra* note 91.

93. Colomy & Greiner, *supra* note 91, at 661 (observing that the media "selectively focus[ed] on highly unusual incidents, and provid[ed] (melo)dramatic accounts of these atypical cases").

94. *Id.* at 671 (noting that while there was only a slight rise in violent crimes during the summer of 1993, there was a dramatic increase in the number of articles and photographs published that summer).

95. *Id.* at 664. The media often referred to these juvenile offenders as "kid gangsters," "hard-core juvenile offenders," "greedy, self-serving, predatory street punks" and "tiny terrorists." *Id.* at 679. The terms that have been used to characterize adolescents "have functioned in important ways both to shape and to justify juvenile justice reforms." Scott, *supra* note 73, at 292.

96. Colomy & Greiner, *supra* note 91, at 662.

97. Act of June 3, 1996, 1996 Colo. Sess. Laws 1595, 1641-42.

98. See COLO. REV. STAT. § 19-2-518 (2000).

99. See § 19-2-517.

100. See § 19-2-518.

the district court.”¹⁰¹ Under this procedure, the adolescent’s case originates in the juvenile court and may only be transferred following a hearing.¹⁰²

Direct filing gives prosecutors the authority to decide whether the young offender will be tried in juvenile or adult criminal court.¹⁰³ Colorado is one of only fifteen jurisdictions, including the District of Columbia, which allows direct filing, also referred to as prosecutorial transfer.¹⁰⁴ Under Colorado law, prosecutors may directly file charges against juveniles over the age of fourteen who have committed one of the enumerated offenses.¹⁰⁵ Under this approach, the juvenile does not get a transfer hearing and the prosecutor’s decision to di-

101. § 19-2-518(3)(b).

102. See § 19-2-518(1)(a)(II). Factors that a court should consider during a transfer hearing include: (1) the “seriousness of the offense;” (2) the offender’s state of mind; (3) whether the offense was against persons or against property; (4) whether the juvenile was sixteen or older at the time of the offense; (5) the juvenile’s maturity “as determined by considerations of the juvenile’s home, environment, emotional attitude, and pattern of living;” (6) whether the juvenile has previous adjudications; (7) the juvenile’s likelihood of rehabilitation; (8) the “interest of the community in the imposition of a punishment commensurate with the gravity of the offense;” (9) the impact of the offense on the victim; and (10) whether the juvenile “used, or possessed and threatened the use of, a deadly weapon.” § 19-2-518(4)(b).

103. See Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1269 (1996). Due to the increased burden that a transfer hearing places on the prosecution, most prosecutors prefer to directly file charges against juveniles in adult court. See HRW *THE REST OF THEIR LIVES*, *supra* note 10, at 19 (observing that from 1996 to 2000, across the nation, the percentage of transfer hearings fell from approximately 36% to 13%).

104. Bldg. Blocks for Youth, Charts on Transferring Youth to Criminal Court, State Transfer Provisions, <http://www.buildingblocksforyouth.org/issues/transfer/transchart.html> (last visited Jan. 12, 2007) (noting that Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Massachusetts, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming allow charges to be directly filed against children in criminal court).

105. See § 19-2-517. This section is entitled “Direct Filing,” and says that

(1) (a) A juvenile may be charged by . . . direct filing . . . when: (I) The juvenile is fourteen years of age or older . . . and is alleged to have committed a class 1 or class 2 felony; or (II) The juvenile is fourteen years of age or older . . . and: (A) Is alleged to have committed a felony enumerated as a crime of violence . . . or (B) Is alleged to have committed a felony offense . . . except for the possession of a handgun by a juvenile . . . or (C) Is alleged to have used, or possessed and threatened the use of, a deadly weapon during the commission of felony offenses against the person . . . or (D) Is alleged to have committed vehicular homicide . . . vehicular assault . . . or felonious arson . . .

Id.

rectly file charges in criminal court is not subject to review on appeal.¹⁰⁶ Because this method of transferring juveniles to criminal court provides the prosecutor with unreviewable discretion, direct filing has essentially eliminated the use of transfer hearings in Colorado courts for children fourteen or older.¹⁰⁷

Colorado is one of twenty-two states with a reverse waiver provision,¹⁰⁸ whereby a juvenile being prosecuted as an adult in criminal court may petition to have his case transferred back to the juvenile court for adjudication or disposition.¹⁰⁹ However, the adult court's reversal discretion does not extend to cases involving adolescents convicted of class 1 felonies or other crimes of violence.¹¹⁰ Consequently, judges lack the "authority to withdraw their jurisdiction and send a child charged with a serious crime as an adult back to juvenile court."¹¹¹

2. Sentencing Juveniles Convicted in Criminal Court

Colorado law does not permit a judge to exercise discretion in sentencing a juvenile convicted of a class 1 felony; the judge must impose a sentence of LWOP.¹¹² The state's sentencing structure precludes a judge from considering factors such as the juvenile's maturity, delinquency history, or potential for rehabilitation.¹¹³ A 2005 study by Human Rights Watch found that one-third of the forty-six individuals serving mandatory LWOP for crimes committed before age eighteen in Colorado were convicted of felony murder.¹¹⁴ The statistics also suggest

106. *See id.*

107. Moffeit & Simpson, *supra* note 8, at A1.

108. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994–1996, at Juvenile Transfer to Criminal Court, Types of Juvenile Transfers, <http://ojjdp.ncjrs.org/pubs/reform/contents.html> [hereinafter OJJDP] (last visited Jan. 12, 2007).

109. National Center for Juvenile Justice, Colorado Transfer Provisions, <http://www.ncjj.org/stateprofiles/asp/transfer.asp?state=CO04.asp&topic=Transfer> (follow "Colorado" hyperlink under "State Profiles") (last visited May 15, 2007).

110. *See id.*

111. HRW THROWN AWAY, *supra* note 15, at 8 (citing COLO. REV. STAT. § 19-2-518 (1)(d)(III) (2000)).

112. *Id.* at 7. In 1991, a mandatory sentence of LWOP was adopted as the minimum sentence for first-degree murder in Colorado. *See* Miles Moffeit, *Scars of Abuse Concealed*, DENVER POST, Feb. 21, 2006, at A1.

113. HRW THROWN AWAY, *supra* note 15, at 7.

114. *Id.* at 17 (stating that these adolescents were involved in the execution of felonies during which an accomplice committed a murder, but they did not per-

that prosecutors are relying more heavily on felony murder to convict adolescent offenders. For example, over the past six years, sixty percent of juveniles sentenced to LWOP in Colorado were convicted on felony murder charges whereas only twenty-four percent of adults facing LWOP were convicted of felony murder.¹¹⁵ These statistics support the argument that prosecutors disproportionately apply felony murder charges to juveniles.¹¹⁶ Furthermore, many of these juveniles are facing LWOP for their first felony offense.¹¹⁷ These facts and statistics do not support the argument that these children are habitual offenders who are incapable of reformation.

Children who are sentenced as adults may be sent to prison or to the Youthful Offender System ("YOS"), a division of the Department of Corrections ("DOC").¹¹⁸ Colorado's YOS program provides an alternative, blended sentencing option for certain juvenile offenders by permitting the court to suspend the adult sentence and commit the juvenile to the YOS.¹¹⁹ This option offers a structured setting "that affirms dignity of self and others, promotes the value of work and self-discipline, and develops useful skills and abilities through enriched programming."¹²⁰ The YOS serves a dual function by allowing the state "to impose strict, adult sanctions on juveniles . . . while maintaining a rehabilitative focus."¹²¹ The Colorado YOS consists of four stages: (1) an intake, diagnostic, and orientation phase; (2) a period of initial institutional confinement which includes educational and vocational programs; (3) a period of further institutional confinement during which the DOC may transfer the juvenile to any youth residential program; and (4)

sonally commit the murder).

115. Moffeit & Simpson, *supra* note 8, at A1.

116. *Id.*

117. See HRW THROWN AWAY, *supra* note 15, at 18 (observing that many juveniles serving LWOP in Colorado have not committed any previous offense, including misdemeanors).

118. See COLO. REV. STAT. § 19-2-517(3)(a) (2000) ("Whenever criminal charges are filed . . . in the district court pursuant to this section, the district judge shall sentence the juvenile as follows: (I) As an adult; or (II) To the youthful offender system."). See also § 19-2-518 (d).

119. See OJJDP, *supra* note 108, at Sentencing Authority.

120. COLO. REV. STAT. § 18-1.3-407(1)(a) (West, Westlaw through 2006 legislation). Colorado enacted the first YOS program in 1993, and since then at least 11 other states have enacted similar programs. OJJDP, *supra* note 108, at Sentencing Authority.

121. OJJDP, *supra* note 108, at Sentencing Authority.

a period of community supervision during which the DOC closely monitors the juvenile's return to society.¹²²

However, Colorado law provides that juveniles convicted of class 1—and most class 2—felonies may not participate in the YOS program.¹²³ Instead, these juveniles are sentenced as adults pursuant to Colorado Revised Statute § 18-1.3-401, which provides both minimum and maximum sentencing ranges for various felonies.¹²⁴ Under this sentencing scheme, juveniles who are convicted of a class 2 felony may face up to forty-eight years imprisonment, and those convicted of a class 1 felony are automatically sentenced to LWOP.¹²⁵ The current sentencing plan also reflects the trend toward imposing harsher penalties on criminal offenders. Prior to 1973, individuals who received life sentences in Colorado became eligible for parole after serving ten years.¹²⁶ Gradually, the minimum time served before an inmate became parole eligible increased to twenty years, then forty years, until the possibility of parole was ultimately eliminated.¹²⁷

In 1972, Colorado's Division of Youth Services, now the Division of Youth Corrections ("DYC"), opened the Closed Adolescent Treatment Center (referred to as the "CAT House"), offering highly structured, intensive treatment and rehabilitation services for Colorado's most violent adolescent offenders.¹²⁸ This group uses intensive therapy to help juvenile offenders take full responsibility for their crimes, identify destructive thought patterns and behaviors, and develop healthy interpersonal skills.¹²⁹ However, despite the proven success of the CAT House,¹³⁰ the trend of charging juveniles as adults, combined

122. § 18-1.3-407(3.3).

123. See § 19-2-517(3)(a)(II); see also § 19-2-518 (1)(d)(II).

124. § 18-1.3-401.

125. See *id.* at (1)(a)(V)(A) (noting twenty-four years imprisonment as the maximum sentence for a class 2 felony) and (8)(a) (listing aggravating factors which permit a judge to impose a sentence up to "twice the maximum range authorized in the presumptive range for the punishment of a felony").

126. Bob Ewegen, Editorial, *Reducing Sentences for Teens*, DENVER POST, Feb. 25, 2006, at C13.

127. *Id.*

128. Fort Logan Mental Health Ctr. Newsletter, State of Colo., Dept. of Inst., Div. of Mental Health, Oct. 1972. See also Gretchen Peacock, *CAT House Is 'End of Road' for Colorado's Troubled Teens*, LITTLETON INDEPENDENT, Nov. 2, 1976, at 3.

129. Colo. Division of Youth Services, *"I'll Never Forget the Person I Killed,"* UPDATE 1, 3 (Fall 1991).

130. See Peacock, *supra* note 128 (noting that only "5% of those who go through

with mandatory sentencing, prevents many of Colorado's violent adolescent offenders from participating in this intensive program.¹³¹

III. PROBLEMS WITH THE CURRENT SYSTEM AND THE NEED FOR CHANGE

Recent Supreme Court decisions and studies concerning adolescent brain development indicate that the current system for treating juvenile offenders does not adequately address the unique legal status or protect the special rights of adolescent offenders. The Court has rendered several decisions suggesting that defendants with decreased competency should not be subject to the same criminal penalties as competent adults. Additionally, studies regarding adolescent brain development indicate that children have difficulty comprehending the possible consequences of their actions, withstanding peer pressure, and controlling impulsive behavior, and that such children are highly capable of reformation. The current trend of charging and sentencing juveniles as adults at increasingly younger ages discounts the rehabilitative goals that initiated the creation of the juvenile system.

A. Competency Concerns

The Supreme Court has repeatedly noted differences between adolescents and adults with respect to competency and decision-making.¹³² In 1979, the Court concluded in *Purham v. J.R.* that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."¹³³ That same year, the Court noted that adolescents "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."¹³⁴ Furthermore,

the program have committed another crime and end up in the adult correction system").

131. Because the CAT House is under the authority of the DYC, it is only available as a sentencing option for those juveniles who remain within the jurisdiction of the juvenile court system.

132. See HRW THE REST OF THEIR LIVES, *supra* note 10, at 86-87 (citing cases in which the Supreme Court has restricted children from making autonomous decisions due to their limited capacity for analytical reasoning).

133. 442 U.S. 584, 603 (1979).

134. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

studies regarding growth and development, particularly brain development, support the argument that children, including older adolescents, are not as competent as adults and thus, are not as culpable.¹³⁵

1. Case Law Regarding Competency, Culpability, and Punishment

Recent Supreme Court decisions highlight concerns regarding the severity of sentences imposed on offenders with limited competence. These rulings suggest that defendants with decreased competency are less culpable, and thus, should not be subject to the same criminal penalties as competent adults.

In the 2002 case *Atkins v. Virginia*, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of the mentally retarded because their diminished competency makes them less culpable than competent individuals for morally irresponsible and criminal behavior.¹³⁶ The Court commented that while mental retardation does “not warrant an exemption from criminal sanctions,” it does reduce personal culpability.¹³⁷ Furthermore, the Court noted that the execution of mentally retarded defendants would not further the deterrent or the retributive purpose served by the death penalty.¹³⁸ Ultimately, the Court concluded that the Constitution prohibits states from imposing the death penalty on mentally retarded offenders.¹³⁹

Drawing support from *Atkins*, the Supreme Court recently concluded that the Eighth Amendment prohibits imposing death sentences on juveniles under the age of eighteen.¹⁴⁰ In

135. See text accompanying notes 153–62, *infra*.

136. 536 U.S. 304, 321 (2002).

137. *Id.* at 318.

138. See *id.* at 320. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet, the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—also make it less likely that they can understand the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

139. *Id.* at 321.

140. *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005) (noting that this decision overrules *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the Eighth

Roper v. Simmons, the Court noted that eighteen is the age at which "society draws the line for many purposes between childhood and adulthood," and that this age should therefore be "the age at which the line for death eligibility ought to rest."¹⁴¹ In reaching its conclusion, the Court identified three significant differences between juvenile and adult offenders which indicated that juvenile offenders should not be categorized as amongst the worst offenders who are deserving of the death penalty.¹⁴² When compared with competent adults, (1) juveniles were more likely to have an "underdeveloped sense of responsibility;" (2) juveniles were more "susceptible to negative influences and outside pressures;" and (3) the "personality traits of juveniles [were] more transitory."¹⁴³ Ultimately, the Court concluded that juvenile offenders are generally less culpable due to their youth and immaturity, and thus they should not be subject to the same punishment as adult offenders.¹⁴⁴

Justice Kennedy, writing for the majority in *Roper*, mentioned briefly that a sentence of LWOP would likely have the same deterrent effect on juveniles as the death penalty.¹⁴⁵ However, the same arguments which support the Court's holdings in *Roper* should apply to any mandatory sentencing scheme in which juveniles receive the same sentences as adults, including LWOP. *Roper* stands for the proposition that juveniles are less culpable than adults for similar crimes. Therefore, while juveniles should still be held accountable for their crimes, their sentences should reflect their reduced culpability.¹⁴⁶

Amendment did not prohibit states from sentencing juvenile offenders, age sixteen or seventeen, to death.).

141. *Id.* at 574. Most states forbid persons under eighteen from voting, serving on a jury, and marrying without parental consent. *Id.* at apps. B-D. State and federal laws acknowledge the immaturity and irresponsibility of children by establishing a minimum age before they attain certain rights and responsibilities. See HRW THE REST OF THEIR LIVES, *supra* note 10, at 115. In Colorado, individuals under eighteen may not "vote, get married without parental consent, serve on a jury, access school records, buy cigarettes, or sign contracts." HRW THROWN AWAY, *supra* note 15, at 1.

142. *Roper*, 543 U.S. at 569.

143. *Id.* at 569-70.

144. *Id.* at 570.

145. *Id.* at 572 ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.").

146. "Punishment should not exceed the gravity of the crime and the culpabil-

Although the Supreme Court has yet to consider the constitutionality of sentencing juveniles to LWOP, the Colorado Court of Appeals addressed this issue in *People v. Fernandez*.¹⁴⁷ The *Fernandez* court held that a sentence of LWOP was not disproportionate to the crime of first degree murder.¹⁴⁸ In reaching its conclusion, the court commented that the defendant's age was not a relevant factor in a proportionality review.¹⁴⁹

Although some state courts have reached conclusions similar to *Fernandez*,¹⁵⁰ other states have determined that sentencing juveniles to LWOP is a disproportionate sanction and constitutes cruel and unusual punishment.¹⁵¹ Furthermore, the Supreme Court's recent decision that juvenile offenders should not be subject to the same punishment as adult offenders¹⁵² makes the mandatory sentencing of juveniles, especially to LWOP, ripe for reconsideration by the Colorado governor, legislature, and courts.

2. Research Concerning Competence and Adolescent Development

In addition to Supreme Court decisions that support the claim that adolescents are less competent, and consequently less culpable for their criminal acts than adults, various studies regarding growth and development—particularly brain development—bolster this conclusion. Psychological and physiological research reveals that children have more difficulty engaging in rational decision-making than do adults.

Psychological studies indicate that adolescents are less capable than adults of identifying and fully comprehending the possible consequences of their actions, thinking independently,

ity or moral responsibility of the offender." HRW THROWN AWAY, *supra* note 15, at 26.

147. 883 P.2d 491 (Colo. Ct. App. 1994).

148. *Id.* at 495.

149. *Id.* (citing *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993)). The *Fernandez* court held that when a mandatory sentence is imposed "the appropriate review of proportionality is a comparison of the gravity of the offense and the harshness of the penalty." *Id.* at 809

150. HRW THROWN AWAY, *supra* note 15, at 28 n.72 (citing cases in Louisiana, Mississippi, North Dakota, and Washington).

151. *Id.* at 28 (citing cases in Nevada, Kentucky, and Illinois).

152. *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

resisting peer pressure, and controlling impulsive behavior.¹⁵³ Adolescents tend to focus on their present situation and often fail to acknowledge the effects of their decisions.¹⁵⁴ Furthermore, to the extent that adolescents *do* contemplate the potential consequences of their actions, they often place greater emphasis on the short-term rather than the long-term.¹⁵⁵

Advances in neuroscience have allowed researchers to examine the anatomy and function of the brain during various stages of development.¹⁵⁶ Scientists have discovered that adolescent brains are “far less developed than previously believed.”¹⁵⁷ Although the rate at which the brain acquires adult capabilities differs among individuals, researchers have consistently found that the prefrontal cortex—necessary for abstract thinking, imagination, planning, and impulse control—is the last section of the brain to fully develop.¹⁵⁸ In fact, many neurologists believe that this section of the brain may not be fully developed until the early twenties.¹⁵⁹ Because the frontal lobe undergoes the greatest transition during adolescence, juveniles probably do not have the same ability as adults to assess risks and make sensible decisions.¹⁶⁰ Furthermore, research suggests that to compensate for their underdeveloped frontal lobes, juveniles rely more on the amygdale, a more primitive and impulse-driven part of the brain.¹⁶¹ This research does not completely excuse adolescents who commit crimes, but it does suggest that they “are less responsible for their actions than adults because they have physiologically less developed means of controlling themselves.”¹⁶²

Research concerning brain development also suggests that

153. HRW THE REST OF THEIR LIVES, *supra* note 10, at 45.

154. *Id.* at 46.

155. *Id.*

156. *Id.* at 47.

157. Adam Ortiz, *Adolescence, Brain Development and Legal Culpability*, (ABA, Juvenile Justice Center), Jan. 2004, at 1, available at <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>.

158. *Id.* at 1–2.

159. Sue Lindsay, *High Risk Behavior; Researchers Say Teens Show Poor Judgment Because Their Brains Are Still Growing*, ROCKY MOUNTAIN NEWS, Sept. 20, 2005, at 5A.

160. Ortiz, *supra* note 157, at 2.

161. HRW THE REST OF THEIR LIVES, *supra* note 10, at 49 (citing National Juvenile Defender Center, *Adolescent Brain Development and Legal Culpability*, April 2003 (quoting Dr. Deborah Yurgelun-Todd of Harvard Medical School.))

162. HRW THROWN AWAY, *supra* note 15, at 26. See also HUBNER, *supra* note 39, at 85.

juvenile offenders are highly capable of reformation. Because the brain experiences significant growth and transformation during adolescence, the character traits and personalities of juveniles are more transitory than those of adults and more apt to change.¹⁶³ Consequently, even some of the most violent juvenile offenders may be successfully rehabilitated when given adequate support and treatment.¹⁶⁴

B. Harm to Juveniles Convicted and Sentenced as Adults

In Colorado, children who are convicted and sentenced as adults may be housed in the adult prison system at age fourteen.¹⁶⁵ Such confinement is particularly difficult for adolescents because they “often lack the physical and mental coping mechanisms that older adult prisoners use to maintain their mental health and self-respect.”¹⁶⁶ Furthermore, incarceration in the adult penal system deprives juvenile offenders of many of the educational and recreational opportunities and vocational programs offered at a juvenile detention center.¹⁶⁷ According to Colorado’s Administrative Regulation, prisoners in the custody of the DOC lacking basic communication and literacy skills are required to attend academic programs.¹⁶⁸ However, those offenders facing life sentences are excluded from

163. Lindsay, *High Risk Behavior*, *supra* note 159.

164. See, e.g., HUBNER, *supra* note 39, at xxiii (highlighting that the recidivism rate for juveniles who participated in an intensive therapeutic program at the Giddings State School in Texas is significantly lower than the national juvenile recidivism rate).

165. See COLO. REV. STAT. § 19-2-517(3)(1) (2000) (noting that a juvenile convicted of one of certain enumerated felonies is excluded from the youthful offender system, and therefore can only be sentenced as an adult).

166. HRW THE REST OF THEIR LIVES, *supra* note 10, at 52. The American Correctional Association recommends that juvenile offenders who are transferred or sentenced in the adult criminal system be housed in separate juvenile facilities. HRW THROWN AWAY, *supra* note 15, at 31 (citing Am. Corr. Ass’n, “Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction,” Delegate Assembly, Congress of Correction, Nashville, Tenn., Aug. 21, 1996 (unanimously ratified)).

167. Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L. J. 999, 1006–07 (1991). See also HRW THROWN AWAY, *supra* note 15, at 31 (noting that while in prison juveniles are not likely to “gain the life experience and education necessary for healthy mental and physical development”).

168. Colo. Admin. Reg. No. 500-01 (IV)(C)(3)(a)-(g), available at http://www.doc.state.co.us/admin_reg/PDFs/0500_01.pdf.

this requirement,¹⁶⁹ and access to educational opportunities is even more limited for adolescents sentenced to LWOP.¹⁷⁰ Moreover, the prospect of spending life in prison discourages many juvenile offenders from taking advantage of the few services that are available to them.¹⁷¹

Not only are juveniles denied access to certain rehabilitative services, but incarceration in adult correctional facilities places juveniles at a greater risk of becoming victims of sexual assault and rape.¹⁷² In addition, the suicide rate is significantly higher for juveniles in adult prisons than for juveniles in youth facilities.¹⁷³

C. Problems with the Current Method of Treating Juvenile Offenders

Over the past several decades, many states, including Colorado, have enacted laws facilitating the transfer of juveniles to the adult criminal system. As a result, the number of juvenile offenders transferred to adult courts has grown significantly.¹⁷⁴ The rising number of adolescent prosecutions in the adult system conflicts with the original philosophy behind the creation of the juvenile court system. As discussed in Part I.B., *supra*, the juvenile court was developed under the belief that juvenile offenders, given the appropriate treatment and support, are capable of rehabilitation. However, the current trend of charging and sentencing juveniles as adults at increasingly younger ages ignores the philosophy of the juvenile system.¹⁷⁵

169. *Id.*

170. HRW THE REST OF THEIR LIVES, *supra* note 10, at 69 (commenting that due to funding concerns, educational and rehabilitative programs are generally reserved for those who will one day leave the prison system).

171. *Id.* at 111.

172. Shefi, *supra* note 22, at 664. See Bldg. Blocks for Youth, Fact Sheet: Children in Adult Jails, <http://www.buildingblocksforyouth.org/issues/adultjails/factsheet.html> (last visited Jan. 12, 2007) (noting that juveniles are five times more likely to be attacked by another offender in adult institutions than in juvenile facilities).

173. Angell, *supra* note 6, at 142; Shefi, *supra* note 22, at 664. See Bldg. Blocks for Youth, Fact Sheet, *supra* note 172 (observing that the suicide rate is almost eight times higher for juveniles confined to adult prison as compared to those in juvenile facilities).

174. Cintron, *supra* note 103, at 1262–63.

175. *Id.* at 1271. “[P]rosecutorial transfer contributes to a decrease in juvenile court cases and to an erosion of the *parens patriae* philosophy upon which the system is based.” *Id.*

As more children are waived into the adult system, the goals of the juvenile justice system are further discounted.

Furthermore, Colorado law, which allows prosecutors to directly file charges against juveniles in criminal court without providing a method of review, raises concerns regarding abuse of discretion.¹⁷⁶ Prosecutors are not required to present evidence in support of their decisions to bring juveniles charged with serious violent offenses before adult courts.¹⁷⁷ Likewise, juvenile defendants are not entitled to transfer hearings and judges may not withdraw jurisdiction or remand cases to juvenile court.¹⁷⁸

In 2006, the Colorado Supreme Court heard oral argument regarding the constitutionality of Colorado's direct file statute in *Flakes v. People*.¹⁷⁹ The issue before the court was whether Colorado's direct file statute is unconstitutional on its face and as applied.¹⁸⁰ Flakes and amici asserted a number of constitutional challenges to Colorado's direct file statute based on equal protection, due process, and separation-of-powers grounds.¹⁸¹ On February 26, 2007, the Colorado Supreme Court issued a decision upholding the state's direct file statute as constitutional.¹⁸²

176. DAVIS, *supra* note 36, at 857. See also Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985, 996-97 (1994) (opining that a prosecutor's primary concern is protecting the state's interest and that a prosecutor may overcharge a juvenile in order to obtain jurisdiction in the criminal court, especially in high profile cases).

177. See COLO. REV. STAT. § 19-2-518 (2000).

178. See *id.*

179. *Flakes v. People*, No. 05SC593, 2007 Colo. LEXIS 141 (Colo. Feb. 26, 2007).

180. *Id.* at *3-4. In 1997, 16-year-old Gary Flakes was charged with two counts of first-degree murder (after deliberation), two counts of first-degree murder (extreme indifference to human life), and two counts of accessory to murder in the death of two teenage boys. *Id.* at *5. At trial, the jury found Flakes guilty of one count of criminally negligent homicide and two counts of accessory to murder. *Id.* at *6. The trial court imposed an adult sentence of sixteen years in the Colorado DOC. *Id.* at *7. Flakes's sentence was affirmed on appeal. *Id.* Flakes filed a motion for post-conviction relief, challenging the constitutionality of his adult sentence because he was convicted of accessory and criminally negligent homicide, crimes which are outside the scope of Colorado's direct file statute. *Id.* at *7-8.

181. *Id.* at *3-4; see also Brief of Juvenile Law Center et al. as Amicus Curiae supporting Appellant, *Flakes*, No. 05SC593, 2007 Colo. LEXIS 141, at 2007 WL 2304240.

182. *Flakes*, No. 05SC593, 2007 Colo. LEXIS 141 at *4. Justice Martinez, writing for the court, stated that district courts have "discretion to sentence a juvenile guilty of a directly filed but unenumerated offense as a *juvenile* or an adult." *Id.* at *29 (emphasis added). Furthermore, the court stated that when imposing an

Not only have transfer statutes made it easier for more children to be tried as adults, but adolescents also receive criminal sentences similar to those of adult offenders upon conviction. In fact, Colorado law requires judges to impose a minimum sentence of LWOP on any individual convicted of a class 1 felony in the adult criminal system.¹⁸³ Furthermore, state law does not permit judges to consider age, maturity, or any other factors when sentencing juveniles convicted of class 1 felonies.¹⁸⁴ Therefore, in Colorado, a child as young as twelve who is charged and convicted of a class 1 felony necessarily will be sentenced to LWOP.¹⁸⁵

Imposing a sentence of LWOP on juveniles violates the Eighth Amendment because it does not advance the state's interest in reducing crime by punishing offenders based on retribution, deterrence, and rehabilitation.¹⁸⁶ While LWOP may be an appropriate sentence for adults, the same cannot be said for juvenile offenders, especially when the sentence is mandatory. Sanctions should reflect the gravity of the criminal act, but they "also must acknowledge that culpability can be substantially diminished by reason of the youth and immaturity" of the offender.¹⁸⁷ As highlighted by the Court in *Roper*,¹⁸⁸ the significant psychological and physiological differences between adolescents and adults concerning competency and decision-making support the conclusion that children typically have a

adult sentence for unenumerated offenses, the trial court must make findings which support the imposition of an adult sentence. *Id.* (citing *Kent v. United States*, 383 U.S. 541, 566–67 (1966)). While this opinion represents a small victory for juveniles convicted of unenumerated offenses only, it does not impact juveniles who are charged and convicted of those offenses which are enumerated in Colorado's direct file statute.

183. An individual convicted of a class 1 felony will "be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense. . . . [In] which cases, the defendant shall be sentenced to life imprisonment." COLO. REV. STAT. § 18-1.3-1201(1)(a) (West, Westlaw through 2006 legislation). First degree murder is a class 1 felony. § 18-3-102(3).

184. See § 18-1.3-1201(1)(a); see also § 18-1.3-401.

185. HRW THE REST OF THEIR LIVES, *supra* note 10, at 18 tbl.1.

186. Colorado's criminal code provides that the purposes of sentencing are "(a) [t]o punish a convicted offender; . . . (c) [t]o prevent crime . . . by providing an effective deterrent to others likely to commit similar offenses; and (d) [t]o promote rehabilitation" § 18-1-102.5.

187. HRW THE REST OF THEIR LIVES, *supra* note 10, at 6. Those who support a sentence of LWOP "look solely to the crime to determine retribution, ignoring the age and culpability of the offender." *Id.* at 112.

188. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

diminished level of culpability in comparison to adults who commit the same crime. Thus, a judicial system that blindly applies the same standards to adolescent and adult offenders does not adequately balance the state's interest in ensuring safety with the need to protect the juveniles' rights.

Furthermore, LWOP does not serve a deterrent purpose. Research does not indicate that the threat of receiving a harsh sentence discourages other adolescents from engaging in criminal activity.¹⁸⁹ As discussed in Part III.A.2., *supra*, adolescents do not always contemplate or rationally evaluate the possible consequences of their behavior. Therefore, given their limited reasoning skills, adolescents are not likely to fully comprehend the implications of, or be deterred by, the possibility of receiving a sentence of LWOP.¹⁹⁰

Finally, a sentence of LWOP suggests that young offenders who commit serious violent crimes are incapable of rehabilitation.¹⁹¹ However, recent psychological and physiological research on human development strongly indicates that adolescents, even older adolescents, may be reformed.¹⁹² In addition, the success of programs like that at the Giddings State School in Texas provides persuasive evidence suggesting that even the most violent juvenile offenders are capable of rehabilitation.¹⁹³ At Giddings, juveniles participate in an intensive "resocialization" program that requires them to acknowledge and accept responsibility for their crimes.¹⁹⁴ A three-year study completed in 2004 found that only ten percent of graduates from Giddings had been rearrested for violent crimes, as compared to a national juvenile recidivism rate of sixty percent.¹⁹⁵

Furthermore, given that many of the forty-six offenders in Colorado facing LWOP for crimes committed before they were eighteen received this sentence for first offenses,¹⁹⁶ there is

189. HRW THE REST OF THEIR LIVES, *supra* note 10, at 4.

190. HRW THROWN AWAY, *supra* note 15, at 38.

191. *Id.* at 38–39.

192. See discussion *supra* Part III.A.2.

193. See generally HUBNER, *supra* note 39 (providing an in-depth explanation of the Giddings program).

194. *Id.* at xxiii–xxiv. To be successful at Giddings, young offenders must develop interpersonal and communication skills which they often have not learned from their families. *Id.* at xxiv, 5. Hubner did not address the issue of adolescent offenders who maintained their innocence. All of the juveniles profiled in the book confessed to their crimes.

195. *Id.* at xxiii.

196. HRW THROWN AWAY, *supra* note 15, at 18.

minimal evidence to suggest that these juveniles are incapable of rehabilitation or likely to engage in a life of crime.¹⁹⁷ Colorado's mandatory sentencing schemes prohibit judges from making individualized determinations about the juveniles appearing before them.¹⁹⁸ Sentencing adolescent offenders to LWOP completely discounts the philosophical goals of sentencing.

IV. RECENT ATTEMPTS AT REFORM IN COLORADO

Over the past several years, Colorado legislators have introduced a number of bills aimed at reforming the treatment of juvenile offenders who are charged as adults. Although the first several bills were not enacted, these attempts reflect a growing desire by the public to shift away from a purely retributive approach and to focus on the goals of reformation and rehabilitation.¹⁹⁹

In 2003, State Representative Lynn Hefley introduced House Bill 03-1139 ("HB 03-1139"), "Concerning the Sentence Imposed on a Juvenile Who is Convicted as an Adult of a Class 1 Felony," which would allow courts to consider mitigating circumstances when sentencing juveniles convicted as adults.²⁰⁰ H.B. 03-1139 would have also allowed juveniles sentenced to life imprisonment to move for reduced sentences—permitting release after serving twenty-seven years of the sentence.²⁰¹ Although an amended version of H.B. 03-1139 was successfully passed by the House of Representatives, it was later postponed by the Senate Committee on State Veterans and Military Affairs, effectively killing it.²⁰²

197. HRW *THE REST OF THEIR LIVES*, *supra* note 10, at 113.

198. *See id.* at 91.

199. A recent poll conducted by an independent research group revealed that "[s]ixty-two percent of Colorado citizens believe that juveniles should get lesser sentences than adults." *See* Pendulum Juvenile Justice Home Page, <http://www.pendulumjustice.org/> (last visited Mar. 2, 2007).

200. *See* H.B. 03-1139, 64th Gen. Assemb., Reg. Sess. (Colo. 2003), *available at* http://www.leg.state.co.us/2003a/inetcbill.nsf/fsbillcont/416C4FEA3640C4AF87256C5A0062EA40?Open&file=1139_ren.pdf.

201. *See id.*

202. *See* H.B. 03-1139, 64th Gen. Assemb., Reg. Sess., Summarized History for Bill Number HB03-1139 (Colo. 2003), *available at* http://www.leg.state.co.us/2003a/inetcbill.nsf/fsbillcont/416C4FEA3640C4AF87256C5A0062EA40?Open&file=1139_ren.pdf (select "History" link on page heading).

Two years later, Representative Hefley introduced House Bill 05-1109 ("HB 05-1109"), "Concerning Juveniles Charged as Adults," which proposed sweeping changes to the current system of charging and sentencing juvenile offenders in the adult criminal system.²⁰³ As originally presented, H.B. 05-1109 limited the crimes for which a prosecutor could charge juveniles as adults by directly filing cases in adult court.²⁰⁴ Furthermore, the bill would have expanded judges' sentencing options, thus allowing judges to consider various factors—including potential for rehabilitation—in sentencing juveniles convicted as adults.²⁰⁵ H.B. 05-1109 also proposed a completely separate sentencing structure for juveniles convicted as adults.²⁰⁶ In addition, H.B. 05-1109 provided that all juvenile offenders serving LWOP would be eligible for Community Corrections upon satisfying certain program requirements.²⁰⁷ In effect, H.B. 05-1109 introduced the possibility of giving juvenile offenders in adult prison, including those convicted of violent crimes, an opportunity to have restricted interaction with the community.

The House Judiciary committee gutted all reform provisions of H.B. 05-1109, and the resulting bill proposed the formation of a task force to study issues concerning juveniles in the adult criminal system.²⁰⁸ In addition, the amended bill es-

203. H.B. 05-1109, 65th Gen. Assemb., 1st Reg. Sess. (Colo. 2005), *available at* http://www.leg.state.co.us/clics2005a/csl.nsf/fsbillcont3/B9C77905ADD4D70187256F430058DBCC?open&file=1109_01.pdf.

204. *Id.*

205. *See id.*

206. *See id.*

207. *See id.* Community Corrections is a program which helps transition convicted offenders back into the community by providing specialized treatment and enhanced supervision. *See* Colo. Community Corrections Coalition, <http://www.cccco.org/factsheet.html> (last visited May 15, 2007). Offenders participating in the Community Corrections Program are allowed limited interaction with the community. The Colorado DOC maintains jurisdiction over those offenders who are approved for participation in the program by the Community Corrections Board. *Id.* Currently, the program is only available to those individuals "convicted of less severe felony offenses. *Id.*

208. *See* H.B. 05-1109, 65th Gen. Assemb., 1st Reg. Sess. (Colo. 2005) (amended), *available at* http://www.leg.state.co.us/clics2005a/csl.nsf/fsbillcont3/B9C77905ADD4D70187256F430058DBCC?open&file=1109_enr.pdf. Issues to be discussed by the task force included charging juveniles as adults through transfer hearing and direct filing, sentencing options, the YOS (Youthful Offender System), restorative justice programs, rehabilitative services, educational services, and the treatment of juveniles convicted as adults who are currently serving sentences. *See id.*

established a legislative oversight committee to suggest recommendations made by the task force.²⁰⁹ This bill would have required the task force to issue its final report, including legislative recommendations, to the oversight committee on or before March 1, 2006.²¹⁰

Although the amended version of H.B. 05-1109 was passed by the Colorado House of Representatives and Senate, Governor Bill Owens vetoed the bill on May 27, 2005.²¹¹ In rejecting the legislation, Governor Owens concluded that H.B. 05-1109 did not propose a specific problem to be solved, did not create a realistic and workable timeframe in which to address the issue, did not identify a particular failure in the juvenile justice system, and did not present evidence that the direct filing method was inadequate.²¹²

Representative Hefley tried again the following session, introducing House Bill 06-1315 ("H.B. 06-1315"), "Concerning Juveniles Who Are Convicted as Adults of Class 1 Felonies," which would allow juveniles convicted as adults of class 1 felonies to be considered for parole after serving forty years.²¹³ In addition, the bill would require that all juveniles in adult prisons, even those not eligible for parole, be provided with the opportunity to participate in treatment programs that are usually only available to parole-eligible offenders.²¹⁴ In May 2006, H.B. 06-1315 was signed by both the Speaker of the House and the President of the Senate.²¹⁵ On May 25, 2006, Governor Owens signed H.B. 06-1315 into law.²¹⁶

209. *See id.*

210. *See id.*

211. *See* H.B. 05-1109, 65th Gen. Assemb., 1st Reg. Sess., Summarized History for Bill Number HB05-1109 (Colo. 2005), *available at* <http://www.leg.state.co.us/clics>

2005a/csl.nsf/fsbillcont3/B9C77905ADD4D70187256F430058DBCC?open&file=1109_enr.pdf (select "History" link on page heading) (last visited Mar. 2, 2007).

212. Letter from Bill Owens, Governor of Colorado, to the Colorado House of Representatives (May 27, 2005), *available at* <http://www.colorado.gov/governor/press/may05/hb1109.html>.

213. *See* H.B. 06-1315, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006), *available at* http://www.leg.state.co.us/clics2006a/csl.nsf/fsbillcont3/A2B8131796BF3E39872570F900610C87?open&file=1315_01.pdf.

214. *See id.*

215. *See* H.B. 06-1315, 65th Gen. Assemb., 2d Reg. Sess., Summarized History for Bill Number HB06-1315 (Colo. 2005), *available at* http://www.leg.state.co.us/clics2006a/csl.nsf/fsbillcont3/A2B8131796BF3E39872570F900610C87?open&file=1315_01.pdf (select "History" link on page heading).

216. *See id.*

V. RECOMMENDED CHANGES

Although H.B. 06-1315 substantially improves the current system for dealing with juveniles who commit violent crimes, it is not enough. Colorado needs to implement a new process to adequately recognize the unique needs of adolescent offenders, while simultaneously addressing the serious nature of their offenses. These goals can be achieved by allowing juveniles convicted of the most violent crimes to receive blended sentences. By enacting a scheme that permits courts to impose juvenile sentences and stayed adult sentences, there will be less pressure to transfer juvenile offenders to the adult system. Consequently, juvenile offenders would only be transferred to an adult court under rare circumstances and only pursuant to a hearing before a juvenile court judge. Furthermore, the Colorado legislature should create a "Juvenile Sentencing Review Board" to examine the cases of those adolescents currently serving LWOP and make recommendations to the Governor for clemency. Finally, Colorado should enact legislation to make juveniles facing LWOP eligible for the Community Corrections Program.²¹⁷

A. *Blended Sentencing*

Blended sentencing provides both juvenile and criminal court judges with more options when sentencing juvenile offenders.²¹⁸ Among the states that have adopted blended sentencing schemes, five basic models have emerged.²¹⁹ Under the first three approaches, the juvenile court has jurisdiction over the case.²²⁰ The "juvenile-exclusive" model provides a judge with the authority to impose either a juvenile sentence or an adult sentence, while the "juvenile-inclusive model" permits a judge to impose both a juvenile sentence and a stayed adult sentence simultaneously.²²¹ Under the "juvenile-contiguous" model, a judge may deliver a sentence that remains in effect

217. See *supra* note 207 and accompanying text. The DOC would still maintain jurisdiction over those inmates who participate in Community Corrections.

218. See Smallheer, *supra* note 81, at 276.

219. See Torbet & Szymanski, *supra* note 21, at 6-7.

220. *Id.* at 6.

221. *Id.*

beyond the jurisdiction of the juvenile court.²²² In the final two approaches, the case arises before an adult criminal court.²²³ Under the “criminal-exclusive” model, a judge may render either a juvenile sentence or an adult sentence, while the “criminal-inclusive” model permits a judge to impose both a juvenile sentence and an adult sentence.²²⁴

While each model has its advantages, the Colorado legislature should adopt the “juvenile-inclusive” blend model, which allows the juvenile court to retain jurisdiction over the case and grants the judge authority to impose a juvenile sentence and a stayed adult sentence.²²⁵ This scheme best holds young offenders accountable for their crimes while providing juveniles—especially those facing the possibility of LWOP—with the opportunity for a second chance upon a showing of reformation. Under this system, an adolescent begins his sentence in the juvenile facility, where the adolescent has access to treatment programs designed specifically for juvenile offenders.²²⁶ Before reaching the age of majority the juvenile court must determine, with feedback from therapists at the juvenile facility, whether the adolescent should be transitioned back into the community or transferred to the adult system to serve the remainder of his or her sentence.²²⁷

This sentencing scheme allows young offenders to participate in the educational and rehabilitative services available at juvenile facilities while simultaneously providing a safety net to protect society from those individuals who fail to show substantial reform. Under this approach, an adolescent who does not successfully abide by the conditions of his or her juvenile

222. *Id.* at 6–7.

223. *Id.* at 6.

224. *Id.*

225. *See id.*

226. *See* Christian Sullivan, *Juvenile Delinquency in the Twenty-First Century: Is Blended Sentencing the Middle-Road Solution for Violent Kids?*, 21 N. ILL. U. L. REV. 483, 494–95 (2001).

227. This is the approach adopted by the Giddings State School in Texas. HUBNER, *supra* note 39, at xxiv. Although a number of adolescents at Giddings are initially hesitant to participate in therapeutic programs, most eventually benefit from the experience. *See id.* at 9–10. Program directors at Giddings estimate that ninety-five percent of their adolescent population is capable of rehabilitation. *Id.* at 10. Therapists who work with the juveniles on an almost-daily basis play a critical role in determining whether the adolescent has demonstrated sufficient reformation or is merely faking his or her growth and progress. *See id.* at 11.

disposition risks transfer to the adult system to serve the remainder of his or her sentence. Because blended sentencing requires juvenile offenders to make decisions that will have a significant impact on their futures, this model forces violent adolescents to alter their thought processes so they are capable of considering the long-term consequences of their behavior.²²⁸ This sentencing scheme compels adolescent offenders to assume responsibility for their actions and subsequent rehabilitation.²²⁹ Furthermore, blended sentencing creates an incentive for reform by offering adolescent offenders who comply with their juvenile disposition a second chance.²³⁰ Ultimately, this sentencing scheme advances the rehabilitative goals of the juvenile court system while addressing society's concern that the juvenile system is too lenient on young, violent offenders.²³¹

B. Eliminate Direct Filing

Direct filing should be eliminated so that any and all charges filed against juveniles, regardless of the nature of the offense, must originate within the juvenile court system.²³² Under this approach, if a prosecuting attorney believes that a case warrants a transfer to adult court, he or she may request a transfer hearing.²³³ The benefit is that judicial waiver places upon the prosecution the burden of proving that the juvenile court should transfer jurisdiction to the adult court.²³⁴ At the hearing, the juvenile judge is largely responsible for determining whether the juvenile court should maintain jurisdiction or whether it would be more appropriate to prosecute the adolescent in the adult criminal system.²³⁵ This approach would ensure that each adolescent is accorded "the same due process guarantee to a [transfer] hearing" in front of a juvenile judge

228. See *id.* at 86.

229. See Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J.L. & FAM. STUD. 281, 298 (2004).

230. See Smallheer, *supra* note 81, at 283–84.

231. See *id.* at 288.

232. See HRW THROWN AWAY, *supra* note 15, at 4 (listing recommendations to the state legislature).

233. See Boyce, *supra* note 176, at 1008–09.

234. See *id.* at 1009.

235. See Cintron, *supra* note 103, at 1263.

"before the state can charge him as an adult."²³⁶

Judicial waiver is the preferable method of transfer because it allows the juvenile judge to "consider all of the circumstances surrounding the offense, along with many other factors relating to the juvenile."²³⁷ While prosecutors may consider various factors in deciding whether to file charges against a juvenile in the adult system, "prosecutorial discretion cannot substitute for a full adversarial hearing before a judge."²³⁸ Furthermore, juvenile judges are likely to be more familiar with the special needs of adolescents, and thus more capable of making an individualized determination as to whether the juvenile court should retain jurisdiction over a particular child.²³⁹

In addition, before a juvenile may be waived to the adult system, the judge should be required to issue a statement setting forth reasons why the case should be transferred.²⁴⁰ This requirement would satisfy juvenile offenders' due process rights as well as minimize the possibility for judicial abuse of discretion by holding judges accountable for their decisions. This process would likely reduce the number of juveniles tried in the adult system, while still allowing for the transfer of adolescents charged with the most egregious offenses. Judicial waiver ensures that only those adolescents who are unlikely to be rehabilitated are transferred to the adult court after a fair and meaningful hearing.²⁴¹

Finally, Colorado should adopt an alternative sentencing structure for those juveniles who are transferred and subsequently convicted as adults. This sentencing scheme should have a discrete sentencing range for juveniles, even those who are convicted of the most serious crimes. The recommended scheme would reduce the minimum and maximum sentence al-

236. Boyce, *supra* note 176, at 1008.

237. Guttman, *supra* note 72, at 532 (noting that the "nature" of the crime is only one factor for consideration). See also HRW THE REST OF THEIR LIVES, *supra* note 10, at 8-9 (recommending that there "be a presumption in favor of adjudicating children's cases in the juvenile justice system").

238. HRW THROWN AWAY, *supra* note 15, at 8.

239. Boyce, *supra* note 176, at 1002 (opining that a juvenile judge has an obligation to protect the interests of children who appear before the court).

240. In *Kent v. United States*, the Supreme Court identified several factors that juvenile courts may use in determining whether a juvenile should be transferred to the adult court. See 383 U.S. 541, 566-68 (1966).

241. Guttman, *supra* note 72, at 541. "Only judicial waiver ensures that appropriate cases are transferred . . ." *Id.*

lowable for felony offenses. A sentence of LWOP would not be available as an option under this new structure, as the possibility of parole should always be available to juvenile offenders.²⁴²

C. Sentencing Review of Juveniles Currently Serving Life Without Parole

While the proposed transfer and sentencing plan addresses the treatment of adolescents who commit future criminal offenses, it does not address those juveniles who have already been sentenced to LWOP. The Colorado legislature can address this problem by creating a Juvenile Sentencing Review Board that would provide those adolescents already facing LWOP with the opportunity to have their cases and sentences reviewed. The Review Board would re-examine each case and make recommendations to the Governor for clemency.²⁴³

Furthermore, Colorado should enact legislation allowing juveniles currently facing LWOP to be eligible for the Community Corrections Program. Those juveniles who demonstrate positive behavior would be entitled to apply for admission into Community Corrections.²⁴⁴ If accepted into the program, the juvenile would initially have limited access to the community through employment opportunities and treatment programs. Those who successfully comply with the program requirements would be granted additional privileges over time, including the opportunity to move into a private residence. Those offenders allowed to participate in Community Corrections would still be under the jurisdiction of the Colorado DOC. Those individuals who fail to comply with the program requirements would be forced to return to prison. Consequently, such legislation would provide those adolescents who are not recommended for clemency with an incentive to make positive changes. Ultimately, this suggested legislation would give juveniles currently facing LWOP the opportunity to engage in limited ex-

242. Under this proposal, life *with* parole would be available as a possibility during sentencing.

243. See *People v. Herrera*, 516 P.2d 626, 628–29 (Colo. 1973) (holding that “the governor has the *exclusive power* to grant reprieves, commutations and pardons after conviction”).

244. See *supra* note 207 and accompanying text (describing the Community Corrections Program). Juvenile offenders would be required to serve a minimum of six years before becoming eligible for admission into the program.

periences outside of the prison facility upon a showing of good behavior.

CONCLUSION

More than one hundred years ago, reformers established a separate juvenile court system recognizing the unique qualities of adolescents, including their capacity for rehabilitation. Over the past half-century, the state courts and legislatures, with approval from the Supreme Court, have slowly eroded the special features that distinguished the juvenile court from the criminal court. In addition, newly enacted legislation has facilitated the transfer of juvenile cases to the adult system. As a result, more juveniles are being tried in adult courts and the goals furthered by the juvenile court system are being ignored.

The blended sentencing model offers a promising resolution to the conflict between those who believe that the juvenile system is too lenient and those who believe the adult system is too severe. Blended sentencing holds juveniles accountable for their crimes, protects society, and provides young offenders with the resources and the motivation to rehabilitate themselves. By allowing juvenile court judges to retain jurisdiction and impose harsher sentences, transfer hearings would be reserved for only those adolescents charged with committing the most heinous crimes. In addition, transfers of juvenile offenders should only occur after a fair hearing before a juvenile court judge. Ultimately, blended sentences most adequately meet the needs of adolescent offenders, advance the goals of the juvenile court, and sufficiently protect the community from violence.