

**A Reexamination of Youth Involvement in the
Adult Criminal Justice System in Washington:
Implications of New Findings about Juvenile
Recidivism and Adolescent Brain Development**



Washington Coalition for the Just Treatment of Youth

The Washington Coalition for the Just Treatment of Youth

is comprised of a network of juvenile justice advocates who believe that the trial, sentencing, and incarceration of youth should reflect that youth are less capable than adults of assessing risks, controlling impulsive behavior, and engaging in moral reasoning and are more amenable than adults to rehabilitation.

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EXECUTIVE SUMMARY

In passing the Juvenile Justice Act of 1977, Washington’s legislature intended to “[p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile* offender.”¹ Public policy shifted dramatically in the early 1990s, in response to erroneous predictions of an impending juvenile crime wave. As a result, numerous laws were enacted that allowed adolescents to be tried, sentenced, and incarcerated in the same manner as adults, in many cases without any consideration of their age or development. Although juvenile crime rates have actually decreased since the mid 1990s² and many proponents of these changes have now admitted that their predictions regarding juvenile crime were incorrect,³ these policies remain in effect today.

A reexamination of those policies is appropriate for several reasons. First, recent breakthroughs in brain development research have shown that due to anatomical differences in the adolescent brain, youth are less able than adults to assess risks, control impulsive behavior, and engage in moral reasoning. These differences are all relevant to assessing a juvenile’s culpability. This same research also suggests that adolescents are more amenable to rehabilitation than adults because one’s character continues to form as the brain matures. As such, adolescents typically “age out” of delinquent behavior as they move toward adulthood. For this reason, in *Roper v. Simmons*, the United States Supreme Court explained: “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁴

Second, evidence now exists that these policies threaten, rather than protect, public safety. Recent studies show that subjecting adolescents to the adult criminal justice system may actually increase future criminal behavior.⁵ This is likely due to adolescents incarcerated in adult facilities having reduced access to treatment and rehabilitative services while at the same time being exposed to an adult criminal culture rife with violence and antisocial behavior. This experience—known colloquially as “felon finishing school”—results in many youth emerging from incarceration at higher risk of offending than when they entered.

Third, these policies have an unequal impact on youth of color and girls. Youth of color are disproportionately represented amongst adolescents who are tried as adults. A recent study summarized herein shows that this over representation cannot be explained by higher arrest rates for youth of color. The mandatory nature of many of these laws and the lack of gender-responsive services also have troubling consequences for girls who often have unique needs and characteristics that support individualized consideration.

.....due to anatomical differences in the adolescent brain, youth are less able than adults to assess risks, control impulsive behavior, and engage in moral reasoning.

This report summarizes the breakthroughs in adolescent brain development, studies related to recidivism rates of youth who are treated as adults, and data regarding the use and implications of current Washington laws that allow—and in some cases require—that youth be treated as adults. In particular, this report analyzes the cases of the twenty-eight Washington youth in which the law mandated that the youth be sentenced to life in prison without the possibility of parole, the most severe sentence for youth available in Washington. Trial and appellate court records, as well as records from the Department of Corrections and information provided by the individuals sentenced in this manner were analyzed for this report.

There are several important findings related to the twenty-eight adolescents serving life in prison without the possibility of parole. First, in every single case, there were early warning signs that were not addressed by social workers, probation officers, educators, and other adults in these youth’s lives. These signs included mental health problems, chemical dependency, and other conditions that are known to contribute to criminal behavior but are treatable. If these signs had been heeded, these crimes may well not have

* THE TERMS “YOUTH,” “ADOLESCENT,” AND “JUVENILE” ARE USED IN THIS REPORT TO REFER TO PEOPLE UNDER THE AGE OF EIGHTEEN.

occurred. Second, in every single case there were mitigating factors. Each one of these youth had an anatomically adolescent brain less capable than a fully developed adult brain of controlling impulses and engaging in moral reasoning. For many, the effects of this undeveloped brain was compounded by extensive abuse and instability. Third, because of the mandatory nature of the sentence, none of the mitigating factors could be considered by the sentencing court. These findings do not excuse the juveniles for their crimes, nor do they decrease the loss experienced by the victims' families, friends, and communities. What the findings do is present a strong critique of Washington's current laws related to treating youth as adults, particularly the implications of sentencing that allows no opportunity for youth to earn release if fully rehabilitated.

The review of these cases also revealed the fallibility of the justice system. Two of the youth were represented by a defense attorney who was later disbarred; four more were represented by attorneys who were later censured, reprimanded, and/or suspended from the practice of law. Other cases exhibited signs of ineffective representation which were never raised on appeal. In one case there is an appellate court finding of prosecutorial misconduct. In two more, there were appellate court findings of judicial error. Four of the cases were tried in front of judges who were suspended and one more in front of a judge who was later admonished. For two of the youth, the judges were removed from the bench during the course of their proceedings.



This report concludes with a series of recommendations for Washington policymakers that are designed to address the findings detailed herein regarding adolescent brain development, the public safety implications of punishing adolescents like adults, and data regarding the cost-effectiveness of reducing recidivism through the use of rehabilitative services.

1. Eliminate life in prison without the possibility of parole as a sentence for adolescent offenders.
2. Create a juvenile-specific review process designed to promote rehabilitation that allows for meaningful periodic review of youth sentenced in the adult system.
3. Eliminate the automatic transfer of adolescents to the adult criminal justice system.
4. Set fifteen as the age below which no adolescent may be transferred to adult criminal jurisdiction.
5. Create a system to transfer youth back to juvenile court in appropriate cases.
6. Require that youth be held in juvenile facilities both pre-trial and post-conviction through the age of twenty-one absent exigent circumstances.
7. Refocus efforts on prevention and rehabilitation.
8. Ensure policies and practices are culturally competent and gender-responsive.

WASHINGTON LAW REGARDING THE TRANSFER OF YOUTH FROM JUVENILE COURT TO ADULT COURT

In Washington, youth may be transferred to adult court for prosecution through a process known as “declination” in which the court “declines” to exercise juvenile court jurisdiction even though the person charged is a juvenile. When these laws were first enacted, all declinations resulted from a discretionary act by the juvenile court; the laws were later amended so that in the majority of cases the transfer to adult court happens automatically.

automatically transferred for all future actions, even if he or she is found not guilty in the original matter (this is known as the “once an adult, always an adult” rule).⁷ The auto-declination statute eliminates both prosecutorial and judicial discretion over the treatment of juveniles and forever prevents consideration of the youth’s potential for rehabilitation or other mitigating factors.

Under Washington’s auto-declination statute, a youth who is sixteen or seventeen years old at the time of the alleged offense and is charged with a specified list of offenses is automatically tried as an adult without a hearing.⁶ In other words, no court is allowed to consider factors such as the youth’s age, history of trauma, mental health issues, developmental delays, or other mitigating circumstances, nor is a court allowed to consider whether the youth could be more amenable to rehabilitation in the juvenile system. Additionally, once transferred to adult court, a youth is

Under Washington law, the majority of juveniles tried as adults are moved to adult court without any consideration of their social histories such as childhood abuse or mental illness and without any consideration of the circumstances of the crime for which they are charged.

In contrast, under the discretionary declination statute, the juvenile court may decline jurisdiction and transfer a case to the adult court following a hearing if the court determines that doing so would be in

the best interests of the youth or the public.⁸ At the declination hearing, the court considers eight factors set out by the United States Supreme Court in *Kent v. United States*, including whether the alleged offense was premeditated, the sophistication and maturity of the youth, and the prospects that the youth can be rehabilitated if retained in the juvenile system.⁹

Table 1: Youth Automatically Tried as Adults by Age

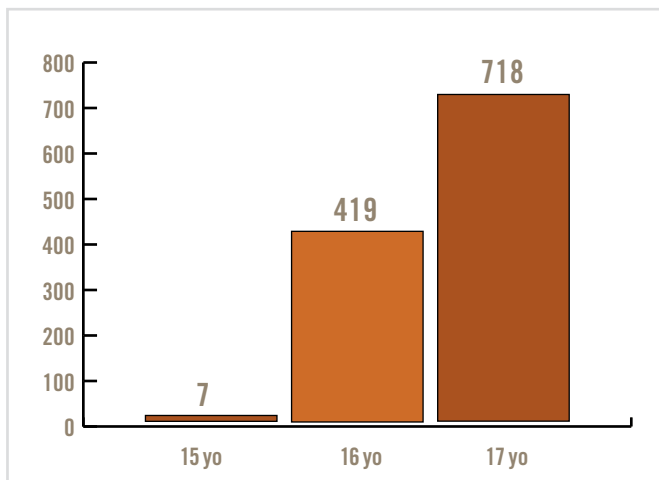
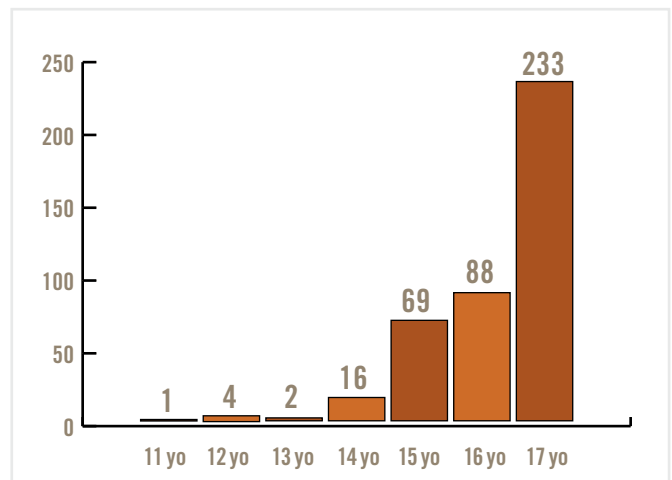


Table 2: Youth Tried as Adults after Discretionary Decline by Age



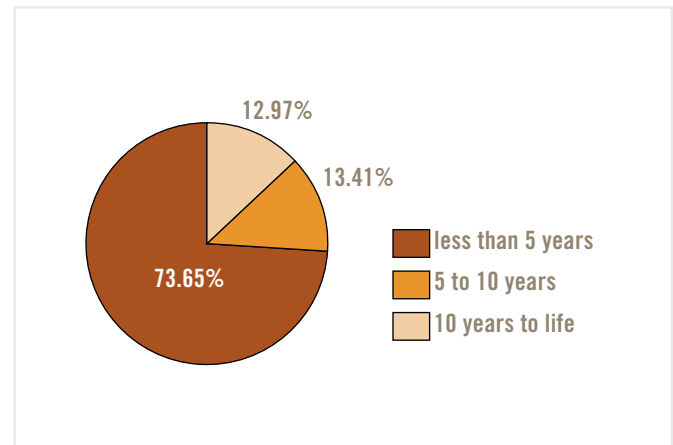
In recent years, a youth as young as eleven years old was tried as an adult in Washington



Washington’s Sentencing Guidelines Commission provided data regarding all youth who were declined for trial and sentenced in adult court between July 1, 1999 and June 30, 2007 (*hereinafter referred to as the “SGC Data Set”*). In that time period, 1,558 youth were transferred to adult court through either automatic declination (1,145 youth) or discretionary declination (413 youth). The two most prevalent crimes for auto declinations are robbery (40%) and assault (27%); the two most common crimes for discretionary decline are property crimes (40%) then assault (23%).¹⁰ While the great majority of youth in the SGC Data Set were in their late teens, those sent to be tried in adult court included youth as young as eleven years old.¹¹

Once declined to the jurisdiction of an adult criminal court, youth are subjected to adult sentencing structures if convicted. In the seven years included in the SGC Data Set, over 200 youth were sentenced to serve prison terms between ten years and life in prison without the possibility of parole. Currently there is no standardized process for reviewing the rehabilitative progress of those youth during the term of that sentence to see if early release is appropriate.

Table 3: Sentencing of Youth Tried as Adults



It is also worth noting that in the same time period almost 75 percent of youth declined to the adult system received a sentence of less than five years, with many receiving sentences that would be completed before their eighteenth birthday. Because youth can be detained in the juvenile system until the age of twenty-one,¹² these figures suggest that their transfer to the adult court was unnecessary and that appropriate treatment of the youth may have been afforded through retention in the juvenile justice system.

NEWLY AVAILABLE RESEARCH AND DATA RAISES QUESTIONS REGARDING THE TREATMENT OF YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM

Developments in scientific and psychosocial research in recent years suggest that Washington laws that allow for the trial, sentencing, and incarceration of youth in the adult system should be reexamined.

As detailed herein, recent breakthroughs in brain development research have shown that adolescent brains are anatomically different than those of adults. This anatomical immaturity renders youth less able to assess risks, control impulsive behavior, and engage in moral reasoning—all of which are implicated when considering a youth’s culpability for his or her actions. This same research also suggests that adolescents are more amenable to rehabilitation than adults because one’s character continues to form as the brain matures. As such, adolescents typically “age out” of delinquent behavior as they move toward adulthood.

Recent studies have also shown that subjecting adolescents to the adult criminal justice system may actually increase future criminal behavior.¹³ This is likely due to adolescents incarcerated in adult facilities having reduced access to treatment and rehabilitative services while at the same time being exposed to an adult criminal culture rife with violence and antisocial behavior.

Finally, data collected by Washington’s Sentencing Guidelines Commission shows that youth of color—particularly African American and Native American boys and girls and Asian American girls—are disproportionately represented amongst adolescents who are tried as adults. This data highlights the need for culturally competent and gender-responsive services for at-risk youth.

Discoveries in Adolescent Brain Development

The development of brain-imaging technology has allowed scientists to better understand anatomical immaturities in adolescent brains that have significant implications for criminal justice.

Scientists have discovered that the frontal cortex, the region of the brain associated with “impulse control, risk assessment, and moral reasoning,” develops after late adolescence. Due to the

“Adolescents’ behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer’s naked eye, but in the very fiber of their brains.”

***Medical and psychiatric experts’ briefing to the United States Supreme Court
Roper v. Simmons***

anatomical immaturity of the frontal cortex, youth utilize the amygdala, part of the “emotional center” of the brain, which is “associated with aggressive and impulsive behavior,” rather than the prefrontal cortex, which “is associated with a variety of cognitive abilities, including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments.”¹⁴

As a result, even fully functioning older adolescents are less capable than adults at assessing risks, controlling impulsive behavior, and moral reasoning. The impairments are likely to be even more severe for youth with developmental disabilities, mental illness, brain injury, or chaotic social histories.¹⁵

The recent advances in brain development research also provide important insight into the amenability of youth to rehabilitation. Due to the incomplete formation of the adolescent brain, the personality traits of youth are in flux, leaving time for additional character formation. As the brain continues to develop, most youth “age out” of delinquent behavior as they move toward adulthood.¹⁶

In 2005, the United States Supreme Court considered adolescent brain and psychosocial development in relation to criminal behavior in *Roper v. Simmons*. The Roper Court agreed with scientific experts and drew three distinctions between adolescents and adults. First, the Court recognized that youth are comparatively more immature than adults and that their immaturity may lead to reckless behavior. Second, the Court noted that youth are more susceptible than adults to negative influences such as peer pressure. Third, the Court recognized that the personality traits of youth are in flux, leaving time for additional character formation.¹⁷ Each of these conclusions has repercussions for the manner in which Washington tries, sentences and incarcerates youth as adults.

Treating Adolescents as Adults Undermines Public Safety

Treating adolescents as adults may actually increase crime and therefore negatively impact public safety. A November 2007 Morbidity and Mortality Weekly Report released by the Centers for Disease Control concluded that “[a]vailable evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth.”¹⁸ The study, conducted by the Task Force on Community Preventive Services, reviewed available rigorous analyses regarding deterrence of future criminal activity by the particular youth subjected to the adult system (specific deterrence) and by all youth who may become involved in the criminal justice system in the future (general deterrence). The Task Force concluded:

*“The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. **To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.**”¹⁹*

“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, ‘[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.’”

*United States Supreme Court
Roper v. Simmons*

“The theory that trying youth as adults reduces violence is false. The Task Force found strong evidence that shows that youth who have been previously tried as adults are, from available evidence, 34 percent more likely to commit violent crimes than youth retained in the juvenile system.”

Dr. Robert A. Hahn
Centers for Disease Control
*Task Force on Youth and the Criminal Justice System*²⁰

The distinction in outcomes for youth treated as juveniles versus those treated as adults is not surprising given the research regarding the anatomy of the adolescent brain. The underdeveloped frontal cortex of the adolescent brain renders adolescents both more amenable to rehabilitation and more susceptible to negative influences. As detailed below, transferring youth to the adult system runs counter to both of these scientific findings, and undermines the original rationale for trying adolescents as adults: public safety.

The amenability of youth to rehabilitation supports retention in the juvenile system. The juvenile detention system is designed for the primary purpose of rehabilitating youth, whereas adult facilities are more punitive in nature. In the adult system, rehabilitative services and programs are fewer and farther between. For example, youth in adult facilities are less likely to have access to mental health treatment.²¹ Although mandated to provide educational services to youth,²² adult jails and prisons are less equipped than juvenile facilities to provide appropriate educational programming. The lack of access to rehabilitative programming and pro-social activities is highly detrimental to adolescents.

The greater susceptibility of youth to negative influences highlights the danger of transferring youth to adult correctional settings where they will be exposed to an adult criminal culture rife with violence and antisocial behavior. As a result, “adult institutions may socialize juveniles into becoming chronic offenders when they otherwise would not have.”²³ This process is known colloquially as “felon finishing school.”

Washington’s youth may be exposed to this environment even before being found guilty; under Washington law, youth transferred to adult court for trial may be incarcerated with adults.²⁴ Whether or not youth are housed with adults while awaiting trial varies from county to county. Of those youth who are convicted, many serve the first years of their sentence in a juvenile facility, but often go on to serve time in an adult prison.

Along with exposure to serious antisocial behavior, youth incarcerated in adult facilities are at significant risk of psychological harm. Youth incarcerated with adults are nearly twenty times more likely than other adolescents to commit suicide, with an unknown number of additional non-lethal suicide attempts.²⁵ Even brief periods of confinement with adults can result in suicidal behavior; nearly one quarter of suicide attempts take place on the first or second day in jail.²⁶

Along with often pre-existing mental health problems, this suicidal behavior can be explained in part by the significant risk of physical and sexual victimization. Physical violence takes many forms, including individual assaults, gang attacks, riots, and murders.²⁷ Sexual assault of youth confined in adult facilities is also widespread. In implementing the Prison Rape Elimination Act of 2003, the United States Congress found that “[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”²⁸ The exposure to sexual violence may itself be a death sentence for these juveniles. By year end 2005, tens of thousands of state and federal prisoners, and an untold number in local jails, were infected with sexually transmitted diseases such as HIV/AIDS and hepatitis C.²⁹

Faced with the near constant threat of assault, youth in adult facilities have limited options. Many engage in disruptive behavior, such as participating in gang activities, in order to obtain protection from other inmates. Others seek attention and intervention by corrections staff through misbehavior.³⁰ Both options create safety and security concerns for corrections staff and the youth themselves. The remaining alternative is to request placement in protective custody, which in Washington typically means solitary confinement (known as “segregation”) for up to twenty-three hours a day. That isolation can have devastating consequences for youth. Confinement in segregation can prevent youth from participating in rehabilitative and pro-social activities, such as education, chemical dependency treatment, and vocational training. Prolonged isolation can result in serious mental health issues and is particularly dangerous for those youth who already suffer from mental illness. One federal court described placing a mentally ill person in isolation as “the mental equivalent of putting an asthmatic in a place with little air to breathe.”³¹ Washington’s Department of Corrections has recently recognized that prolonged isolation can increase recidivism by making it difficult for releasing inmates to adjust to reentering society.³²

Accordingly, when considering changes to law and policy related to transferring youth to the adult system, consideration should be given to the risks of doing so to both the youth and to public safety.



Youth of Color are Disproportionately Represented

Youth of color are disproportionately represented in the justice system. The reason for this disproportionality is unknown, but it cannot be explained by higher arrest rates for youth of color. In a May 2008 report, Human Rights Watch compared arrest and sentencing rates, showing that Washington was one of ten states where African American youth arrested for murder are significantly more likely to be sentenced to life in prison without the possibility of parole than white youth arrested for murder. According to the report, for every 11.60 African American youth arrested for murder in Washington, one is serving life in prison without the possibility of parole, while for every 17.31 white youth arrested for murder in Washington, one is serving life in prison without the possibility of parole.³³

The SGC Data Set shows that in Washington, the largest disparity is in the declination of African American youth. Although African American youth make up only 5.54 percent of Washington’s juvenile population,³⁴ they make up nearly 25 percent of auto-declinations and over 15 percent of discretionary declinations.³⁵ Native American youth are also over-represented, making up less than 2 percent of the state juvenile population, but 3.14 percent of auto-declinations and 4.60 percent of discretionary declinations. Although Asian American youth are underrepresented in juvenile declinations—making up 7.33 percent

of the juvenile population and 5.65 percent of all declinations—Asian American girls are over represented, making up 15.22 percent of all girls who are declined.

There are also distinctions regarding the type of crimes for which youth of color are declined. According to Washington’s Sentencing Guidelines Commission: “African-Americans have received more Robbery sentences while Hispanics had more Assault sentences, and are also the sole group with Drug sentences. Whites had the largest number of Sex sentences of any known race/ethnicity.”³⁶

Racial disproportionality carries over from declination into the sentencing of juveniles who are tried as adults. Of juveniles sentenced to less than ten years, African American and Native American youth are significantly over-represented, making up 21.61 percent and 3.39 percent respectively. That disproportionality increases when looking at sentences between ten years and life without the possibility of parole. African American youth make up 23.76 percent and Native American youth make up 4.46 percent of youth receiving the longest sentences. Regardless of the sentence range, youth of color are over represented. Youth of color make up only 29.35 percent of Washington’s youth population, but 40.05 percent of youth sentenced as adults.

Table 4: Washington’s Youth Population by Race

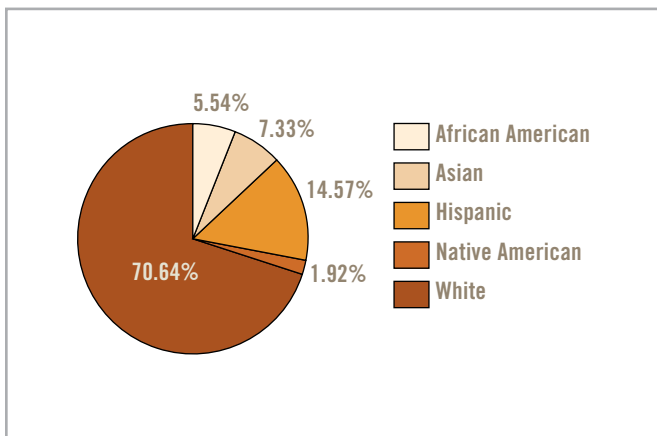
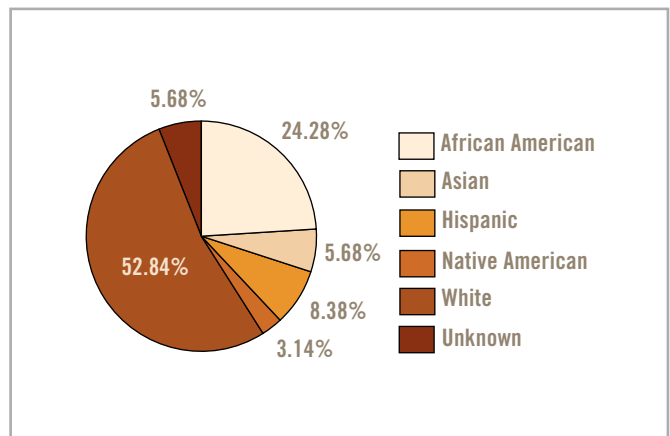


Table 5: Youth Automatically Tried as Adults by Race



While objective data leaves no doubt that youth of color are disproportionately represented from arrest through incarceration, those figures do not reveal why that disproportionality exists. The problem may stem from policies and practices within the justice system, macro level societal factors outside of the justice system (i.e., increased levels of poverty), or some combination of the two. The task of clearly understanding the causes of disproportionate minority contact with juvenile and adult criminal justice systems should be undertaken as soon as possible, as this is a critical component of preventing crime, bettering rehabilitative systems, and improving the lives of youth of color. Research should be conducted to determine the causes so that a meaningful strategy can be developed toward that end.

The Unique Needs of At-Risk Girls Must Be Addressed

It is of critical importance that policymakers pay attention to girls at risk of entering or remaining in the criminal justice system. Although in Washington girls make up only 5.91 percent of all youth in the SGC Data Set who were transferred to adult court, in recent years arrest rates for girls have been increasing nationally. According to the U.S. Bureau of Justice, Office of Juvenile Justice and Delinquency Prevention: “juvenile arrests generally decreased between 1996 and 2005, but the decrease was greater for boys than for girls; the exception to the general trend was arrests for simple assault, which increased for girls while decreasing for boys.”³⁷

The reasons that adolescent girls become involved in the juvenile or adult criminal justice systems are often distinct from their male peers. For

example, “[a] substantial body of research indicates that regardless of race and age, female offenders have higher rates of mental health problems, both internalizing and externalizing, than male offenders.”³⁸ Depression and low-levels of self-worth are common amongst adolescent girls.³⁹ Girls who commit offenses are also more

likely than boys to have experienced childhood

“As many as 92% of girls in detention report having been victims of abuse.”

Reported by the Child Welfare League of America

Table 6: Youth Tried as Adults after Discretionary Decline by Race

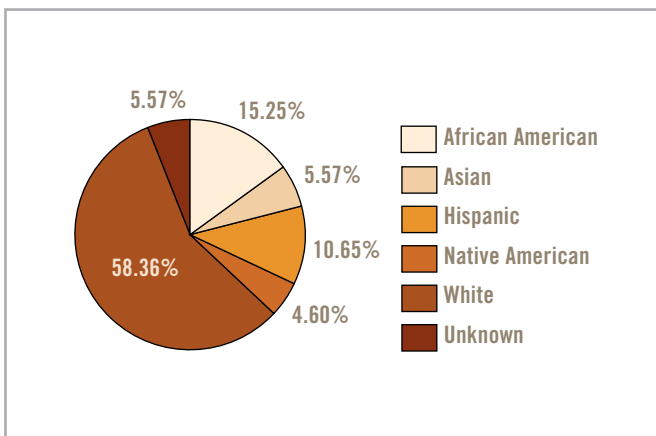
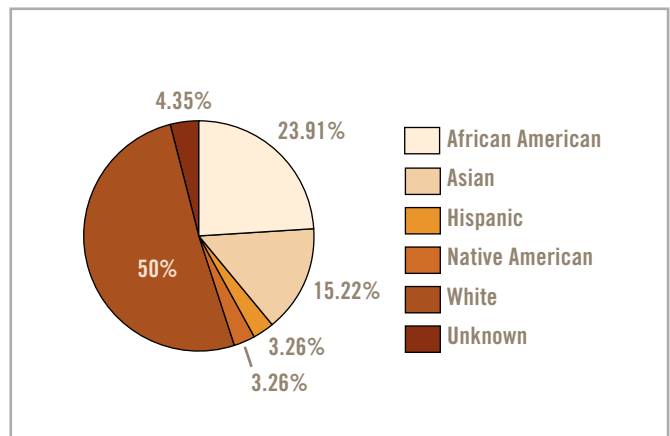


Table 7: Girls Tried as Adults by Race



The Unique Needs of At-Risk Girls.... (continued)

abuse; girls are “typically abused before their first offense.”⁴⁰ Indeed, “[a]s many as 92% of girls in detention report having been victims of abuse.”⁴¹ These problems often lead to failure in school, association with antisocial peers, drug abuse, and a high incidence of runaway behavior.⁴²

Although these unique needs and characteristics are directly tied to a girl’s culpability and amenability to rehabilitation, those factors cannot be considered for cases where automatic transfer to adult court is required. That was true for 63 percent of girls transferred to adult court in the SGC Data Set. The treatment of girls as adults despite their individual circumstances highlights the importance of considering the individual characteristics of all youth rather than requiring automatic transfer.

These characteristics also underscore the importance of providing gender-responsive treatment and services. Services available in both the community and in juvenile and adult detention facilities typically are not designed to be responsive to the special needs of girls.⁴³ Programs which focus on “control rather than the provision of effective support for girls to become successful” are largely ineffective.⁴⁴

If girls are to be successful in these environments they must be provided services that account for gender differentiation and that are responsive to their individual cultural and mental health needs. Just as it is ineffective to homogenize the services provided to girls with those driven by the needs of boys, it is also inappropriate to create a rigid set of services under the assumption that all girls are the same.



Additional consideration should be given to diverting girls from incarceration settings entirely, as researchers have found that: “Diverting female offenders with mental health problems to community-based treatment programs would not only improve individual outcomes, but allow the juvenile justice system to focus on cases that present the greatest risk to public safety.”⁴⁵

Addressing these gender differences is important not just for the safety and health of the girls themselves, but also the community at large. “A review of twenty studies on the adult lives of antisocial adolescent girls found higher mortality rates, a variety of psychiatric problems, dysfunctional and violent relationships, poor educational achievement, and less stable work histories than among non-delinquent girls.”⁴⁶ Providing a nurturing environment where girls can obtain meaningful services early on is critical to providing at-risk girls with the tools they need to have safe and productive adult lives.

SENTENCING WASHINGTON YOUTH TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE

The most extreme form of sentencing for youth in Washington is the sentence of life in prison without the possibility of parole. There are at least twenty-eight adolescents serving life in prison without the possibility of parole in Washington State.⁴⁷ There are numerous other adolescents who are serving sentences that, due to their length (e.g., fifty years), are actually life sentences.⁴⁸

In each of the twenty-eight Washington cases, life in prison without the possibility of parole was the only sentence available to the court. In other words, the court was required by law to sentence the youth to life in prison without the possibility of parole and was not allowed to consider any mitigating circumstances, including the type

that are implicated by discoveries related to adolescent brain development, the youth's age, history of trauma, mental health, or amenability to rehabilitation. This report is the first time these twenty-eight cases have been analyzed for that purpose.

This report also presents the first global analysis of the performance of the justice system in cases involving youth where sentences of life in prison without the possibility of parole were mandatory. A review of these cases reveals that youth facing the most severe sentence they may receive are often deprived of quality representation and other assurances of a fair and just process and outcome.



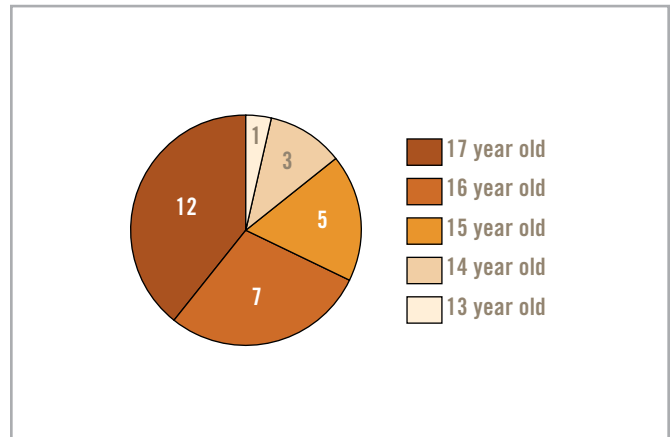
Social Histories of the Youth Sentenced to Life in Prison without the Possibility of Parole

Due to the mandatory nature of the sentence of life in prison without the possibility of parole in the twenty-eight cases, no court was allowed to consider mitigating factors when sentencing these youth. In fourteen of the cases, the youth was also transferred to an adult court without a hearing,⁴⁹ so there was no opportunity at any time for a court to consider factors such as a youth's age, maturity, or amenability to rehabilitation. In order to determine whether such factors may exist, trial and appellate court records, as well as records from the Department of Corrections and information provided by the individuals sentenced to life in prison without the possibility of parole as youth were analyzed for this report.⁵⁰ These records revealed that in each of the twenty-eight cases, there were extreme stressors in the lives of these youth that should have been recognized and addressed long before the youth was involved with crime. Each of these youth had adults who could have intervened, including social workers, educators, and juvenile justice professionals. Had these youth been protected from childhood abuse, provided needed treatment and services, and afforded some degree of stability in their lives, these crimes may have been avoided.

The difficulties experienced by these youth do not excuse the crimes for which they were convicted. These crimes are tragic, and undoubtedly devastating for the victims' families, friends, and communities. When considering appropriate sentencing, it is incumbent upon society to consider the experiences of victims.⁵¹ It is also essential that society recognize the unique characteristics of adolescents, including incomplete brain development. This review provides a tool to measure the latter, by identifying the mitigating circumstances that courts could not consider. The lives of these young men also provide us direction, giving specific insight about just what types of changes must be made in the social safety net in order to prevent future juvenile crime and better protect both our communities and Washington's youth.

Age: The sentence of life in prison without the possibility of parole in these cases was mandatory regardless of the age of the youth. Washington is one of only six states that has a prisoner serving life in prison without the possibility of parole who was as young as thirteen at the time of the crime.⁵² The breakdown of age at the time of the crime for the twenty-eight juveniles in Washington is as follows: one was thirteen years old, three were fourteen years old, five were fifteen years old, seven were sixteen years old, and twelve were seventeen years old.

Table 8: Youth Sentenced to Life in Prison without the Possibility of Parole by Age



Washington is one of only six states that has a youth who was as young as thirteen at the time of the crime serving life without the possibility of parole. Washington's thirteen year old had a mental age of 9.9 years at the time of the crime.

Childhood Abuse: Abuse is uniquely difficult to calculate because many victims do not report their abuse, particularly sexual abuse. Even with that limitation, records reveal that 60 percent of the youth were victims of child abuse and/or severe neglect, with some of these youth suffering multiple forms of abuse. At least 36 percent of the youth were physically abused, nearly 18 percent were sexually abused, 21 percent were psychologically abused, and over 14 percent suffered serious neglect. The U.S. Department of Justice has determined that children who suffer such abuse are significantly more likely than their peers to become involved in delinquent and criminal behavior.⁵³

“One longitudinal study revealed that ‘being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent, as an adult by 28 percent, and for a violent crime by 30 percent.’”

*Reported by the Child Welfare League of America*⁵⁴

Mental Illness: Records show that 43 percent of the youth suffer from mental illness. Evidence of their mental illness was often apparent long before the youth were convicted. We cannot know whether intervention in these juveniles’ lives and mental health treatment would have prevented their crimes, but it is a reasonable possibility. As a result of severe under-funding of community mental health services and a critical absence of such services in many areas of Washington state,⁵⁵ youth like these receive little to no mental health treatment or only treatment that is not designed to address their actual mental health needs. These adolescents often find themselves embroiled in the criminal justice system.

Developmental Delays: A quarter of the youth functioned in the low average range to borderline mentally retarded range at the time of the crime. Records also indicate that another 18 percent showed indications of developmental delays, including provision of special education services. As noted above, developmental delays can exacerbate the behaviors associated with immature brain development, such as assessing risks, controlling impulsive behavior, and moral reasoning. Typically, Washington law would allow a sentencing judge to consider whether a “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired”⁵⁶ but that could not occur in these cases because of the sentence of life in prison without the possibility of parole was mandatory.

Developmental delays also may make it even more difficult for youth to meaningfully negotiate the criminal justice system and make decisions related to that process. Significantly, in every case where the youth was questioned, not one had a parent or attorney present during interrogation by the police. An expert on interrogations and confessions analyzed one of these interrogations and found that a borderline mentally retarded youth had likely provided a false confession, which was evident because the details of the confession did not match the forensic evidence in the case.

“I think there were red flags. ... [I]f someone, especially if it were a counselor-type person, a Boy Scout leader, a church advisor, youth advisor, somebody like that might have called the mental health professional and this kid would have been committed involuntarily, if he didn’t want to go to the psychiatric hospital voluntarily. ... He’d be in the mental hospital now.”

Testimony of psychiatric expert in trial of one youth now serving life in prison without the possibility of parole

Substance Abuse: At least 71 percent of the youth had significant substance abuse problems. Several were intoxicated at the time of the crime. Only a few of the youth had any sort of treatment prior to the commission of the crime. One who did receive treatment had to drop out of the program when his family's insurance ran out. Again, it is reasonable to conclude that if there had been meaningful intervention and treatment provided to these youth, these crimes may never have occurred.

Housing Instability: At least 68 percent of the youth had a history of homelessness and/or run-away behavior. The relationship between homelessness and criminal activity is not fully understood, but some available statistics indicate that there is a connection, particularly when the person who is homeless is also mentally ill.⁵⁷ Additionally, "homeless youth are at a higher risk for anxiety disorders, depression, posttraumatic stress disorder (PTSD), and suicide because of increased exposure to violence while living on their own. Overall, homeless youth are also likely to become involved in prostitution, to use and abuse drugs, and to engage in other dangerous and illegal behaviors."⁵⁸

““My mother and father split up when I was very young. My dad used to beat us so bad that my mother thought that my father would some day beat us to death. So she left him. We saw him for a while, until one of his neighbors killed him.”

Description of the childhood by one youth sentenced to life in prison without the possibility of parole

Parental Instability: Parental histories were not consistently provided in the records reviewed for this study, so the data in this area is particularly limited. Nonetheless, the records did show that 14 percent of the youth had one or both parents who were mentally ill and 36 percent had one or both parents who were chemically dependant. At least 18 percent of the youth had previously been in foster care, 7 percent had parents who had been murdered, and another 21 percent had parents who were in prison. This type of instability has been directly correlated with future criminal activity. For example, youth with a parent in prison are five to six times more likely than their peers to be incarcerated.⁵⁹

Education: The educational histories of many of the youth were chaotic. One dropped out of school in the fourth grade; eleven others only made it through grades in middle school. Several of the youth bounced around from school to school—one was in as many as fourteen schools by the eighth grade. Another dropped out in the eighth grade so he could stay home to protect his sister from being molested by his father. Despite the young age at which these youth left the school system, their departures appear to have gone unnoticed. Again, intervention may have made a difference. The Washington State Institute for Public Policy has determined that programs that increase adolescent access to education services are a cost-effective way of reducing crime.⁶⁰

Degree of participation in the crime:

As is discussed below, a number of these youth were charged along with co-defendants and therefore had varying levels of participation in the crime. For example, according to prosecutors, two of the adolescents were present at the time of the crime but did not actually commit the murders for which they are now being punished by a term of life in prison without the possibility of parole. The court was not allowed to consider the level of participation in imposing the mandatory sentence.

Lack of criminal history: A third of the twenty-eight adolescents were first time offenders with no prior juvenile or adult record. Again, due to the mandatory nature of the sentence, the courts had no opportunity to consider whether these crimes were aberrations in otherwise law-abiding youth who might be able to successfully reenter society at some point without threat of further offense.

Racial Disproportionality: As with declination and other sentencing, the sentencing of youth to life in prison without the possibility of parole in Washington is racially disproportionate. Of the twenty-eight youth serving life in prison without the possibility of parole, fourteen are white, three are African American, four are Asian, three are Hispanic, three are Native American, and one is African American/Native American. Youth of color make up just over 29 percent of Washington's youth population,⁶¹ but 50 percent of youth sentenced to life in prison without the possibility of parole.

“In light of the disproportionate imposition of life imprisonment without parole on young offenders—including children—belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.”

*United Nations Committee on the Elimination of Racial Discrimination*⁶²

Analysis of the Performance of the Justice System When Youth Are Youth Sentenced to Life without the Possibility of Parole

Records related to the twenty-eight cases where youth were sentenced to life in prison without the possibility of parole reveal troubling information related to the quality of defense, prosecution, and judicial action, as well as the treatment of the youth as compared to the treatment of co-defendants. This information provides another reason for reconsideration of the sentencing of the youth serving life in prison without possibility of parole.

Quality of Representation: Two of the youth were represented by a defense attorney who was later disbarred. For one of those youth, a federal court determined that the lawyer failed to provide effective assistance of counsel (but the youth did not receive a new trial due to limitations on the federal courts' ability to grant relief). Five other youth had defense attorneys who were later censured, reprimanded and/or suspended from the practice of law.

The court records also included deficiencies in representation that were never raised on appeal (in some cases this occurs because the trial attorney and appellate attorney are one in the same). For example, in one case defense counsel failed to have a mental health evaluation done, did not call a single witness at the hearing to determine whether the youth would be tried as a juvenile or an adult, spent no more than five hours with the client between the transfer to adult court and the trial, spent only two hours interviewing witnesses, and called no experts at trial. In another case, the youth's attorney failed to present forensic evidence that, given the angle of entry of the bullet, his client was too short to have been the shooter, proving that the co-defendant and not his client was the person who actually committed the homicide.

If not for these problems some of these youth may have been retained in juvenile court or received lesser convictions and shorter sentences even if moved to adult court. For example, one defense attorney who advised his client to agree to be tried in adult court and plead to a sentence of life in prison without the possibility of parole was later disbarred.

Prosecutorial Misconduct: Appellate courts have found that prosecutors engaged in misconduct during the trial of one of the youth. In the case, the prosecutor threatened witnesses with possible criminal action if they spoke with defense counsel without the prosecutor present. Such behavior is improper and undermines confidence in the fairness of the process and outcome.

Judicial Conduct: In two cases, appellate courts found that the trial courts had committed errors during the trials by allowing in improper evidence that should have been excluded. Four of the cases were tried before judges who were censured and/or suspended, and another was tried before a judge who was later admonished on two separate occasions. These actions were taken for behaviors such as "failing to maintain, enforce, and observe high standards of judicial conduct so that the integrity and independence of the judiciary would be preserved." For two of the youth, judges were removed from the bench during the course of their proceedings, but the majority of the decisions made by the judges prior to their removal were not reconsidered.

Treatment of Co-Defendants: Six of the youth had adult co-defendants. Two of the adults received significantly lower sentences; one received a sentence of 13.5 years, the other received a sentence of 29.75 years. Several of the youth had juvenile co-defendants. In many cases, the juvenile co-defendants also received significantly lower sentences, typically in exchange for testifying against their peer. Many of these sentences ranged between six and twenty-five years for practically the same behavior, suggesting that a sentence of a term of years less than life in prison without the possibility of parole can both protect society and allow for a youth's amenability to rehabilitation.

This data raises serious questions about the fairness of the process by which these youth were convicted and sentenced. That is particularly troubling given that these youth faced the most severe sentence youth may receive anywhere in this country—indeed in this world—a sentence of life in prison without the possibility of parole.



RECOMMENDATIONS

As this report notes, scientific evidence shows that the anatomical immaturity of adolescent brains render youth less capable than adults of assessing risks, controlling impulsive behavior, and engaging in moral reasoning as well as more amenable to rehabilitation than adults. At the same time, subjecting youth to the adult criminal justice system has been shown to have a detrimental effect on public safety. For the good of both the public and the youth, Washington lawmakers should review the manner in which many youth are tried, sentenced, and incarcerated as adults, and consider renewing the ideals of crime prevention and rehabilitation central to the juvenile justice system.

A survey conducted by the John D. and Catherine T. MacArthur Foundation in September 2007 found:

- *90% of the Washington public feels that “almost all youth who commit crimes are capable of positive growth and have the potential to change for the better.”*
- *80% feel “that incarcerating youth offenders without rehabilitation is the same as giving up on them.”*
- *“The public feels that programs and services are very effective in rehabilitating youth. The public feels that juvenile and adult facilities are not.”*
- *“The public favors programs and services over incarceration.”*
- *“The public favors reallocating government funds from incarceration of youth offenders to counseling, education and job training.”⁶³*

1. Eliminate life in prison without the possibility of parole as a sentence for adolescent offenders.

Sentencing a youth to spend the rest of his or her life in prison until death is an extraordinarily severe sentence that is not commensurate with the youth’s age or brain and psychosocial development. The sentence fails to recognize adolescent amenability to rehabilitation by prohibiting release from prison even where a youth is fully rehabilitated. Further, imposing this term of imprisonment results in youth being more severely punished than their adult counterparts; by the very fact of their young age, adolescents will typically end up serving a longer sentence than an adult sentenced to life without parole. As of the date of publication, four of the twenty-eight youth serving life in prison without the possibility of parole had served more than twenty years in prison (twenty years is a possible sentence for adults who are convicted of murder⁶⁴); a third of the youth had served more than half of their lives in prison.

Although this reform would eliminate the most extreme sentence available for youth, Washington law could still allow for lengthy sentences for some adolescents where there are strong aggravating factors.⁶⁵ In doing so, Washington would restore judicial discretion in sentencing, retain a strong mechanism for protecting public safety, and allow recognition of the distinctions between adolescents and adults. This reform should apply retroactively as well as prospectively.

This reform would also bring Washington in line with several other American states and the international community. The United States is the only country in the world where youth are serving life in prison without the possibility of parole.⁶⁶ In 2006 and 2007, the United Nations General Assembly voted on resolutions to prohibit the sentencing of youth to life in prison without the possibility of parole.⁶⁷ The United Nations Human Rights Committee determined that the U.S. was not in compliance with the Convention on Civil and Political Rights due to the sentencing of youth to life in prison without the possibility of parole,⁶⁸ and the United Nations Committee Against Torture stated that sentencing youth to life in prison without the possibility of parole “could constitute cruel, inhuman, or degrading treatment or punishment” in violation of that treaty.⁶⁹ Although not a signatory, the United States is also in violation of the United Nations Convention on the Rights of the Child, which prohibits the sentencing of youth to life in prison without the

2. Create a review process designed to promote rehabilitation that allows for meaningful, periodic review of youth sentenced in the adult system.

Adolescent brain science shows that adolescent character development is in flux, making it likely that most youth will age out of delinquent behavior as they progress toward adulthood.⁷³ In order to account for these changes and ensure that youth have an opportunity to reenter society when rehabilitation has occurred, Washington should provide a mechanism for meaningful, periodic review of sentences received by youth in adult court. Such a review process should prove to be cost effective by leading to the release of people who are fully rehabilitated and who do not pose a threat to the community. This reform is supported by the American Bar Association.⁷⁴

To ensure meaningful review, any commission established for this purpose should be staffed with members who have expertise in adolescent development and rehabilitation. Additionally, reviews should occur at regular intervals, both so that the youth has an opportunity to prove rehabilitation, and to encourage the youth to continually progress.⁷⁵

possibility of parole.⁷⁰ Further, in March 2008, the Committee on the Elimination of Racial Discrimination recommended that due to racial disparity, the U.S. should discontinue the sentencing of youth to life in prison without the possibility of parole and review the sentences of all youth serving such sentences.⁷¹

The elimination of life without the possibility of parole sentencing for adolescent offenders is also important given the financial burden such sentencing creates for the public. As of the date of this publication, the yearly cost of incarcerating a single person in an adult prison in Washington averaged just over \$35,000 per year.⁷² Utilizing that figure, the cost to date to incarcerate just the twenty-eight youth sentenced to life without the possibility of parole has been almost \$13 million dollars. Assuming that each reaches a modest life expectancy and assuming a minimal yearly increase in prison costs, it will cost Washington at least another \$46 million dollars to incarcerate those young men. That figure will increase if other youth are sentenced to life in prison without the possibility of parole.

“Whatever the appropriateness of parole eligibility for forty-year-old career criminals serving several life sentences, quite different issues are raised for fourteen-year-old first time offenders sentenced to prison. They may have committed essentially the same acts and have been convicted of the same offenses, but 14-year-olds, certainly as compared to forty-year-olds, are almost certain to undergo dramatic personality changes as they age from adolescence to middle-age. Sentences for such offenders should not conclude today what kind of adults these adolescents will be many years from now. As any parent knows, predicting what teenagers will become by next week, let alone when they are grown adults, is nearly impossible. The key decision should wait to be made until adolescents have reached adulthood and can be assessed more accurately at that stage of their lives. If they have evolved into promising and non-threatening adults, strong consideration should be given to various forms of release on parole for those juvenile offenders.”⁷⁶

***American Bar Association, Criminal Justice Section
Report to the House of Delegates***

3. Eliminate the automatic transfer of adolescents to the adult criminal justice system.

Washington’s auto-declination laws prevent courts from considering whether a youth’s age, mental capacity, culpability, and prospects for rehabilitation make it appropriate to retain the youth in the juvenile justice system. Given evidence that transferring youth to adult court is likely to increase future criminal activity, it is in the public’s interest to ensure that declination is limited to only those cases where sufficient evidence shows that the youth cannot be rehabilitated in the juvenile system.

The advantage to discretionary declination is that while the nature of the offense still plays a central role in the decision—five of the eight prescribed criteria relate to the charged crime—the inquiry does not end there. Unlike with automatic transfer, courts are given the discretion to balance the charged offense with other relevant factors.

This reform should include the elimination of all forms of automatic declination, including the “once an adult, always an adult” rule, which requires automatic transfer to the adult court if a youth has ever previously been transferred.⁷⁷ This rule creates two problems. First, if the youth is found not guilty of the crime charged, the courts are still required to treat the youth as an adult if he or she is later charged with a new offense. There is no other place in Washington law where penalties attach even where a defendant is found not guilty. Second, a subsequent charge may be for a lesser offense that by its nature is better addressed within the juvenile system. As currently written, however, the court would have no discretion to consider that fact and the youth would be automatically moved to the adult court.

4. Set fifteen as the age below which no adolescent may be transferred to adult criminal jurisdiction.

Evidence showing that youth are more amenable to rehabilitation than previously thought supports retaining youth in the juvenile system. This is particularly true for youth who, by virtue of being in childhood or early adolescence, will have several years within the juvenile system to obtain treatment and rehabilitative programming.

5. Create a system to transfer youth back to juvenile court in appropriate cases.

The decision of whether to retain an adolescent in the juvenile system or transfer jurisdiction to the adult court is made at the beginning of a case either automatically or following a hearing. As a case progresses, evidence may be uncovered which suggests that the defendant and public would be better served if the youth was returned to the juvenile system (for example, evidence of a mental illness or developmental delay better treated in a more rehabilitative setting). There is no existing mechanism for the court to consider whether a youth should be returned to the juvenile court after declination has occurred. Washington laws should be amended to create such a mechanism to ensure that those youth that can be rehabilitated in the juvenile system are retained.

6. Require that youth be held in juvenile facilities both pre-trial and post-conviction through the age of twenty-one absent exigent circumstances.

Youth incarcerated while awaiting trial should not be placed in adult facilities where they may be preyed upon and exposed to adult criminal behaviors. Isolating youth in an adult facility is not a sufficient solution, as this can cause significant psychological harm. Washington law prohibits the pre-trial incarceration of youth with adults absent exigent circumstances, but once a youth is declined he or she is considered an adult and therefore not protected by this statute.⁷⁸ Although some counties retain declined youth in juvenile detention facilities, the decision of whether or not to place youth in adult facilities varies from county to county. Amending the existing statute to require that adolescents remain in juvenile facilities absent exigent circumstances would comport with Washington law

regarding post-conviction incarceration of youth⁷⁹ and bring Washington in line with recommendations by numerous corrections organizations. The American Correctional Association, the National Commission on Correctional Health Care, the American Jail Association, the Council of Juvenile Correctional Administrators and the American Bar Association Task Force on Youth in the Criminal Justice System all recommend against incarcerating juveniles with adults.⁸⁰

Further, both the Juvenile Rehabilitation Administration and the Department of Corrections favor holding youth in juvenile facilities up to the age of twenty-one where the youth: (1) may be vulnerable to victimization if transferred to an adult prison; (2) would be able to complete treatment or programming by staying in a juvenile facility; or (3) where reentry to the community may be more successful from a juvenile facility than an adult prison.⁸¹ Washington law should be changed to allow for this retention to occur.

The American Correctional Association, the National Commission on Correctional Health Care, the American Jail Association, the Council of Juvenile Correctional Administrators and the American Bar Association Task Force on Youth in the Criminal Justice System all recommend against incarcerating juveniles with adults.

7. Refocus efforts on prevention and rehabilitation.

When considering reforms in the treatment of youth in the adult criminal justice system, Washington should also refocus its efforts to prevent youth from entering into the criminal justice system at all. To do so, Washington must improve and increase the availability of services in the community. For example, community mental health services are severely limited, with troubling results. Youth who are properly treated in the community are less likely to engage in criminal activity and be subjected to incarceration. Another key aspect of prevention will be improvements to the social safety net so that children who are abused and vulnerable are not ignored until it is too late. “Any program that effectively reduces abuse and neglect can serve as a prevention strategy for juvenile delinquency. Given the firmly established relationship between abuse/neglect and subsequent delinquency and criminality identified by the U.S. Department of Justice, it seems imperative that policymakers embrace emerging technologies that significantly improve decision making and help communities devote resources to children and families most at risk.”⁸²

“We are receiving juveniles that five years ago would have been in an inpatient mental health facility. ... [W]e have had a number of juveniles who should no more be in our institution than I should be able to fly.”⁸⁴

Washington Juvenile Rehabilitation Administrator interviewed by the U.S. House of Representatives

Given the amenability of youth to rehabilitation, Washington also should provide robust services for youth regardless of whether they are convicted as juveniles or adults. Where such services have been provided, there have been significant drops in recidivism. For example, providing even basic education programs has reduced recidivism by 7.0 percent. Vocational education programs resulted in a 9.0 percent decline in recidivism. Studies also showed a 9.3 percent reduction in recidivism where people with chemical dependencies are provided drug treatment in the community. Providing meaningful treatment to mentally ill youth may also effectively reduce recidivism rates, with studies showing reductions of nearly 20 percent.⁸³

Although the provision of treatment and services is a costly endeavor, the benefit of undertaking such expenditures is high. A meta-analysis of all available rigorous evaluations of evidence-based adult and juvenile corrections programs and community prevention efforts conducted by the Washington State Institute of Public Policy (WSIPP) evidences the economic benefit of each dollar spent on treatment and services. WSIPP found

18 Hahn, *supra* note 5 at 1 (emphasis added). Of the six studies analyzed by the CDC, only one study found any level of deterrence; a study conducted by the Washington State Institute for Public Policy found no change in adolescent behavior following declination; and the “remaining four studies all found an undesirable effect in which transferred juveniles committed more subsequent violent or general crime than retained juveniles.” *Id.* at 7. The Task Force also concluded that available studies

Other Secure Facilities 8 (Nov. 2006) (“Researchers believe that the combination of mental health disorders youth bring into detention coupled with the negative effects of institutionalization places incarcerated youth at a higher risk of suicide than other youth.”).

26 Christopher Mumola, U.S. Dep’t of Just., Bureau of Just. Stats., *Suicide and Homicide in State Prisons and Local Jails* (Aug. 2005).

27 *Confronting Confinement, The Comm’n On Safety And Abuse In America’s Prisons* 11-12 (2006).

28 Prison Rape Elimination Act, 42 U.S.C. § 15601 (2003).

29 Laura M. Maruschak, U.S. Dep’t of Just., Bureau of Just. Stats., *HIV in Prisons*, 2005 1 (Sept. 2007); Allen J. Beck & Laura M. Maruschak, U.S. Dep’t of Just., Bureau of Just. Stats., *Hepatitis Testing and Treatment in State Prisons* 1 (Apr. 2004).

30 *Jailing Juveniles*, *supra* note 23 at 7-8 (“Researchers have found that young inmates try to find ways to fit into the inmate culture, which often involves adopting an identity that hides their youthful status and forces them to accept violence as a routine part of institutional life.”).

31 *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

32 Vanessa Ho, *Prisons Shift from Solitary Confinement: New Approach Eases Inmates into Society*, *Seattle Post-Intelligencer*, Apr. 17, 2008.

33 *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States* in 2008, *Human Rights Watch* 7 (May 2008).

34 *Juvenile Justice: Report 2007*, Governor’s Juvenile Justice Advisory Committee 79 (June 2008) (hereinafter “JJAC Report”).

35 Racial data was unknown for 5.65% of juveniles in the SGC Data Set. Gender data was unknown for 3.53% of the SGC Data Set.

36 *Historical Juvenile Declines*, *supra* note 10.

37 Flores, *supra* note 2. Although at first glance, these statistics suggest that girls’ involvement in violent activity, particularly simple assaults, may be increasing relative to boys, the JJAC report concluded otherwise. The researchers compared arrest rates to victimization data and self-reports by juveniles and determined that there has not been any meaningful change in gender differences for violent offenses by juveniles, and that the changes in arrest rates may be due to policy changes and practices in law enforcement. For example, zero tolerance laws related to domestic violence may require the arrest of all parties, including girls who may previously have been considered a victim.

regarding general deterrence were insufficient to conclude whether or not there was any deterrent effect caused by transfer of youth to adult courts. *Id.* at 8.

19 *Id.* (emphasis added).

20 Press Release, Centers for Disease Control, CDC Task Force on Youth and the Criminal Justice System Is Led by UMDNJ Dean – Report Finds Teens in Adult Justice System Victimized, Re-Offend (Apr. 25, 2007).

21 See Doris J. James & Lauren E. Glaze, U.S. Dep’t of Just., Bureau of Just. Stats., *Mental Health Problems of Prison and Jail Inmates* 1, 9 (2006) (only 34 percent of state prisoners with mental health problems received treatment since admission).

22 *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000); RCW 13.04.135.

23 *Campaign for Youth Justice, Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America 7-8* (Nov. 2007) (hereinafter “Jailing Juveniles”).

24 RCW 13.04.116. Some of these youth may be retained in juvenile facilities. RCW 13.04.030(4). For pre-trial detainees, that determination is made on a county-by-county basis. For post-conviction inmates, the decision of whether to house youth in juvenile facilities for all or a portion of their sentence is determined following an administrative hearing. RCW 13.40.280.

25 *Jailing Juveniles*, *supra* note 23 at 10. See also Barry Holman & Jason Zidenberg, *Justice Policy Institute, The Dangers of Detention: The Impact of Incarcerating Youth in Detention and*

9 *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L.Ed. 2d 84 (1966).

10 *Sentencing Guidelines Commission Briefing Paper, Historical Juvenile Declines* (Aug. 2008).

11 Under Washington law, “[c]hildren under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.” RCW 9A.04.050.

12 RCW 13.40.300.

13 Hahn, *supra* note 5.

14 *Amicus Brief of the American Medical Society, et al., Roper v. Simmons*, 543 U.S. 551, 1255 S.Ct. 1183 (2005) at 10. Amici included the American Medical Association, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child & Adolescent Psychiatry, the American Academy of Psychiatry and the Law, the National Association of Social Workers, the Missouri Chapter of the National Association of Social Workers, and the National Mental Health Association.

15 *Id.*

16 *Id.*

17 *Roper*, 125 S.Ct. at 1195.

Endnotes:

1 RCW 13.04.010(2)(d).

2 J. Robert Flores, *Violence by Teenage Girls: Trends and Context*, U.S. Dep’t of Just., Office of Juv. J. & Delinquency Prevention 4 (May 2008).

3 See, e.g., Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aid Has Regrets*, *N.Y. Times*, Feb. 9, 2001, at A19.

4 *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1195-96 (2005).

5 Robert Hahn, Ph.D. et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Vol. 56/RR-9 at 1 (Nov. 30, 2007).

6 RCW 13.04.030(1)(e)(v). If a juvenile is declined to adult court but is found not guilty or is found guilty of a lesser included offense that would not have been subject to auto-declination, jurisdiction returns to the juvenile court. If the case is returned as a result of a conviction on a lesser included offense, the juvenile court has discretion to hold a decline hearing to determine whether the case should be sent back to adult court for sentencing. RCW 13.04.030(1)(e)(v)(E)(ii).

7 RCW 13.40.020(14).

8 RCW 13.04.030(1)(e)(i); RCW 13.40.110(1)-(2).

that there are numerous programs and treatment systems which result in both reductions in recidivism and an associated return on investment. For example, providing multidimensional treatment to foster youth (versus regular group care) results in a 22 percent reduction in recidivism; the per-participant cost benefit of such care is \$77,798 for every dollar spent. Providing Functional Family Therapy to juveniles on probation results in a 15.9 percent reduction in recidivism, with a benefit of \$31,821 for every dollar spent. Numerous other programs also result in reduced crime and cost savings.⁸⁵

The savings to taxpayers that could be achieved by implementing these kinds of programs are substantial. WSIPP determined that a 20 to 40 percent increase in education and employment programming and drug and mental health treatment for adults and juveniles, along with proven prevention programs, could save Washington's state and local taxpayers "between \$1.9 to \$2.6 billion" in direct prison and criminal justice system costs between 2008 and 2030.⁸⁶

8. Ensure policies and practices are culturally competent and gender-responsive. Washington's lawmakers should be mindful of the disproportionate impact existing statutes have on youth of color, including how those statutes are implemented and enforced, and how any changes to those statutes may remedy or exacerbate that problem. An analysis of the underlying causes of existing racial disproportionality will be key to understanding how to remedy this problem.

Programmatic development and policy changes should also be done with consideration for the unique needs and vulnerabilities of at-risk girls. Treatment and service options that account for gender differentiation and that are responsive to the individual cultural and mental health needs of girls should be developed for use in the community and in juvenile and adult corrections facilities. Consideration should also be given to programs which divert girls from incarceration altogether.

38 Elizabeth Caffman, *Understanding the Female Offender*, 18 *The Future of Children* 124 (Fall 2008).

39 *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*, American Bar Ass'n & National Bar Ass'n 9-10 (May 1, 2001).

40 Caffman, *supra* note 38 at 130.

41 Christy Sharp & Jessica Simpson, *Girls in the Juvenile Justice System: The Need for More Gender-Responsive Services*, Child Welfare League of America 16 (2004).

42 *Justice by Gender*, *supra* note 39 at 3-4, 9-10.

43 *Id.* at 12-13, 23.

44 *Id.* at 10, 12.

45 Caffman, *supra* note 38 at 133.

46 *Id.* at 124-25.

47 This figure was arrived at by a review of case files and data from the Sentencing Guidelines Commission. There is no single source which captured all twenty-eight juveniles. As such, there may be additional youth who have been sentenced to life in prison without the possibility of parole that are not accounted for here.

48 See SGC Data Set.

49 Transfer was required in thirteen of the cases pursuant to Washington's automatic transfer statute; there was one additional case in which no hearing was held because it was waived by the youth upon advice of his attorney (the attorney was later disbarred).

50 The social history data provided herein may underestimate the full extent of the problems faced by these adolescents before their crimes. For example, if a defense attorney did not investigate a youth's mental illness or substance abuse history there may be no record of the problem in the court files, but that does not mean the issue was not present. These limitations are most prevalent in cases where there was no hearing to determine whether a youth should be tried as a juvenile or an adult. In such cases there would never be a consideration of the social history of the youth because the decision of whether to try the youth as an adult and the sentence of life in prison without the possibility of parole would have been mandatory. Therefore, to supplement the information available in court records, a review was also conducted of Department of Corrections records and information provided by the twenty-eight youth serving life in prison without the possibility of parole following their convictions.

51 The perspective of victims of juvenile crime, including murder, are not monolithic. While some victims favor sentencing youth to life in prison without the possibility of parole, others believe that youth should be afforded an opportunity for release if they become rehabilitated. See *When I Die They'll Send Me Home: The Perspective of Victims*, Human Rights Watch (Oct. 17, 2008).

52 *Cruel & Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison*, Equal Justice Initiative 20 (Nov. 2007).

53 Richard Wiebush, et al., *Preventing Delinquency Through Improved Child Protection Services*, U.S. Dep't of Just., Office of Juvenile Justice & Delinquency Prevention (July 2001).

54 Sharp & Simpson, *supra* note 41 at 16.

55 See, e.g., *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, Human Rights Watch 19-23 (2003).

56 RCW 9.94A.535(1)(c).

57 Nino Rodriguez & Brenner Brown, *Preventing Homelessness Among People Leaving Prison*, Vera Institute of Justice 1 (Dec. 2003).

58 *Fact Checker: Youth Homelessness*, National Alliance to End Homelessness (June 2007).

59 *The Children of Incarcerated Parents Project*, Oregon Department of Corrections at 1.

60 Wash. St. Inst. For Pub. Pol'y, *Watching the Bottom Line: Cost-Effective Interventions for Reducing Crime in Washington* 5 (Jan. 1998) (regarding TeamChild, a legal service provider that helps youth attain access to educational services).

61 GJJAC Report *supra* note 34 at 5.

62 *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, 72nd Sess. Held on 7 March 2008, (CERD/C/Sr.1853, 1854, 1870), para. 21. See also Human Rights Watch, *supra* note 33 at 9.

63 Laurence Steinberg & Alex R. Piquero, *Do People Value Punishment More than Rehabilitation? A Study of the Willingness to Pay for Rehabilitation and Incarceration of Juvenile Offenders* (Sept. 2007).

64 RCW 9.94A.510; RCW 9.94A.515.

65 RCW 9.94A.537.

66 Committee on the Elimination of Racial Discrimination, *supra* note 62 at 8. In the past year, 5 countries — Burkina Faso, Israel, Kenya, South Africa and Tanzania either cancelled or changed their laws to eliminated the sentencing of youth to life in prison without the possibility of parole. Apart from the United States, there are only three countries — Argentina, Australia, and New Zealand — that allow for the sentencing of youth to life in prison without the possibility of parole; those countries do not actually have any juveniles serving sentences of life in prison without the possibility of parole. *Id.*

67 General Assembly Resolution 62/141, "Rights of the Child," para 36(a), UN Doc. No. A/RES/62/141, (18 Dec. 2007), passed by General Assembly vote, 183 to 1, opposed, the United States; General Assembly Resolution 61/146, "Promotion and protection of the rights of children," para. 31(a), UN Doc. No. A/Res/61/146, (19 Dec. 2006), passed by General Assembly vote, 176 to 1 opposed, the United States.

68 *Concluding Observations of the Human Rights Committee on the United States of America*, 87th Sess. Held on 27 July 2006, (CCCPR/C/SR.2395), para. 34.

69 Committee Against Torture, 36th Session, "Conclusions and Recommendations of the Committee Against Torture: United States of America," at para. 35, UN Doc. No. CAT/C/USA/CO/2, 25 July 2006.

70 Art. 37, Convention on the Rights of the Child, U.N. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167 Convention, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. The only other nation that has not yet ratified the Convention on the Rights of the Child is Somalia.

71 Committee on the Elimination of Racial Discrimination, *supra* note 62, para. 21. See also Human Rights Watch, *supra* note 33 at 9.

72 Washington Department of Corrections, *Statistical Brochure* (July 2008).

73 Roper, 125 S.Ct. at 1195-6.

74 American Bar Association Policy 105C: *Advocates Balance of Interests in Sentencing Youthful Offenders*.

75 See generally *Confronting Confinement*, *supra* note 27 (security and safety for both corrections staff and inmates improves where inmates have access to programming activities and treatment).

76 American Bar Association, Criminal Justice Section: Report to the House of Delegates regarding Policy 105C (adopted 2008).

77 RCW 13.40.020(14).

78 RCW 13.04.116.

79 RCW 13.40.280; RCW 72.01.410; RCW 72.01.415.

80 American Correctional Association, *Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction* (Jan. 2004); American Correctional Association, *Public Correctional Policy on Juvenile Justice Policy* (Jan. 2002); American Bar Association Criminal Justice Section, *Task Force on Youth in the Criminal Justice System*, youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001); National Commission on Correctional Health Care, *Health Services to Adolescents in Adult Correctional Facilities* (May 1998); American Jail Association, *Juveniles in Jails Resolution* (May 1993); Council of Juvenile Correctional Administrators, *Position Paper on: Waiver and Transfer of Youths to Adult Systems*.

81 Letter from John Clayton, Assistant Secretary, Juvenile Rehabilitation Administration to Sentencing Guidelines Commission (Sept. 8, 2008).

82 Wiebush, *supra* note 53 at 18.

83 See Steve Aos, et al., *Wash. St. Inst. for Pub. Pol'y, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (Oct. 2006) at 9.

84 Holman & Ziedenberg, *supra* note 25 at 8.

85 Aos, *supra* note 83 at 9.

86 *Id.*



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