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PUNISHMENT, PROPORTIONALITY AND JURISDICTIONAL TRANSFER OF ADOLESCENT OFFENDERS: A TEST OF THE LENIENCY GAP HYPOTHESIS

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**PUNISHMENT, PROPORTIONALITY AND JURISDICTIONAL TRANSFER
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In the past two decades, nearly every state has expanded its authority and simplified its procedures to transfer adolescent offenders from juvenile to criminal (adult) courts. As a result, the use of jurisdictional transfer has grown steadily. These developments reflect popular and political concerns that punishment in juvenile courts is too lenient for serious crimes committed by adolescents. Yet there is mixed evidence that expanded transfer authority has produced more certain or severe punishments for adolescents prosecuted in criminal courts. Some empirical studies show that adolescents transferred to criminal court are more likely to be convicted, sentenced to prison, and serve longer sentences, compared to similar cases that remain in the juvenile court. Other studies show that transferred cases receive similar sentences or receive less severe punishments. In this article, we report the results of a natural experiment comparing detention, disposition and custodial sentence lengths for matched groups of adolescents charged with serious felony offenses in juvenile or criminal courts. We report that adolescents prosecuted as adults are at a greater risk of detention and incarceration, and if incarcerated, sentenced to longer sentences than adolescents in juvenile courts. Yet the disparity between outcomes in juvenile and criminal courts is not as large as the rhetoric surrounding this issue would lead one to believe. The resilience of common law doctrine of diminished culpability of adolescents is evident in the limited effects of expanded jurisdictional transfer activity on sentencing and punishment of adolescents in criminal court. We discuss the jurisprudential and social policy implications of denying adolescents the latitude of a traditionally more rehabilitative and lenient juvenile court.

I. INTRODUCTION

For over two decades, legislatures across the nation have enacted a variety of laws and policies to criminalize delinquency by relocating adolescent offenders from the juvenile to the adult court.¹ More recently, the U.S. Congress passed legislation to “get

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¹ Keith Bradsher, Fear of Crime Trumps Fear of Lost Youth, NEW YORK TIMES, November 21, 1999.

tough” on youth crime by promoting the transfer of adolescents to criminal court, and has provided funds to facilitate state efforts to do the same.² This legislation threatens to accelerate a trend that began with the passage of New York State’s Juvenile Offender Law in 1978,³ and continues today even as juvenile crime rates have fallen dramatically.⁴ Since 1990, nearly every state and the federal system have expanded the use of adult adjudication and punishment for adolescent offenders.⁵ Some states have expanded the number of cases eligible for judicial waiver, and still others have reassigned the burden of proof for waiver hearings from the prosecutor (seeking to waive a case to criminal court) to the defense counsel (seeking to deny waiver).⁶ In some states, legislatures have excluded specific offenses from juvenile court jurisdiction. Other states permit prosecutorial choice of forum between concurrent jurisdictions.⁷

California’s recent enactment of the ‘Gang Violence and Juvenile Crime Prevention Act’, or Proposition 21, is typical of both the statutory shifts in the boundary between juvenile and criminal court and the procedural changes by which cases cross this boundary. Proposition 21 allows for increased use of transfer to criminal court and greater prosecutorial control over this practice. Enacted through a voter initiative in March, 2000, this law lowered the age of eligibility for transfer to criminal court from 16 to 14. It also shifted discretion from judges, who would previously conduct an investigation to determine if the defendant was amenable to treatment in juvenile court, to prosecutors who can now directly file cases in criminal court if they meet certain criteria⁸. Proponents of this initiative claim that it has been made necessary by a rising tide of juvenile violence and the inadequacy of an outdated juvenile court to deal with

Section 4, p. 3. See, *generally*, Jeffrey Fagan and Franklin E. Zimring, Editors’ Introduction, in *CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (Jeffrey Fagan and Franklin E. Zimring, eds.) (2000).

² Both political parties introduced nearly identical legislation in the 106th Congress that would broaden the categories of juvenile offenses and offenders eligible for transfer to the criminal court. In S. 254, 106th Cong. § 1302 (2000) (“Certain Punishment and Graduated Sanctions for Youth Offenders”) calls for “graduated sanctions” that would require adult punishment after three successive juvenile crimes. This is akin to a “three strikes” law where transfer occurs after a juvenile reaches a threshold of prior offenses and offense severity. The bill provides fiscal incentives to the states, via block grants, to implement these provisions. Similar to S. 10 in the 105th Congress, S. 254 would also eliminate many of the current protections for separating minors from adults in jails and prisons housing adult inmates.

³ 1978 N.Y. Laws. Ch. 478 ' 2. See, Simon Singer, *RECRIMINALIZING DELINQUENCY* (1996). Legislative distrust of juvenile justice officials prompted passage of the 1978 Juvenile Offender Law, an excluded-offense waiver provision that places certain categories of violent offenses automatically in criminal court.

⁴ Symposium, *Juvenile Justice: Reform after One-Hundred Years*, 37 *Am. Crim. L. Rev.* 1409, 1414-15 (2000). See, also, Juan Alberto Arteaga, *Juvenile (In)Justice: Congressional Attempts To Abrogate The Procedural Rights Of Juvenile Defendants*, 102 *Columbia Law Review* 1051 (2002).

⁵ Arteaga, *id.* See *generally* BARRY C. FELD, *BAD KIDS* (1999); Franklin E. Zimring, *AMERICAN YOUTH VIOLENCE* (1998); FAGAN AND ZIMRING *supra* note 1.

⁶ Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 *J. CRIM. L. & CRIMINOLOGY* 471 (1987); *YOUTH IN ADULT COURT: BETWEEN TWO WORLDS* (Donna M. Hamparian et al. eds., 1982); P. GRIFFIN ET AL., *TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS* (1998); Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in FAGAN AND ZIMRING *supra* note 1.

⁷ Barry C. Feld, *Legislative Exclusions of Offenses From Juvenile Court Jurisdiction: A History and Critique*, in FAGAN AND ZIMRING *supra* note 1.

⁸ Sara Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California’s Juvenile Justice System and Reasons to Repeal It*, *GOLDEN GATE UNIVERSITY LAW REVIEW* (2000). The criteria for transfer include: an offense that would be punishable by death or life imprisonment if committed by an adult, the use of a firearm in committing a felony, or accusation that the youth committed any crime either in conjunction with a street gang, for the purpose of interfering with a victim’s constitutional rights, or against a victim 65-years-old or older.

this violence⁹. Yet its critics contend that misleading and error-prone statistics were used to support this claim, in that juvenile and gang violence actually had been declining in recent years¹⁰. Others have criticized the statute as a breach of due process¹¹.

Another example of these shifts, at the national level, is HR 1501, the Violent Juvenile and Repeat Offender Accountability Act of 1999, sponsored by former Representative Bill McCollum of Florida¹². Had it been enacted, this act would have granted federal prosecutors discretion to bypass juvenile court and directly file cases of defendants aged 14 and older in criminal court or age 13 if approved by the Assistant Deputy Attorney General. To be eligible, defendants must be arrested for a violent felony offense or for certain drug offenses. The Act was passed in the House of Representatives by a margin of 249 to 181 in June, 1999, but subsequently died in committee due to an attached provision strengthening firearm laws. This Act is fascinating both for its demonstration of legislators' willingness to forsake a doctrine of diminished capacity for criminally offending youth, and for the ambivalence of legislators who want to crack down on adolescent violence yet not adopt laws restricting youths' access to firearms.

The primary focus of Proposition 21, HR 1501, and similar laws is the removal of adolescent offenders from the juvenile justice system to the criminal courts, in order to increase the certainty and severity of punishment¹³. Once transferred, other companion statutes promote harsh punishment for youths convicted in the criminal court: mandatory minimum terms of secure confinement, mandated confinement in secure settings, and recently, confinement in adult institutions.¹⁴ Several states have also adopted "blended" sentencing schemes, allowing for the transfer of adolescents to adult institutions when they reach age eighteen¹⁵.

⁹ See Proposition 21, in California Ballot Pamphlet, General Election 119 (March 7, 2000); Pete Wilson, *How is Juvenile Justice Served?* SAN FRANCISCO CHRONICLE February 27, 2000. Proponents of increased use of transfer provisions claim that juvenile courts were created to deal with shoplifting and truancy, and are unable to adequately punish violent youth.

¹⁰ Barbara Stack White, *Is this Justice? The 'adult time' law for juveniles hasn't fulfilled its backers' promises* PITTSBURGH POST-GAZETTE, March 18, 2001; Brian Hansen, *Kids in Prison: Are the states too tough on young offenders?* 11 THE CQ RESEARCHER (2001).

¹¹ Raymond, *supra* note 8. See also George Mgdesyan, *Gang Violence and Crime Prevention Act of 1998*, JOURNAL OF LEGAL ADVOCACY & PRACTICE (2001). Critics claim that by transferring all power to choose jurisdiction to the prosecutor curtails a juvenile's due procedural safeguards. According to the U.S. District Court for the District of Columbia, prosecutorial waiver is a short cut that streamlines the juvenile justice process "at the expense of the individual's right to due procedural safeguards." (Raymond, *supra* note 8 at 274). See also Franklin Zimring et al., Amicus Brief for Morgan Victor Manduley et al. vs. the Superior Court of California, County of San Diego, (Fourth Appellate District Court of Appeal 2001)(Nos. D036356, D036456). For arguments against breaches of due process in the *juvenile court*, see Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, NORTH CAROLINA LAW REVIEW (1991); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1997).

¹² 1999 HR 1501; 106, see Title II, sec. 201.

¹³ Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW (1995); Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice* AMERICAN CRIMINAL LAW REVIEW (1998); Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, CARDOZO LAW REVIEW (1995).

¹⁴ See, for example, Cynthia M. Conward, *Where Have All the Children Gone: A Look at Incarcerated Youth in America*, 27 Wm. Mitchell L. Rev. 2435, 2435 (2001).

¹⁵ Richard Redding and James C. Howell, *Blended Sentencing in American Juvenile Courts*, in FAGAN AND ZIMRING *supra* note 1.

Choosing the criteria for legal “adulthood” reflects tensions in sentencing policies between retribution and rehabilitation as well as questions about culpability (criminal liability) and the risk of continued criminality versus behavioral change.¹⁶ Yet theory and law may be less important in the current debate on the boundary of juvenile justice than are popular and political concerns with the perceived leniency of punishment in the juvenile court.¹⁷ The common law assumed that adolescents are less culpable than adults, and the juvenile court institutionalized these notions both jurisprudentially and statutorily.¹⁸ That is, the juvenile court offered a punishment discount for adolescents punished as juveniles, relative to the punishment given to adults. This discount is rooted in the belief that serious crimes committed by young offenders may reflect developmental deficiencies in autonomy and social judgment, suggesting a reduction in their culpability and, in turn, their punishment liability.¹⁹

But for adolescents charged with serious crimes, the principle of penal proportionality would require more severe punishment than that available in the juvenile court.²⁰ For such crimes, the normative demand for punishment requires punitive responses often beyond the limitations of the juvenile court.²¹ Recent developments in transfer law often express the preference of penal proportionality over the common law assumptions of reduced culpability of adolescent offenders.²² In this view, the traditional preoccupation with rehabilitation in the juvenile court, with its limitations on punishment opportunities, deprecates the moral seriousness of crimes and offers inadequate retribution.²³ Proponents of harsher punishments for adolescents argue that punishments that are disproportionately lenient compared to the severity of the adjudicated offense also undermine both the specific and general deterrent effects of legal sanctions.²⁴

¹⁶ FAGAN AND ZIMRING, *supra* note 1.

¹⁷ Putting Consequences Back into Juvenile Justice: Federal, State and Local Efforts: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 106th Cong. 1 (1999) [hereinafter House Hearing II] (statement of Rep. McCollum), available at <http://www.house.gov/judiciary/106-332a.htm>; 143 Cong. Rec. S145 (daily ed. Jan. 21, 1997) (statement of Sen. Ashcroft) (commenting that procedural safeguards afforded to juvenile offenders, such as the confidentiality of juvenile records, “coddle[d] hardened criminals”).

¹⁸ Feld, *supra* note 5.

¹⁹ See Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts* 19 LAW & HUMAN BEHAVIOR (1995); Laurence Steinberg & Elizabeth Cauffman, 20 LAW & HUMAN BEHAVIOR (1996).

²⁰ Franklin E. Zimring, *The Law’s Construction of Children’s Culpability*, in COMPETENCE, CULPABILITY, AND YOUTH: TOWARD A COHERENT SYSTEM OF JUVENILE JUSTICE, 271 (Robert Schwartz & Thomas Grisso eds.) (2000).

²¹ Franklin E. Zimring, *The Punitive Necessity of Waiver*, in FAGAN AND ZIMRING *supra* note 1, at 207.

²² McCollum and Ashcroft statements, *supra* note 17.

²³ See, e.g., FELD, *supra* note 5.

²⁴ Standards also are unstated with respect to specific versus general deterrence of crime. Certainly, the rhetoric and symbolism of these “reforms” has been directed at deterring adolescents as a class from crime commission by raising the perceived certainty and severity of punishment (see M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME AND DELINQUENCY (1986); Simon Singer and David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW AND SOCIETY REVIEW (1988). Yet criminal court punishments for adolescents, like their older cohorts, are accorded to individuals, usually within a discretionary sentencing scheme with broad boundaries that govern the upper and lower limits of confinement. For example, waiver statutes rarely achieve more than a symbolic role in reform, limited from larger impacts by their low base rate and uncertain outcomes in the criminal court (see Jeffrey Fagan and E. Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1990); DEAN J. CHAMPION AND G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE (1991)).

These developments reflect the presumption in modern juvenile justice law that those who commit crimes and are remanded to the criminal court, or even those who are charged with such crimes, are fully culpable for their acts.²⁵ This legal threshold clashes with emerging empirical evidence on the immaturity of adolescents with respect to both their ability to make informed and nuanced judgments about their behavior, and their moral development.²⁶ By ignoring these indicia of reduced culpability, the new transfer or waiver policies offend the common law doctrine of incapacity.

Accordingly, demands for harsher punishment of adolescents are based on perceptions of a "leniency gap" – that is, that juveniles committing serious crimes are punished less severely in the juvenile court due to constrained punishment options.²⁷ These constraints include fewer custodial placements, shorter custodial sentences, and more permissive conditions of release on parole. It is not clear, though, whether such a leniency gap exists. Both equivocal empirical evidence and contrasting theories of felony case processing lead to contradictory predictions about the severity of punishment awaiting adolescents transferred from juvenile to criminal court. Early research on juveniles prosecuted in criminal courts suggested that juveniles may appear less serious in the "stream of cases"²⁸ in criminal court in contrast to older, more experienced offenders. The juvenile usually had less time to accumulate a record in the criminal justice process; as a result, the most restrictive sentences are reserved for older defendants who are viewed as more "dangerous".²⁹ Furthermore, the adolescent defendant's age could lead judges to impose less severe sanctions, due in part to the potential dangers to the youth of incarceration in an adult prison.

But the offense-based criminal court also may be inclined to view *serious* juvenile crime as a threat to public safety and deserving of the most severe sanctions. Some research with chronic violent adolescents adjudicated as adults suggests that they indeed are treated with equal or greater severity as those who remain in juvenile court,³⁰ based simply on the severity of their offenses. In juvenile court, the tension between punishment and treatment may mitigate sentence severity.³¹ Though violent offenders in juvenile court are the most serious cases before the court, the traditional emphasis on rehabilitation, together with administrative and statutory limitations on sanction length or

²⁵ Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 590 (2000). Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 307 (Thomas Grisso & Robert Schwartz eds., 2000).

²⁶ Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 253–56 (1996).; Elizabeth Cauffman, and Laurence Steinberg, *Researching Adolescents' Judgement and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 333 (Thomas Grisso & Robert Schwartz eds., 2000).

²⁷ PETER GREENWOOD ET AL., FACTORS AFFECTING SENTENCE SEVERITY FOR YOUNG ADULT OFFENDERS (1984); James C. Howell, *Juvenile Transfers to the Criminal Justice System: State of the Art* 18 LAW & POLICY (1996) 25.

²⁸ ROBERT EMERSON, JUDGING DELINQUENTS (1969)

²⁹ Martin Roysher and Peter Edelman, *Treating Juveniles as Adults in New York: What Does it Mean and How is it Working?*, in READINGS IN PUBLIC POLICY (John C. Hall et al. eds., 1981); Greenwood et al. *supra* note 27

³⁰ Eg. Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986). See the following section for a more detailed description of studies reaching this conclusion.

³¹ Jeffrey Fagan, "Punishment or Treatment for Adolescent Offenders? Therapeutic Integrity and the Paradoxical Effects of Punishment." 18 *Quinnipiac Law Review* 502, 1999.

severity, suggests that they may be treated less harshly than similar youth in criminal court.

What happens to adolescents once placed in the criminal justice system is the focus of this article. The pace of change, the severity of the new laws, the potential for unintended negative outcomes, and the empirical reality of adult punishment of juvenile offenders creates new urgency to this question. We begin with a review of prior empirical comparisons of punishment in juvenile versus criminal court. Most studies that have addressed the question of a “leniency gap” have several weaknesses and limited reliability. Most focus on only judicial waiver, yet this mechanism is responsible for less than 10% of the adolescents who wind up in criminal court³². Other mechanisms that account for far more adolescents in criminal court, such as legislative exclusion or a lowered overall boundary of criminal court culpability, have received little attention by researchers comparing dispositions across court types³³. Moreover, if discretionary transfer provisions such as judicial waiver operate as intended by weeding out the most serious juvenile offenders for prosecution as adults, then this selection bias would distort comparisons of outcomes in juvenile and criminal courts. In addition, the inconsistencies and ambiguities of results from these previous research efforts necessitate further evaluation.

Then, we address this issue by reporting results of a natural experiment that compares the certainty, celerity, and severity of sanctions for adolescents charged with violent crimes and adjudicated in the juvenile court or criminal court. We compare punitiveness in legal decision making for adolescents aged 15 and 16 who are charged with serious felonies and whose cases are adjudicated in the criminal court in New York City, with a matched sample of case adjudicated in the juvenile court in three counties in northeastern New Jersey. We compare case outcomes in juvenile and criminal court at three stages of case processing: pretrial detention, disposition (including conviction and sentencing), and the length of custodial sentences imposed.

Jurisdictional differences in a single metropolitan area create conditions that allow for a natural experiment.³⁴ In New Jersey, nearly all offenders ages 15 and 16 remain in the juvenile court, while these cases are adjudicated in the adult (criminal) courts in New York City.³⁵ In New York, adolescents are charged as adults at age 15 under the New York Juvenile Offender Law if they commit specific crimes and the statutory age of majority is 16 in New York.³⁶ Thus we compare cases of similar offenders in adjacent

³² Howell *supra* note 27.

³³ For exceptions, see Jeffrey Fagan, *The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POLICY (1996); Singer *supra* note 3

³⁴ See, for example, Mercer Sullivan, *GETTING PAID: YOUTH CRIME AND WORK IN THE INNER CITY* (1989), and Phillippe Bourgois, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* (1995) (showing the diffusion of crime networks and markets across state borders in the New York City metropolitan area, including counties in both New York City and northeastern New Jersey where transportation networks facilitate travel across state borders for criminal activity).

³⁵ We use the term ‘criminal court’ throughout this paper to refer to adult court, as opposed to juvenile court. It should be noted that within New York’s criminal court system, there is a distinction between the misdemeanor ‘criminal court’ and the felony ‘supreme court’. We use the term criminal court to mean this entire court system, and not specifically the lower court.

³⁶ New York Juvenile Offender Law, *supra* note 3. N.Y. Penal Law ' 30.00 Infancy provides:

1. Except as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for conduct.
2. A person thirteen, fourteen or fifteen years of age is criminal responsible for acts constituting murder in

states who are prosecuted as juveniles in one state (New Jersey) and as adults in the other (New York). The article concludes by reviewing the implications of harsher punishment in the criminal court for adolescent offenders on law, jurisprudence and social policy.

II. IS THERE A LENIENCY GAP?

Few studies have studied the effects of statutes and administrative laws that relocate juvenile offenders to the criminal court, and few studies specifically have examined whether jurisdictional transfer from juvenile to criminal court produces the intended outcomes of harsher and more certain punishment. These few published studies have reported equivocal results with regard to whether adolescents in criminal court receive more certain or severe punishment than adolescents in juvenile court. Some early research suggests that juveniles may appear less serious in the "stream of cases" in criminal court in contrast to older, more experienced offenders.³⁷ A greater number of studies, however, have found that youth transferred to criminal court are convicted and incarcerated more often than youth in juvenile court. Yet this general result largely may reflect a selection process whereby only fairly serious cases are chosen for waiver to criminal court by prosecutors and/or judges. Such findings beg the question of whether those very cases would also have received similarly severe dispositions had they been retained in the juvenile court.³⁸ To determine whether the criminal court is itself more punitive than the juvenile court requires comparisons of court responses to equivalent cases.³⁹

A. National Statistics

the second degree . . . ; and a person fourteen or fifteen years of age is criminally responsible for acts constituting the crimes . . . [of] kidnapping in the first degree; . . . arson in the first degree; . . . assault in the first degree; . . . manslaughter in the first degree; . . . rape in the first degree; . . . sodomy in the first degree; . . . aggravated sexual abuse; . . . burglary in the first degree; . . . burglary in the second degree; . . . arson in the second degree; . . . robbery in the first degree; . . . robbery in the second degree . . . ; or . . . an attempt to commit murder in the second degree or kidnapping in the first degree.

³⁷ See *supra* notes 27, 28. See also I. Sagatun et al., *The Effect of Transfers from Juvenile to Criminal Court: A Loglinear Analysis*, 8 CRIME AND JUSTICE (1985); Kristine Kinder et al., *A comparison of the Dispositions of Juvenile Offenders Certified as Adults with Juvenile Offenders Not Certified*, JUVENILE AND FAMILY COURT JOURNAL (1995).

³⁸ To the extent that sentence lengths in criminal court exceed those available in juvenile court, particularly for youth with only a short time remaining until the end of juvenile court jurisdiction, the criminal court will be more punitive (see e.g. Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, in CRIME AND JUSTICE: AN ANNUAL REVIEW (Michael Tonry ed. 2000; Donna Bishop and Charles Frazier, *Consequences of Transfer* in FAGAN & ZIMRING *supra* note 1). However, states are increasingly experimenting with blended sentencing and other ways of extending the juvenile court jurisdiction at sentencing (see Richard E. Redding and James C. Howell, *supra* note 15), which may partly eliminate this effect.

³⁹ See, e.g., PETER GREENWOOD ET AL., AGE CRIME AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT (1980); Peter Greenwood, *Differences in Criminal Behavior and Court Responses Among Juvenile and Young Adult Defendants*, in 7 CRIME AND JUSTICE (Michael Tonry and Normal Morris eds., 1986); Joel Eigen, *Punishing Youth Homicide Offenders in Philadelphia*, 72 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1981); Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME AND DELINQUENCY (1987); Barry C. Feld, *supra* note 5.

We begin by examining recent national statistics to consider the general trend of greater punitiveness for youth in the criminal court, and whether this is due largely to differences between the cases processed in juvenile and criminal courts. Strom, Smith & Snyder⁴⁰ present case processing statistics for juveniles (below age 18) in both juvenile and criminal courts from the 75 largest counties in the country, during 1990, 1992, and 1994. We show some of their findings in Table 1. The first result shown concerns the aggregate distribution of arrest charges in the two courts. Overall, juvenile court cases are considerably less violent than those of youth in the criminal court. Of defendants at least fifteen years old in juvenile court, only 22% were charged with violent offenses and 46% with property offenses. In contrast, in the criminal court, 66% were charged with violent offenses and 17% with property offenses.

This disparity among types of cases in each court affects detention, conviction, and sentencing rates. Overall, the juvenile court detained only 35% at any time prior to disposition, while the criminal court detained 49% of the defendants from arrest until disposition. Yet stratifying cases rather grossly on the most serious charge and separately examining violent, property, and drug offenses reveals that this disparity is due mostly to different treatment of violent offenders (43% vs. 56% are detained, though detention rates are similar for property and drug cases). We also find that criminal courts convict⁴¹ at a slightly higher rate than the juvenile court (59% vs. 55%). This difference generally holds for each charge type, and is actually somewhat larger for drug offenses.

At sentencing, juvenile court residential placements could be compared either to adult prison sentences only, or to both adult jail and prison sentences. Because the distinction between jail and prison largely turns on sentence length (less than vs. more than a year), both are comparable to some juvenile court residential placements. The data from Strom et al. permit us to compare the adult incarceration rate both with and without jail sentences. If we include jail sentences in the criminal court's incarceration rate, then the overall rate is considerably higher than the juvenile court rate (68% vs. 40%). While this difference is largest for violent offenses, the criminal court incarcerates more often for each charge type. If criminal court incarceration is restricted instead to prison sentences, then the overall criminal court imprisonment rate still remains higher than the juvenile court's incarceration rate (49% vs. 40%), but the difference is limited to violent offenses (68% vs. 44%), and even reverses for drug offenses.

Table 1 considers data aggregated across the various legal mechanisms by which juveniles appear in criminal court (i.e., judicial waiver, prosecutorial election, legislative exclusion). Most of those mechanisms require individuals to select more violent, serious, and/or chronically offending youth for transfer to the criminal court. In contrast, when state law sets the overall age of criminal majority below eighteen, no discretionary transfer decisions are made. In these states, some adolescents younger than 18 are considered adults by definition⁴², not by any discretionary selection process. Because the

⁴⁰ KEVIN STROM ET AL., *JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS* (1998). These reports use data collected by the Bureau of Justice Statistics from the 75 most populous U.S. counties in its biennial State Court Processing Statistics program.

⁴¹ For ease of exposition, we use the term "conviction" in describing both juvenile and criminal court outcomes, although technically the juvenile court adjudicates rather than convicts.

⁴² Youth can be adults 'by definition' by virtue of a lower overall threshold for criminal age of majority. Most states maintain the age of 18 as their age of criminal majority, 8 states use age 17, and 3 use age 16. However, even when statutes set an age threshold for specific offenses, police and prosecutors can influence whether the offender falls above or below the offense threshold for transfer by exercising

cases of such youth who are adults by definition are not restricted to serious offenses or chronic offenders, the dispositions of these cases might be more similar to dispositions of juvenile court cases, and less like the dispositions of youths whose cases are more serious and therefore transferred to the criminal court via other (discretionary) mechanisms.

Table 1. Charges and Dispositions for Youth in Juvenile and Criminal court, 1990, 1992, and 1994 (% of All Cases)

		All Cases (%)	Violent Offenses (%)	Property Offenses (%)	Drug Offenses (%)
Charge Distribution	Juvenile Court	100	22	46	13
	Criminal court	100	51	21	15
Detained	Juvenile Court	35	43	29	40
	Criminal court	49	56	26	37
Convicted	Juvenile Court	55	51	55	55
	Criminal court	59	56	61	68
Incarcerated in Jail or Prison	Juvenile Court	40	44	35	41
	Criminal court: prison sentences	49	68	32	34
	Criminal court: jail or prison sentences	68	79	57	50

Source: Strom et al., *supra* note 40, Tables 6-11, 13.

Note: Juvenile court cases are limited to offenders 15 years of age or older; charge distributions are at conviction; detention in juvenile court is at any time and for any length of time before disposition, but in criminal court continuously until disposition, which somewhat inflates the relative juvenile court rate; incarceration is only of those convicted. Only three charge categories are shown, therefore the percentages within court jurisdiction are less than 100%.

Table 2 shows trends identified by Brown and Langan⁴³ comparing dispositions in states where adolescents reach the age of majority below 18 by statute (and are excluded from juvenile court), with states where adolescents are transferred to adult courts by discretionary decisions of judges or prosecutors. Brown and Langan estimate that of youth who were adults by definition and convicted of felonies in 1994, only 28% were convicted of violent offenses and 31% of property offenses. In contrast, most of the juveniles transferred to criminal court were convicted of violent offenses (53%) and 24%

discretion in charging. For example, a robbery in the second degree for an offender age 14 falls under the New York Juvenile Offender Law, while a third degree robbery for the same person is a juvenile offense. The characteristics of second versus third degree robbery involve subjective criteria such as the degree of force used, giving wide berth to police and prosecutors to steer cases toward the juvenile or criminal court.

⁴³ JODI M. BROWN AND PATRICK A. LANGAN, STATE COURT SENTENCING OF CONVICTED FELONS, 1994 (1998). These estimates are based on data from another Bureau of Justice Statistics biennial statistics program, the National Judicial Reporting Program, based on a sample of all felony sentences in state courts.

were convicted of property offenses. By comparison, only 19% of convicted adults (over 18) were convicted of a violent offense and 32% of a property offense. Thus, the cases of youth transferred to the criminal court seem to stand out for their severity, involving more violent offenses than the cases of youth who are adults by definition, the overall adult felony caseload, or the overall juvenile court caseload (22%, shown earlier in table 1).

Not surprisingly, when convicted, the transferred youth receive prison sentences more often than youth who are adults by definition (63% vs. 54%), or adults in general (46%). This difference largely results from the differing charge distributions. When we look separately at violent, property, or drug offenses, these sentencing disparities are greatly diminished (e.g., 78% vs. 73% received prison sentences for violent offenses).⁴⁴

These national aggregates suggest that the criminal court is more punitive to juveniles in general than is the juvenile court. At the same time, we see that much of that punitiveness is due to the selection of more serious cases for transfer to the criminal court, and the resulting differing charge distributions. Within charge categories, we find much smaller differences. Though these selection effects can be partially controlled by looking within charges, it is hard to match cases well using national figures. Such aggregates include cases across many different localities, which vary in criminal and juvenile justice policies and practices. These localities may have nonequivalent offense definitions or charge distributions, and may report to the national statistics program at different rates, among other difficulties. To determine whether the criminal court is more punitive than the juvenile court for equivalent cases, therefore, requires more local studies, which can focus more carefully on and calibrate these comparisons.

⁴⁴ DAVID J. LEVIN ET AL., STATE COURT SENTENCING OF CONVICTED FELONS, 1996 (2000) report similar results for the next biennial survey, for 1996 cases. The overall difference between youth transferred and youth punished as adults by definition is somewhat larger (60% vs. 37% prison sentences, respectively). Again, this difference seems largely attributable to the different charge distributions, so that sentences were similar for violent or drug offenses. However, in 1996, youth who were adults by definition seem to receive considerably less imprisonment than earlier (down from 47% to 18% receiving prison sentences), with the result that transferred property offenders seem to receive relatively more punitive sentences (46% prison).

Table 2. Incarceration in Criminal Court, 1994

		All Cases (%)	Violent Offenses (%)	Property Offenses (%)	Drug Offenses (%)
Charge Distribution	All Adult Felony Convictions	100	19	32	31
	Under 18 and Adults by Statute	100	28	31	24
	Youth Transferred to Criminal Court	100	53	24	13
Prison Sentences Only	Adults over 18	46	62	42	43
	Under 18 and Adults by Statute	54	73	47	47
	Youth Transferred to Criminal Court	63	78	42	45
Jail or Prison Sentences	Adults over 18	72	83	70	71
	Under 18 and Adults by Statute	66	77	62	56
	Youth Transferred to Criminal Court	80	88	65	70

Source: Brown & Langan *supra* note 43, Tables 1.1, 6.2, 6.4, 6.5.

Note: Cases limited to those convicted in criminal court. Percentages in specific charge categories do not add to 100% since they are subsets of all offenses.

B. Local Studies of Cases Filed for Waiver

In local or single jurisdiction studies, it is especially clear that local decision makers select some cases for transfer while retaining others, with the intent of transferring a different set of cases to criminal court than the cases retained in the juvenile court.⁴⁵ We limit our review of local studies to those using conservative strategies to control for selection bias.⁴⁶

⁴⁵ How serious a methodological problem these selection effects pose depends on the local realities of transfer. For example, Charles Frazier, *Deep End Juvenile Placement or Transfer to Adult Court by Direct File?* (1991), found little difference between the cases selected for prosecutorial waiver to retained cases in Florida. See also Donna Bishop and Charles Frazier, *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME AND DELINQUENCY (1989); Donna Bishop and Charles Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME JOURNAL OF LAW, ETHICS, AND PUBLIC POLICY, (1991).

⁴⁶ For more comprehensive reviews, see Donna Bishop, *supra* note 38; Bishop & Frazier *supra* note 38;

Researchers studying this process usually control for selection bias in judicial or prosecutorial transfer by limiting the comparison group of juvenile court cases to the most serious cases, making them more comparable to the generally more serious (transferred) criminal court cases. One strategy is to limit comparisons only to cases that were considered for transfer to criminal court. Criminal court treatment of cases that were in fact transferred is then compared to the juvenile court treatment of those cases that were considered for transfer but ultimately retained in juvenile court. This narrows considerably the range of cases to be compared, controlling for much of the selection bias.

Such studies generally find criminal courts to be more punitive, although not without exception. For example, Rudman et al.⁴⁷ examined cases considered for transfer between 1980 and 1984 in three jurisdictions, Boston, Newark, and Phoenix. They report that over 90% of cases in their sample considered for transfer were convicted, regardless of whether cases were in fact transferred to criminal court; however, the criminal court imposed longer sentences than did the juvenile court. Barnes & Franz⁴⁸ examined all the cases considered for transfer in a large metropolitan county in northern California between March 1978 and December 1983. They found that person offenses received harsher sentences in criminal court than in juvenile court, but that property offenses were treated more leniently in criminal court. Podkopacz and Feld⁴⁹ examined cases considered for transfer in Hennepin County, Minnesota, from 1986 through 1992, and also controlled for many case characteristics using multivariate statistical procedures. They found that transferred cases were more likely to be convicted than cases retained by the juvenile court, and generally received longer sentences as well.

Lanza-Kaduce et al.⁵⁰ utilized another strategy to control selection bias. For each of 475 cases transferred to the Florida criminal court in 1995 or 1996, a matching case was identified in the juvenile court with equivalent current offense, number of charges, criminal history, and demographics. Outcomes were then compared for the pairs of cases. Fewer cases were disposed and sentenced in juvenile court than in criminal court (325 vs. 395, or 68% vs. 83%). Of those sentenced, the juvenile court made fewer residential placements (153, or 47%) than the criminal court (247, or 63%, jail and/or prison).

Fagan⁵¹ examined the effects of the New York model relatively soon after enactment of the Juvenile Offender Law⁵², which excludes certain adolescents from juvenile court. In studying the outcomes of 1981-1982 cases, he took advantage of a natural experiment afforded by the state line (the Hudson River) running through the larger New York City metropolitan area. Because New Jersey retains a traditional system

Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, in CRIME AND JUSTICE: AN ANNUAL REVIEW (Micael Tonry ed. 1998); Howell, *supra* note 27.

⁴⁷ Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME AND DELINQUENCY (1986).

⁴⁸ Carole W. Barnes and Randal S. Franz, *Questionably Adult: Determinants and Effects of the Juvenile Waiver Decision*, 6 JUSTICE QUARTERLY, (1989).

⁴⁹ Marcy Rasmussen Podkopacz and Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (1996).

⁵⁰ Lonn Lanza-Kaduce et al., JUVENILE TRANSFER TO CRIMINAL COURT STUDY: FINAL REPORT, (2002). Table 2.4.

⁵¹ Fagan *supra* note 33. Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in SERIOUS, VIOLENT AND CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK (James C. Howell et al. eds., 1995)

⁵² *supra* note 36.

in which eighteen is the age of criminal responsibility, and the primary waiver mechanism to criminal court is judicial waiver, Fagan was able to compare conviction and sentencing rates (as well as recidivism, not summarized here) of comparable cases across the state line. Such comparisons across the jurisdictional boundary are largely immune to the selection bias that arises when decision-makers select serious cases for the criminal court, because cases cannot migrate from the criminal court (in NY) to the juvenile court (in NJ).⁵³

Fagan examined first-degree burglary and robbery cases of 15- and 16-year-olds. Two hundred criminal court cases were sampled from each of two New York counties (Kings [Brooklyn] and Queens), and 200 juvenile court cases from each of two New Jersey counties (Essex and Passaic). For robbery cases, the juvenile court convicted adolescents less often than the criminal court (46% vs. 57%), and the juvenile court then imposed incarceration less often than the criminal court (18% vs. 46%). For burglary cases, conviction rates in the two courts were similar, but the juvenile court imposed incarceration less often (24% vs. 47%)⁵⁴.

In sum, the prior research comparing punishments in juvenile and criminal courts is equivocal. Though some studies find that a leniency gap exists whereby youth in juvenile court are treated more leniently than those in criminal court, others do not reach this conclusion. Many of these studies are limited by the difficulty of finding suitable cases for comparison across the two types of courts.

III. A NATURAL EXPERIMENT ON THE PUNISHMENT OF ADOLESCENTS

A. Study Design

This study is a replication and extension of Fagan's earlier cross-jurisdictional comparison of adolescent felony case processing in New York versus New Jersey,⁵⁵ using cases approximately ten years later, in 1992-1993.⁵⁶ We compare punishments

⁵³ Cases were sampled from the population of filed cases. In principle, judicial waiver may reduce the severity of the New Jersey cases retained in the juvenile court, and reverse waiver is possible for the 15-year-olds in the New York sample. However, very few cases – only 3.3% of the robbery cases and none of the burglary cases in his sample were waived. Fagan *supra* note 33, footnote 11.

⁵⁴ There have been several other empirical studies of the effects of the New York Juvenile Offender Law, though few have examined the certainty, severity or celerity of punishment before and after its passage in 1978. Simon Singer and David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the Juvenile Offender Law*, 22 LAW & SOCIETY REVIEW (1988); Roysner and Edelman *supra* note 29; George E. Hairstone, *Black Crime and the New York State Juvenile Offender Law: A Consideration of the Effects of Lowering the Age of Criminal Responsibility* in Hall et al. (1981).

⁵⁵ Fagan *supra* note 33.

⁵⁶ Within-jurisdictional comparisons of New York City's juvenile vs. criminal court during the same time period are reported in Akiva Liberman and Laura Winterfield, CASE PROCESSING OF JUVENILE ARRESTS IN NEW YORK CITY'S ADULT AND JUVENILE COURTS DURING FISCAL YEAR 1992 (1996), and Akiva Liberman and William Raleigh, *Specialized Court Parts for Juvenile Offenders in New York City's Adult Felony Courts: Case Processing in 1994-1995 and 1995-1996*, Paper presented at 1998 Annual Conference of the American Society of Criminology. Liberman and Winterfield found that the criminal court was more punitive than the juvenile court over its entire caseload. Liberman and Raleigh restricted juvenile court cases to those comparable to the criminal court cases on age and charge (i.e., 14- and 15-year-olds arrested on 'Juvenile Offender' eligible charges), and also examined robbery cases alone, which comprise more than half of the criminal court caseload. A higher proportion of cases were formally prosecuted (filed) in

received by adolescents (ages 15-16) charged in three of New York City's criminal courts to a matched sample of cases adjudicated in the juvenile court in three adjacent counties in northeastern New Jersey. This replication extends the previous study in three ways: it adds another county to each state sample, it doubles the sample size from each county, and also broadens the eligible offenses to include youths charged with first or second degree aggravated assault.

1. Statutory Contexts

New York's statute governing jurisdiction of adolescent offenders provides fertile ground for comparing outcomes of cases in juvenile and criminal courts. Sixteen is the age for criminal responsibility in New York. In 1978, New York became the first state to mandate legislatively the automatic transfer of youth accused of serious offenses to criminal court.⁵⁷ New York lowered the age of criminal responsibility by excluding from Family (juvenile) Court jurisdiction the "designated felony" list of 17 felony crimes – various categories of robbery, burglary, assault, rape, and kidnapping – committed by fourteen and fifteen year olds, as well as murder by youths thirteen or older.⁵⁸ Because the legislative definition excludes these ages and offenses from Family Court jurisdiction, those cases originate in adult criminal court and include criminal procedural safeguards such as indictment, bail and public hearings. As a result, youths automatically are processed in the criminal justice system prior to any determination of their suitability for treatment in the Family Court. These adolescents who are prosecuted in the criminal court are referred to as 'Juvenile Offenders'. Youths convicted and sentenced as Juvenile Offenders receive determinate sentences with mandatory terms in secure facilities and for periods substantially longer than the five-year maximum term for juvenile "designated felons"⁵⁹ Although prosecution of Juvenile Offenders originates in adult criminal court, provisions exist for prosecutors and criminal court judges to "remove" or "remand" these Juvenile Offender cases to Family Court prior to indictment, before trial, or for sentencing following criminal conviction.⁶⁰ Despite these "reverse waiver" or transfer back provisions, New York's Juvenile Offender law has been called "the toughest

the criminal court than in the juvenile court system, (88% vs. 50%; or 88% vs. 48% for robberies alone), and that the criminal court detained more cases pretrial than the juvenile court (48% vs. 18%; or 41% vs. 15% for robberies alone). However, these within-jurisdictional results were more ambiguous at conviction and sentencing.

⁵⁷ 1978 N.Y. Laws. Ch. 478 § 2. Juvenile Offender Law offenses include murder & attempted murder 2°, arson 1° & 2°, kidnapping & attempted kidnapping 1°, manslaughter 1°, rape 1°, robbery 1° & 2°, burglary 1° & 2°, sodomy 1°, aggravated sexual abuse, firearms use 1°, and assault 1° & 2°. The background and context of this legislation is described in SIMON I. SINGER, RECRIMINALIZING DELINQUENCY (1996); BUTTERFIELD, FOX, ALL GOD'S CHILDREN: THE BOSKETT FAMILY AND THE AMERICAN TRADITION OF VIOLENCE (1995); and Simon I. Singer et al., *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law* in FAGAN & ZIMRING, *supra* note 1.

⁵⁸ 1978 N.Y. Laws. Ch. 478 § 2. See id for specific offenses. Initially, there were 12 offenses on this list of designated felonies, but it has since grown to 17 by legislative amendments. ERIC WARNER, THE JUVENILE OFFENDER HANDBOOK (2000).

⁵⁹ Judges may depart from prescribed the sentencing ranges if they reclassify the offender as a 'Youthful Offender', a distinct dispositional category that is not considered an official conviction; but for this reclassification to proceed, the offender must not have any previous convictions for any 'designated felony' offenses. 'Youthful Offender' status entails a sealed record, and allows a judge to depart from sentencing guidelines to give the defendant a non-custodial sentence. N.Y. Penal Laws § 70.05.

⁶⁰ N.Y. Penal Laws § 60.10.

juvenile offender law in the country,”⁶¹ “this nation’s toughest law dealing with children accused of committing certain violent felony offenses,”⁶² and “among the most severe in the country by initiating prosecution in the adult courts and providing for longer sentences.”⁶³

Until the early 1980s, the New Jersey juvenile code subscribed to the traditional, rehabilitative model of juvenile justice. From its inception in 1929, children charged as “delinquents” (i.e., accused of criminal or status offenses) who were below the age of 16 (amended to 18 in 1952) were adjudicated under the jurisdiction of Juvenile and Domestic Relations Courts.⁶⁴ In 1970, the New Jersey Supreme Court reaffirmed in *State v. L.N.* that “[t]he philosophy of our juvenile court system is aimed at rehabilitation through reformation and education in order to restore a delinquent youth to a position of responsible citizenship.”⁶⁵ In 1973, the state removed status offenders from the jurisdiction of the juvenile court.⁶⁶

But in 1982, the New Jersey legislature enacted a new Juvenile Code effective on September 1, 1983, that recognized the dual purposes of juvenile courts:

This bill recognizes that the public welfare and the best interests of juveniles can be served most effectively through an approach which provides for harsher penalties for juveniles who commit serious acts or who are repetitive offenders, while broadening family responsibility and the use of alternative dispositions for juveniles committing less serious offenses. . . .⁶⁷

The new legislation included “tougher” delinquency sentencing and waiver provisions, and permitted the use of short term incarceration, not to exceed sixty days, to deter future offending.⁶⁸ The new law also created a presumption for secure confinement in the juvenile system for youths charged with serious crimes such as murder, rape, and robbery.⁶⁹ The New Jersey juvenile code authorizes substantial sentences for the most serious crimes and proportionally shorter sentences for less serious offenses.⁷⁰

⁶¹ Lucia Beadel Whisenand and Edward J. McLaughlin, “Completing the Cycle: Reality and the Juvenile Justice System in New York State.” 47 *Albany Law Review* 1,1 (1982).

⁶² Alison Marie Grinnell, “Searching for a Solution: The Future of New York’s Juvenile Offender Law,” 16 *New York Law School Journal of Human Rights* 635, 636 (2000).

⁶³ Roysner and Edelman, *supra* note 29, at 266.

⁶⁴ N.J.Stat. Ann. §2A:4-2 (1952), and N.J. Stat. Ann. §2A:4-14 (Permanent edition 1952). The original 1929 statute also gave jurisdiction of this juvenile court over youths charged as disorderly persons, vagrants, incorrigibles, immoral, truant, “growing up in idleness” or “who deported herself so as to endanger her morals, health or general welfare.” See 1929 N.J. Laws ch 157.

⁶⁵ (109 N.J. Super.278, 286-87, 263 A.2d 150, 154-55 (App.Div.), *aff’d per curiam*, 57 N.J. 165, 270A.2d 409 (1970)).

⁶⁶ The state created a separate jurisdictional category of “juveniles in need of supervision” (JINS) – children under eighteen years of age who committed non-criminal acts such as incorrigibility, truancy, and disobedience. See, Laws of 1973, ch. 306; N.J. Stat. Ann. §§ 2A:4-43(a) & 45 (West Cum. Supp. 1981). The legal separation of status offenses and delinquency also included a prohibition on the secure detention and institutional confinement of status offenders.

⁶⁷ Senate Judiciary Committee Statement No. 641-L1982, c. 77. See, also, New Jersey Assembly Bills Nos. 641-45 (Jan. 19, 1982).

⁶⁸ New Jersey Stat. Ann. § 2A:4 - 24 (c).

⁶⁹ New Jersey Stat. Ann. § 2A:4 - 25.

⁷⁰ In addition, the legislation provides for periods of incarceration beyond the statutory maximum if a juvenile is convicted of a crime of the first, second, or third degree, has two prior convictions of crimes of the first or second degree, and has been committed previously to a correctional facility (N.J. Stat. Ann. §

Because the new code strengthened substantially the delinquency sentencing options, the legislature anticipated that reliance on discretionary transfer to criminal court might decrease.⁷¹ At the same time, the code substantially revised the transfer provisions by creating a presumption for transfer for youths charged with certain serious offenses – e.g., homicide, robbery and arson – and putting the burden of proof on them to demonstrate their amenability to treatment within the juvenile system by the age of nineteen, rather than the previous dispositional maximum of age twenty one.⁷² Despite these conditions promoting judicial transfer, the incidence of transfer remains low in New Jersey, and continues to remain low to the present day.⁷³

The sharply differing jurisdictional boundary for adolescent felony offenders between New York and New Jersey, coupled with their geographical contiguity and shared social ecology, creates the conditions to conduct a natural experiment. Instead of randomization of cases, the geographical border establishes contrasting jurisdictional conditions for the adjudication of adolescent felony offenders.

2. Selecting Counties within States

In New York, three counties supplied cases for the study: Kings (Brooklyn), Bronx and Queens Counties. In New Jersey, cases were sampled from Essex, Hudson and Passaic Counties. These six counties are part of a large metropolitan SMSA and are interrelated economically, in transportation, media and culture, and in major social institutions such as educational institutions and medical centers. Matching criteria for counties included demographic, socio-economic, labor force, and housing characteristics. According to 1990 census data, these counties are well matched regarding rates of unemployment, poverty, female-headed households, and residential mobility.⁷⁴ Moreover, the crime problems among juveniles and young adults in these communities are comparable relative to other counties in their states and to each other.⁷⁵ Each county was among the top five counties in the state in their contributions to the state's prison population and in the state's homicide fatalities.⁷⁶ When the cases were sampled, each state was experiencing over-crowding in its adult correctional facilities. Each county has

2A:4A - 44(3)). In fact, the statutes include a sentencing table that operates as a sentencing guideline system. See, N.J. Stat. Ann. § 2A:4A-44(d)(1). In addition, youths with prior convictions who are convicted of murder may have their 20-year term extended by five years. Youths with prior records who are convicted of other crimes of the first, second, or third degree may have their maximum sentence extended by an additional two years. The release of juveniles on parole prior to the completion of at least one-third of their sentence requires the approval of the sentencing court (N.J. Stat. Ann. § 2A:4A-44(d)(2)).

⁷¹ “Practically, this presumption [for juvenile imprisonment for serious offenses], may encourage less dependency on waiver of a juvenile to the adult court, because of some assurance that the juvenile committing a serious crime would possibly receive a more appropriate disposition in the juvenile system (Senate Judiciary Committee Statement L. 1982, c. 77:222).”

⁷² N.J. Stat. Ann. § 2A:4- (West Cum. Supp. 1984).

⁷³ Fagan, *Comparative Impacts of Juvenile and Criminal Court Sanctions*, supra note 33; Wayne S. Fisher, *Juvenile Waivers to Adult Court: A Report to the New Jersey Legislature* (1985); Bruce Stout, *The Impact of the New Jersey Code of Juvenile Justice*, (1987). In the New Jersey sample in this study, 1.2 % of the cases were transferred to criminal court. These cases are included in the New Jersey sample for all following analyses.

⁷⁴ U.S. CENSUS BUREAU, *CITY AND COUNTY DATA BOOK* (1994). These data are based on projections of 1990 U.S. Census data. We used 1994 estimates as the closest time point to the point of origin of the cases.

⁷⁵ Mercer Sullivan, *GETTING PAID* (1989).

⁷⁶ Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, Report to the National Institute of Justice (1991).

a local incarceration facility for adults (New York City counties share the Rikers Island facility), and local juvenile and adult detention facilities (New York City's five boroughs share beds in the city's juvenile detention system). Each has a well-developed indigent defender system for juveniles and adults.

Crime markets and criminal activity in this metropolitan region also often span county and state lines, suggesting a homogeneity of crime problems that also strengthens the experimental design. Drug markets in this region, for example, include regional territory and exchanges, with sellers and buyers moving across counties and at times across state lines.⁷⁷ Adolescent and young adult crime, then, are part of a redistributive process within a regional informal and illicit economy.

3. Selecting Charge Categories

We sampled cases where adolescents aged 15 and 16 were charged with felony robbery, assault, or burglary. These three types of crimes are recurrent criminological events that are paradigm cases representing two faces of the debate in defining juvenile jurisdiction. Robbery and assault events comprise the prototypical violent juvenile crimes which have evoked fear of crime as well as legislative action in the past decade⁷⁸. Adolescent burglary offenses encompass a broader, more complex and at times persistent pattern of crimes that are recurring challenges to judicial responses to juvenile crime. While their offenses may be considered less serious than violent offenders, property offenders with long prior records pose a different type of challenge to the perceived legitimacy and efficacy of the juvenile court, a challenge that also has animated the policy initiatives to narrow or eliminate the jurisdiction of the juvenile court. Property offenders comprise a large proportion of incarcerated juveniles in each state and also those transferred to criminal court,⁷⁹ illustrating their importance in the policy debate on the juvenile court.

The distinct age-specific jurisdictional boundaries for these offenses contribute to the experimental design. In New York, under the Juvenile Offender Law, cases alleging felony robbery (1^o and 2^o), aggravated assault (1^o and 2^o) and burglary (1^o) charges for 14- and 15-year-old defendants originate in criminal court.⁸⁰ Although original jurisdiction is criminal court, the criminal court judge may transfer cases to the juvenile court. The age of majority in New York is 16, so no such reverse waiver is possible for the 16-year-olds in our sample.⁸¹ In New Jersey, initial jurisdiction is in the juvenile court until 18 years of age, although transfer to criminal court is permitted at age 13. Accordingly, at the time of the this study, all charges against 15- and 16-year old

⁷⁷ Robert Jackall, *WILD COWBOYS* (1997); Phillippe Bourgois, *IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO* (1995).

⁷⁸ Barry Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 *MINNESOTA LAW REVIEW* (1995); A. Miller and L. Ohlin, *The politics of secure care*, in *VIOLENT JUVENILE OFFENDERS: AN ANTHOLOGY* (Mathidas et al. eds., 1984).

⁷⁹ Hamparian et al., *supra* note 6; Barry C. Feld, *Criminalizing the American Juvenile Court*, in 17 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH*, (Tonry, ed, 1993).

⁸⁰ *Supra* note 57.

⁸¹ In order to prevent any selection bias with regard to the 15-year olds in the current sample who may be transferred to New York juvenile court, we have retained in our dataset all such cases. There are 146 of the 407 15-year-olds in New York who were formally transferred to juvenile court. They are included in the New York sample in all following analyses.

defendants are adjudicated in the juvenile court, unless judicially waived to the criminal court. However, very few youths are transferred⁸².

4. Selecting Cases

We used a multi-stage stratified random sampling procedure to select cases. First, a population of eligible cases was identified for each county based on the case and charge criteria. Second, cases were selected based on their representation by age, sex and offense within each county. This procedure generated a sample of N= 2382 adolescents aged 15-16 and charged with the specified penal code violations between January 1, 1992 and December 31, 1993. Cases were selected after charges were filed in court – at Supreme Court indictment (the felony court) in New York, and upon filing of juvenile court petitions in New Jersey. This selection procedure insured that only cases which have passed a probable cause determination (i.e., a legal sufficiency determination) in each court are included in the sample. Juvenile Offender cases in New York are originally heard in the Criminal Court (the court of general jurisdiction) in New York City. They are arraigned there and, if indicted, they are arraigned again in the Supreme Court, the felony jurisdiction for New York, and adjudicated there. In New Jersey, petitions are screened initially by court intake officers simultaneously with prosecutorial screening for legal sufficiency. This procedure avoided sample attrition at the outset from prosecutorial screening or dismissals prior to arraignment.

5. Data Sources

New Jersey data for Hudson County were provided in automated format by the New Jersey Administrative Office of Courts. For the other two New Jersey counties, data were manually collected at the county courthouses from case files of sampled individuals. These data were supplemented by adult records provided by the New Jersey State Police. New York data were provided by the New York City Criminal Justice Agency, the city's pretrial services agency, which collects and stores data on all New York City criminal defendants. The New York data were supplemented by data from the New York Department of Criminal Justice Services, including data concerning cases waived from the criminal court down to New York family court.

6. Sample Description

Table 3 compares the demographic, legal and offense characteristics of the sampled cases. Though the cases from each state are similar along most dimensions, cases differ by state in a few important ways. The New York (criminal court) sample consists of greater percentages of 16-year olds, minority defendants and male defendants than in New Jersey (juvenile court). In the New Jersey sample a greater percentage of individuals have prior arrest records, are arrested during sampled case processing, and have arrest warrants issued by a judge during case processing. All variables are included as control variables in the following analyses to prevent the introduction of a sample selection bias.

⁸² *Supra* note 73

Another noticeable difference between samples is the distribution of arrest charges. The New Jersey cases are nearly equally divided among the three sampled charges, though the New York cases consist of mostly robbery arrests. This is the result of the sampling procedure – cases were selected based on their representation within each state’s court system. Thus, sample differences result from natural variation between the two populations sampled. This sampling method included the most serious 15- and 16-year old offenders in each state other than adolescents arrested for homicide or sexual assault. It should be noted that though they involve different behaviors, most first degree aggravated assault and first degree robbery are of equal severity within each jurisdiction⁸³. Again, we include arrest charges as control variables in all analyses, as well as analyze the data separately by arrest charge.

⁸³ In New York all of the most serious robberies and aggravated assaults are considered B felony charges and are thus of equal severity. In New Jersey, most robberies of greatest severity are considered 2nd degree offenses, as are all aggravated assaults of the greatest severity. However, robberies may be 1st degree offenses in New Jersey and thus a more severe classification than that of the most severe assault charges, though such charges are very rarely filed.

Table 3. Sample Characteristics by State

	New Jersey (n=1061)	New York (n=1321)
Age:		
15	46.9	30.8
16	53.1	69.2
Sex		
Female	17.1	11.8
Male	82.9	88.2
Race		
White	13.3	4.9
African-American	54.8	58.0
Hispanic	26.1	32.2
Asian	0.2	1.4
Other and Unknown	5.6	3.5
Charge		
% Robbery	25.4	80.3
% Aggravated Assault	43.4	15.2
% Burglary	31.1	4.5
% Ever Detained by Court	41.4	47.0
% Warrant Ordered by Court	18.6	7.9
% With Associated Weapon Charge	34.9	41.4
% With Prior Arrest Record	67.0	45.0
Mean # of Prior Arrests	5.6	2.4
Mean # of Prior Convictions	3.1	1.1
% Rearrested During Case Processing	37.1	16.3
Mean # of Rearrests During Case Processing	1.9	1.3

B. Measures and Variables

1. Independent Variables

We collected data that were uniformly available and similarly measured across states. The resultant set of independent variables is more detailed and extensive than

many prior studies examining court outcomes.⁸⁴ Table 4 shows the domains of information and specific variables within each.

Table 4. Independent Variables

<i>Domain</i>	<i>Measure</i>
Demographic	Age
Characteristics of Defendant	Sex (dummy variable for female) Ethnicity (dummy variables for African American, White, Hispanic, and All Other Ethnicities) County of Residence
Offense	Charge (most serious at court filing) Associated Weapon Charge (indicating weapon used in offense)
Offender	Number of Prior Arrests (logged) Number of Arrests During Case Processing (labeled concurrent arrests - logged) Prior Incarcerations
Case Processing	Warrants Issued During Sample Case Detained During Case Processing Case Processing Time (months)
Court Jurisdiction	Juvenile (New Jersey) or Criminal (New York)

2. Dependent Variables

To compare punishments in juvenile and criminal court, we examine three dependent variables: detention during case processing, disposition, and length of incarceration for those sentenced to jail or prison.

Pretrial detention is an important predictor of future court outcomes⁸⁵, and a substantive punishment.⁸⁶ Defendants who are remanded pretrial may be more likely to plea guilty in order to either gain immediate freedom from jail, or to begin receiving ‘credit’ for their time spent in custody.⁸⁷ We use a dichotomous measure to indicate whether the defendant was detained at any point between court filing or initial hearing and sentencing or final disposition.

⁸⁴ For reviews see Gary Kleck, *Racial Discrimination in Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AMERICAN SOCIOLOGICAL REVIEW (1981), Darrell Steffensmeier and Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 AMERICAN SOCIOLOGICAL REVIEW (2000).

⁸⁵ SEE M.A. BORTNER, *INSIDE A JUVENILE COURT* (1982).

⁸⁶ MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); JONATHAN CASPER, *AMERICAN CRIMINAL JUSTICE* (1972).

⁸⁷ Often defendants detained pretrial are incarcerated for long terms, and may not have this time count towards their eventual prison sentences.

To reconcile procedural differences and disparities among dispositional categories across the two court jurisdictions, we constructed a four-level categorical variable rather than a dichotomous variable indicating conviction. For example, both jurisdictions offer a similar disposition, titled “adjourned in contemplation of dismissal” in New York and “adjourned disposition” in New Jersey, in which cases are monitored for 6 to 12 months and dropped with no further court action if the defendant is not re-arrested. However, to be eligible for this a defendant must plead guilty and hence be convicted in New Jersey, but not so in New York where a defendant is still considered innocent when this disposition is ordered. The categorical variable used here groups similar dispositions that may have different official classifications regarding the convicted vs. not convicted dichotomy. The resultant variable includes the following categories: not convicted or diverted from court; being given a review period (such as being adjourned in contemplation of dismissal); convicted and given a fine, probation, or alternative to detention; and incarceration.

Custodial sentence length among New Jersey cases were computed from actual release dates from the records of the New Jersey Juvenile Justice Commission. We estimated custodial sentence lengths for New York cases as 2/3 of the maximum sentence given by the sentencing judge. This estimate was used on advice of staff at the New York City Criminal Justice Agency, by whom the sentencing data were supplied.⁸⁸

C. Data Analytic Strategy

To estimate differences in the use of detention, we first look at bivariate comparisons of detention rates by state, prior arrest record, and arrest charge. Next, we estimate three logistic regression equations of detention. Logistic regression is used because the dependent variable is dichotomous.⁸⁹ The first regression equation includes all relevant independent variables; the second model adds interaction terms of state by each arrest charge⁹⁰ to test if the predictor variables have state-specific effects. The third model is restricted to robbery cases, in order to limit our comparisons to a smaller group of more homogenous and noteworthy cases.

We use a similar strategy to estimate differences by state in dispositions. We examine bivariate relationships between states in dispositions, and by arrest charge and prior record within and between states. Then we estimate a Heckman two-stage probit regression equation on the likelihood of incarceration to determine whether state predicts incarceration when controlling for all other independent variables. Heckman two-stage models are used because any model predicting sentencing practices includes a censored sample, in that only convicted cases are included in models with sentencing as the dependent variable⁹¹. The Heckman two-stage model produces parameter estimates that

⁸⁸ Personal communication with Mary Philips, Criminal Justice Agency Researcher.

⁸⁹ G.S. Maddala, *LIMITED DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS* (1983).

⁹⁰ We include two interaction terms: state x aggravated assault charge, and state x burglary charge. Robbery charges are excluded as a contrast variable, as is appropriate when working with series of dummy variables.

⁹¹ Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 *AMERICAN SOCIOLOGICAL REVIEW* (1983); Richard Breen, *REGRESSION MODELS: CENSORED, SAMPLE SELECTED, OR TRUNCATED DATA* (1996).

take into account censoring for those cases where there was no finding of guilt or delinquency. In the two-stage model, a censoring parameter is estimated and then incorporated into the probit analysis of the dependent variable.⁹² Probit analyses are used because the dependent variable is dichotomous.⁹³ The models include a robust cluster by county, which adjusts the standard error of each coefficient to account for any systematic differences among cases from each of the six included counties⁹⁴. As we did with the detention analyses, we estimate three multivariate models predicting incarceration: a full sample model with no interaction terms; a full sample model with interaction terms of state by arrest charge (one for state by burglary, and one for state by aggravated assault); and a robbery only model.

Our comparison of sentence lengths is somewhat more constrained than the previous two comparisons. Because the statutes guiding custodial sentence lengths in each state are different from one another, it would be meaningless to model this as a dependent variable in a multivariate model. Thus, we graphically display the relative distribution of sentences in each state, among cases that resulted in incarceration. We present the percentages of incarcerated cases falling into each sentence length category rather than the actual number of cases in each category. This is due to the greater number of incarcerated cases in New York; as a result the frequencies of sentences are on different scales in the two states and need to be adjusted to show relative distributions. For ease of comparison, we group the sentence length values into ranges that allow for a more coherent graphical presentation.

IV. RESULTS

A. Detention

Table 5 displays the numbers and percentages of cases detained overall by state, by arrest charge within each state and by prior arrest record within each state. Overall, detention rates are higher in the criminal court cases in New York compared to the juvenile court cases in New Jersey (47.1% versus 41.4%). Detention rates are comparable for robbery cases but differ by state for burglary and assault cases. Detention rates for youths with prior records are similar across states. The likelihood of being

⁹² There is some debate over whether to correct for sample selection (*see* Greene *id.*). This paper does so because conviction decisions may be based on quality of evidence rather than on other factors related to sentencing (*see* VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS* (1977)). Thus the question of what factors predict incarceration is relevant for the entire sample of arrestees, as it tells us what factors lead to incarceration regardless of the factors that lead to conviction. By correcting for a truncated sample the results can be generalized to the entire sample, and not just to the portion of the sample that resulted in conviction. In addition, most research on court sentencing has used the two-stage sample selection bias correction method or variations thereof (*eg. see* Darrell Steffensmeier and Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Court: Who is Punished More Harshly*, 65 *AMERICAN SOCIOLOGICAL REVIEW* (2000); JEFFERY ULMER, *SOCIAL WORLDS OF SENTENCING* (1997)).

⁹³ See, generally, Michael Finkelstein and Bruce Levin, *STATISTICS FOR LAWYERS* (2nd edition)(2001); Peter Kennedy, *A GUIDE TO ECONOMETRICS* (1993); William Greene, *ECONOMETRIC ANALYSIS* (4th edition) (2000). All the Heckman two-stage models are performed in STATA 7 statistical package. Other analyses are performed in SPSS 10.0.

⁹⁴ Only the results of the second stage of the Heckman two-stage model are reported, the prediction of a custodial sentence.

detained is augmented by a prior record in both states, and the disparity between the overall state detention rates remains when splitting the sample into those with and without prior records.

Table 5. Detention by State, Charge and Prior Arrest Record

	New Jersey		New York	
	N	%	N	%
Overall Detention Rate	439	41.4%	622	47.1%
Detention by Arrest Charge:				
Robbery Cases	138	51.1%	536	50.5%
Aggravated Assault Cases	182	39.5%	59	29.4%
Burglary Cases	119	36.1%	27	45.8%
Detention By Presence by Prior Arrest Record:				
No Prior Record	71	20.3%	232	31.9%
Prior Arrest Record	368	51.8%	390	65.7%

These results suggest that arrest charge and prior record are important predictors of pretrial detention, as is jurisdiction. To test the combinations of offense and offender characteristics that predict detention, we estimate logistic regression models with all predictors included. Model 1 in Table 6 shows that variables related to severity of offense and prior record of the offender are significant predictors of detention, including: weapon charge, arrest warrant, prior arrests, concurrent arrests and a history of incarceration. Both burglary and aggravated assault cases are less likely to be detained than robbery cases. We control for offender demographic characteristics, several of which are significant: males are more likely to be detained than females, and whites less likely than African-Americans, net of all other variables. After controlling for offense and offender characteristics, cases originating in the criminal court in New York are significantly more likely to be detained.

We next include two interaction terms to examine whether specific charges were more or less likely to result in detention within states and re-estimated this model. Model 2 in Table 6 shows that the results are unchanged by the addition of the two interaction terms. The two interaction terms do not significantly improve the model’s fit, and neither one is a significant predictor on its own. Finally, we estimate separate regression models each of the three offense categories. Model 3 in Table 6 shows results for robbery, the largest offense category. The coefficient for state is positive in all three of these offense-specific models, though at varying levels of significance⁹⁵. This pattern of results again

⁹⁵ Results of the aggravated assault and burglary models are available on request. In sum, state was highly significant among robbery cases (p=.006), moderately significant for burglary cases (p=.046), and not

shows that New York criminal courts are more likely to detain defendants pretrial, after controlling for all other offense and offender factors.

In sum, we find that detention is reserved for more serious cases and cases with defendants of lengthy prior offending histories, that females and whites are less likely to be detained than males or any minorities, and that prosecution in criminal court leads to a greater likelihood of detention relative to prosecution in juvenile court. Thus with regard to “front-end” punishment at this first stage of case processing, we find a leniency gap between juvenile and criminal courts.

Table 6. Logistic Regression on Detention

	Model 1		Model 2		Model 3	
	Main Effects		Interactions		Robbery Only	
	B	Exp (B)	B	Exp (B)	B	Exp (B)
Age	-0.002	0.998	0.006	1.006	0.021	1.021
Sex (Contrast=Female)	0.509 ^{***}	1.663	0.520 ^{***}	1.682	0.826 ^{***}	2.284
Ethnicity (Contrast=African American)						
White	-0.745 ^{***}	0.475	-0.730 ^{***}	0.482	-0.354	0.702
Hispanic	-0.060	0.942	-0.062	0.940	0.024	1.025
Other Ethnicity	0.031	1.032	0.021	1.021	0.009	1.009
Current Charge (Contrast=Robbery)						
Burglary	-0.431 ^{**}	0.650	-0.298	0.742		
Aggravated Assault	-0.881 ^{***}	0.414	-0.918	0.399		
Associated Weapon Charge	0.975 ^{***}	2.651	0.969 ^{***}	2.635	1.075 ^{***}	2.929
Arrest Warrant	0.418 ^{**}	1.518	0.419 ^{**}	1.521	0.109	1.115
# Prior Arrests (logged)	0.883 ^{***}	2.418	0.881 ^{***}	2.414	0.892 ^{***}	2.440
# Concurrent Arrests (logged)	0.705 ^{***}	2.024	0.704 ^{***}	2.023	0.496 ^{**}	1.643
History of Incarceration	0.939 ^{***}	2.556	0.930 ^{***}	2.535	0.931 ^{***}	2.536
Case Length (in days, logged)	0.008	1.208	0.008	1.008	0.024 [*]	1.024
State (Contrast=New Jersey)	0.436 ^{***}	1.546	0.459	1.583	0.484 ^{**}	1.622
State x Burglary Charge			0.204	1.227		
State x Aggravated Assault Charge			-0.335	0.715		
Constant	-2.320		-2.506		-3.155	
Model Statistics						
Log Likelihood	2638.010		2635.461		1553.959	
Chi-Square	617.866		620.416		306.847	
p(Chi-Square)	0.000		0.000		0.000	

*p<.05, **p<.01, ***p<.001

B. Disposition

Table 7 compares four categories of dispositions across the two states – not convicted or diverted from court; being given a review period (such as being acquitted in contemplation of dismissal); convicted and given a fine, probation, or alternative to detention; and incarceration⁹⁶. About four in ten cases in each state are not convicted, either by dismissal, acquittal, or diversion from court prior to any disposition. This is fairly consistent for each arrest charge.

There are substantial state-level differences among results in the three sentencing categories. New Jersey juvenile courts are more likely than New York criminal courts to impose either a review period or a non-custodial sanction. Youths in the criminal court in New York are more likely to be incarcerated overall, and for each offense category.⁹⁷ Youths charged with burglary in New York are nearly seven times more likely to be incarcerated compared to New Jersey cases. We find these differences despite the “reverse waiver” provisions in New York that result in the return of 146 defendants to the Family Court for sentencing⁹⁸.

Table 7 shows that sanction certainty is no more likely in the criminal court compared to the juvenile court. But the severity of punishment – specifically, the use of incarceration compared to less restrictive forms of punishment – is far greater in the criminal court. Courts in New York are more likely to impose custodial sanctions relative to periods of non-custodial supervision or community sentences. Once again, we observe that the criminal courts appear to be far more punitive.

⁹⁶ We include cases not convicted as a dispositional category. See Section III for an explanation of the construction of this measure.

⁹⁷ The only divergent arrest charge category is aggravated assault. Contrary to results for the other charge categories, for assaults cases New York criminal courts are somewhat more likely than New Jersey juvenile courts to not convict or to impose a review period. However, consistent with the other results, New York is still somewhat more likely than New Jersey to incarcerate assault cases.

⁹⁸ *Supra* note 81.

Table 7. Conviction and Sentencing by State and Charge

	Not Convicted or Diverted		Review Period		Fine - ATD - Probation		Incarceration	
	NJ	NY	NJ	NY	NJ	NY	NJ	NY
	%	%	%	%	%	%	%	%
All Cases	39.1	39.2	15.1	11.2	37.9	25.8	7.9	23.8
By Arrest Charge								
Robbery Cases	40.0	38.0	14.9	8.8	33.7	27.1	11.4	26.1
Aggravated Assault Cases	44.9	47.7	15.0	23.3	31.8	18.8	8.4	10.2
Burglary Cases	30.6	32.7	15.5	14.3	49.5	24.5	4.4	28.6

We test these results with a Heckman two-stage probit regression on likelihood of incarceration among those who are convicted. As model 1 in table 8 displays, several variables predict increased likelihood of incarceration. Most of the variables relating to offense severity and severity of prior record are significant. Specifically, incarceration is more likely when: (a) there is an associated weapon charge, (b) the defendant has a longer record of prior arrests, (c) there are concurrent arrests, (d) the defendant has previously been incarcerated, and (e) the defendant was detained during the course of adjudication. In addition, adolescents arrested for aggravated assault and for burglary are less likely to be incarcerated than those arrested for robbery. The coefficient for state was positive and significant; net of all other factors, being prosecuted in New York leads to a greater likelihood of incarceration than prosecution in New Jersey.

Model 2 in table 7 adds two interaction terms to model 1, state by each included arrest charge category (state x aggravated assault and state x burglary, with robbery excluded as a contrast variable). Though one of these variables, state as a function of a burglary charge, is a significant predictor of incarceration, adding them to the model fails to improve the model fit ($p > .10$). Thus, the interaction terms do not enhance our ability to predict incarceration over a main effects model⁹⁹.

⁹⁹ A separate model was also estimated using an interaction term of state by number of prior arrests. The addition of this variable did improve the model fit, though the results were not robust. Results in a related paper, using similar data, demonstrate a lack of significance for a set of variables including state by prior arrests (Aaron Kupchik *Legal Rationality and Jurisdictional Transfer: Comparing Sentencing of Adolescents in Juvenile and Criminal Courts*, n.d.), despite significance for this individual variable. Thus prior record may have a different impact in the two states, but this does not appear to be robust.

Model 3 returns to the main effects analysis, but includes only robbery cases in the analysis in order to eliminate the effect of different charge distributions in the two states. Overall, the results of model 3 mirror those of model 1, suggesting that similar factors shape the decision to incarcerate for robbery cases and for the entire sample. In both models, the best predictors of incarceration are state, a history of incarceration, and arrests during case processing (concurrent arrests). Coefficients for sex and age variables do attain significance in model 3, but their effects are only marginally larger than in model 1.

Table 8. Heckman Two-Stage Censored Probit Regression of Incarceration by Offense, Offender and Jurisdictional Factors

	Model 1		Model 2		Model 3	
	Main Effects		Interactions		Robbery Only	
	B	z	B	z	B	z
Age	-0.069	-1.69	-0.075	-1.72	-0.125*	-2.00
Sex (Contrast=Female)	0.285	1.71	0.293	1.68	0.470*	1.98
Ethnicity (Contrast=Afr. American)						
White	-0.104	-0.87	-0.079	-0.63	0.282	0.90
Hispanic	0.064	0.65	0.060	0.60	0.024	0.15
Other Ethnicity	-0.069	-0.41	-0.077	-0.45	-0.121	-0.66
Current Charge (Contrast=Robbery)						
Aggravated Assault	-0.176*	-2.03	-0.228**	-2.67		
Burglary	-0.319*	-2.10	-0.193*	-2.34		
Associated Weapon Charge	0.248**	3.09	0.243**	2.91	0.251*	2.12
Arrest Warrant	0.114	1.08	0.135	1.15	0.313	1.53
# Prior Arrests (logged)	0.177*	2.08	0.189*	1.99	0.127**	2.77
# Concurrent Arrests (logged)	0.281***	5.36	0.289***	4.93	0.328***	3.32
History of Incarceration	0.954***	7.38	0.947***	7.74	0.978***	9.34
Case Length (in months)	0.005	0.82	0.003	0.55	0.006	0.88
Detained	0.534*	2.19	0.563*	2.19	0.689	1.81
State (Contrast=New Jersey)	1.109***	8.07	1.149***	7.55	1.082***	4.83
State x Aggravate d Assault			-0.136	-0.67		
State x Burglary			0.621***	3.19		
Constant	-1.855		-1.864		-1.276	-1.20
Log-likelihood	-1942.769		-1939.465		-1175.073	

*p<.05, **p<.01, ***p<.001

C. Sentence Length

We continue by considering sentence lengths for those who are sentenced to prison in each state. On average, prison sentences in New York are significantly longer than prison sentences in New Jersey; the average sentence in New York is 26.6 months, and 18.7 months in New Jersey. This difference is statistically significant, as demonstrated by a t-test ($p < 0.05$).

Figure 1 clearly shows that custodial sentence lengths have very different relative distributions in the two states. The results indicate that adolescents incarcerated in New Jersey are more likely to receive a shorter prison sentence than adolescents incarcerated in New York.

The New Jersey cases show a unimodal, positively skewed distribution. Most cases receive sentences of less than 18 months. The cases at the high end of this distribution are the few New Jersey cases that are waived to criminal court and convicted there ($n=10$).¹⁰⁰ Thus most adolescents incarcerated in New Jersey's juvenile courts receive relatively short prison sentences. The New York distribution is more complicated than that of New Jersey, as it shows three distinct peaks instead of one. The first peak is similar to that of the New Jersey distribution and shows a concentration of short sentences¹⁰¹. The second peak occurs when the New Jersey distribution tails off, at around 24-36 months. The third peak is at 48-60 months. To investigate why cases clustered in these three peaks, we looked for relationships among several factors. Neither defendant's age, the court in which the sentencing occurred (criminal, supreme or family), or severity of offense charge at conviction could explain this clustering (tables not shown).¹⁰² Further research should investigate the factors that influence custodial sentence lengths for adolescents in criminal courts.

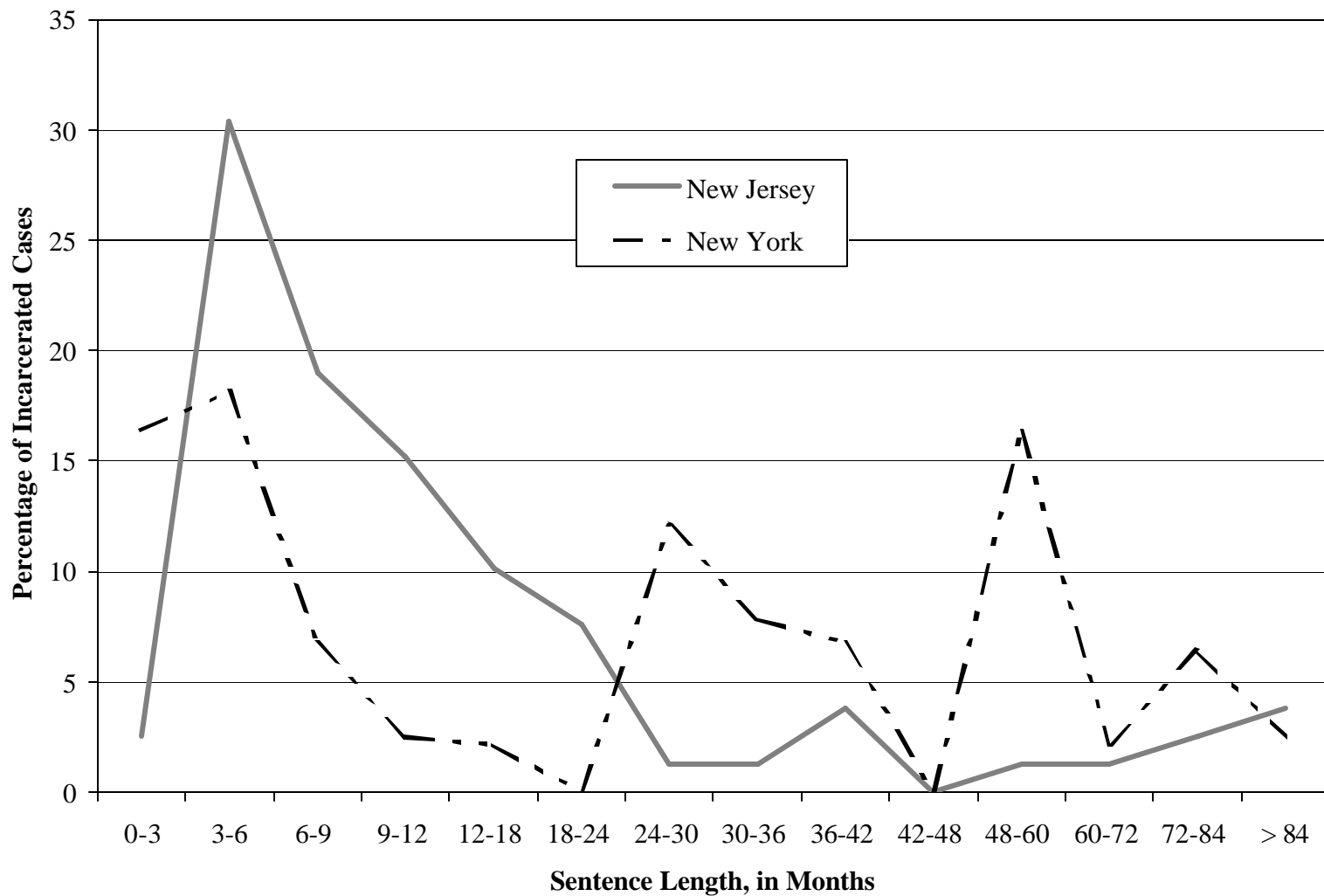
In this third dimension of punitiveness, as in the two others, adolescent offenders charged in criminal court jurisdiction receive harsher punishments. Once again, there is evidence of more conservative allocation of punishment for adolescent felony offenders in the juvenile court.

¹⁰⁰ *Supra* note 53.

¹⁰¹ This may reflect jail sentences of up to one year, the result of plea bargains reducing conviction charges to misdemeanors where incarceration is capped at one year.

¹⁰² We also tested for a relationship here between sentence length and 'Youthful Offender' status. 'Youthful Offender' status is an official sentencing option for adolescents in the New York criminal courts *supra* note 59. If designated with this status, the defendant's case is sealed and sentences are limited to four years of incarceration. Yet this did not explain the clustering of sentence lengths, either.

Figure 1. Prison Sentence Length Relative Distribution, by State



V. CONCLUSION

Using a natural experiment, we compare matched samples of cases adjudicated in juvenile versus criminal courts across two jurisdictions with disparate thresholds for criminal court culpability. To determine whether juvenile transfer policies meet their stated goals of providing more severe punishments for adolescents than would be imposed by juvenile courts, we test whether there is a leniency gap between these two jurisdictions. The results show that across three dimensions, criminal courts are in fact consistently more punitive. Adolescents in criminal court are more likely to be detained pretrial, more likely to be incarcerated, and if incarcerated, they are sentenced to longer prison terms than similarly situated adolescents in juvenile court. Thus, we find that the punishments for comparable adolescents in the two types of courts are consistently and significantly greater in criminal court than in juvenile court. Moreover, we find an incarceration rate in criminal court that is almost three times as great as the rate in juvenile court, overall, and almost seven times as great for burglary cases in juvenile court. We find a very wide leniency gap separating juvenile and criminal court.

Several factors contribute to the greater punitiveness of criminal courts for adolescent offenders. The most likely is simply the statutory goal of each court, and the jurisprudential norms expressed by these statutory goals. Most juvenile courts, including those in New Jersey, have a dual mission of rehabilitation and punishment,¹⁰³ yet criminal courts emphasize retribution and community protection. Without an explicit and formal goal of rehabilitation, it is not surprising that criminal courts are more likely to detain, convict and incarcerate youths, and once convicted, to sentence them to longer prison terms. Another factor contributing to punitiveness in the criminal court is the limited options for non-custodial or treatment-oriented sentencing options, a reflection both of the disparity between the two courts' sentencing goals, and the narrowly defined sentencing goals in most states' criminal codes.

Though our research confirms that transfer to criminal court results in harsh punishment, the differential effects of this policy are seemingly less extensive than intended by policy-makers¹⁰⁴. Given the relentless and urgent demands for increased punishment for adolescents – typified by laws such as California's Proposition 21 – it may be surprising to some that fewer than one in four criminal court cases in our sample resulted in incarceration. This incarceration rate, though far greater than in the juvenile courts we study, is significantly lower than the overall felony incarceration rates for adults we report in Table 2 above. This result may reflect enduring adherences to a child-saver ideology and to the common law principles of diminished capacity and individualized justice for youth that survive transfer to criminal court. The diversity of sentencing of adolescents by criminal court judges suggests that many treat adolescent defendants as children in need of guidance rather than adult-like offenders. This diversity

¹⁰³ In addition to rehabilitation, juvenile courts in the U.S. were also founded on the principle of avoiding the personal and social stigma of conviction and punishment as an adult. See, generally, Franklin E. Zimring, *The Common Thread*, in *A CENTURY OF JUVENILE JUSTICE* (Rosenheim, Margaret K., Franklin E. Zimring, David S. Tanenhaus, and Bernardine Dohrn, eds.) (2002).

¹⁰⁴ See Singer *supra* note 3.

of sentencing made possible in New York criminal courts by laws that allow judges to circumvent sentencing guidelines and give reduced sentences to certain youths¹⁰⁵.

Although a “leniency gap” is evident in the severity of punishment between juvenile and criminal court, it is possible that principles of ‘juvenile justice’ – diminished culpability, the possibility of developmental correction and desistance – are reproduced within the criminal courts¹⁰⁶. To test this possibility, sentencing research should compare the criteria that juvenile and criminal court judges apply in sentencing adolescents. This research should determine the dimensions and thresholds of culpability to which adolescent defendants actually are held in criminal courts and the extent to which criminal court decision-makers consider youthfulness as a mitigating factor. Moreover, future research should study the construction of institutional mechanisms to preserve a child-saver ideology within a harsher and potentially more actuarial¹⁰⁷ context of criminal court. Such studies should examine whether and how the childhood “discount” survives the jurisdictional transfer to criminal court. That is, with respect to punitiveness toward serious adolescent offenders, juvenile and criminal courts should be compared on their own merits and not by unidimensional categorical labels as either “juvenile” or “criminal” court.

Juvenile courts embody the common law principles of reduced culpability for adolescents who commit crimes. Yet in the past few decades we have seen a proliferation of policies mandating that increased numbers of adolescents be denied the benefit of a traditionally more rehabilitative juvenile court and held fully accountable for crimes in criminal court. Our research shows that criminal courts to which these adolescents are transferred are indeed more punitive than juvenile courts. However, despite the attempts to weaken the principal of reduced culpability for adolescents, the resilience of common law doctrine of diminished responsibility in childhood has animated organizational adaptations and the creative exercise of discretion that seem to defeat popular efforts to criminalize adolescent offenders.¹⁰⁸ These developments

¹⁰⁵ New York’s Youthful Offender Law allows for reduced sentences and judicial discretion in making sentencing decisions for certain youth under age 18. *Supra* note 59.

¹⁰⁶ See Singer et al., *supra* note 40, who find that New York City youth parts reproduce juvenile justice in adult court by holding a small proportion of eligible offenders accountable to the extent allowed by law, and by creating specialized courts for dealing with adolescents.

¹⁰⁷ See generally Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution* 57 U. MIAMI LAW REV (2001).

¹⁰⁸ The highly publicized conviction of thirteen-year-old Nathaniel Abraham on first degree murder charges in Michigan in 1999 and his sentencing later on to treatment in a secure facility in Michigan’s juvenile justice system illustrates the tensions and competing normative strains inherent in the movement to criminalize delinquency and to allocate punishments to adolescents convicted under these laws. Despite the fact that Nathaniel “was officially assessed as functioning at the level of a six-year-old, both intellectually and emotionally,” prosecutors charged him as an adult for first degree murder on the basis that he was capable of forming the requisite intent. He was the youngest person ever to stand trial for murder in the United States. Keith Bradsher, *Michigan Boy Who Killed at 11 is Convicted of Murder as Adult*, *New York Times*, Nov. 17, 1999, at A1. His conviction as an adult illustrates the tendency of prosecutors to respond to the severity of the offense instead of the developmental or therapeutic needs of juvenile offenders. Nathaniel was found guilty by a jury of second degree murder. However, the judge exercised the discretion under Michigan law to sentence Nathaniel to a juvenile detention center rather than a prison. See, Deanna M. Maher, *Michigan Juveniles are Denied Equal Defenses Before the Law: The State of Michigan’s Reaction to Juvenile Defendants*, 78 *University of Detroit Mercy Law Review*, 259, 260 (2001). The judge was able to exercise this discretion because Nathaniel was under the age of fourteen when he committed the alleged offense. However, Nathaniel was placed in the maximum security program

suggest that the century-long embrace of the common law doctrine of childhood is not about to go away any time soon in American law.

at Maxey Boys Training Center, a program that was established for “older, violent offenders”. Christina DeJong & Eve Schwitzer Merrill, Getting “Tough on Crime”: Juvenile Waiver and the Criminal Court, 27 *Ohio Northern University Law Review*, 175(2001).