



THE CONSEQUENCES AREN'T MINOR

INTRODUCTION

In the early 1990's, as a result of the Central Park jogger case, prominent and influential individuals, such as former Princeton professor and Bush Administration appointee John Dilulio, made doom and gloom predictions about the emergence of a "generational wolfpack" of "fatherless, Godless and jobless" youth. This superpredator phrase stuck and almost every state passed new laws to make it easier to try and sentence youth in the adult criminal justice system. Now researchers estimate that approximately 200,000 youth are prosecuted in adult courts every year. This places youth at risk of assault, suicide and death in adult jails and prisons. The consequences of an adult conviction are long-term, serious and life-threatening. This book is designed to help policymakers understand the full impact of these policies and highlights seven states: California, Connecticut, Florida, Illinois, North Carolina, Wisconsin and Virginia.

KEY FINDINGS

National and state research, and the experience of young people, their parents, and their families, give us a concrete picture of how the laws governing the trying, sentencing, and incarceration of youth do not promote public safety. The following are more than a dozen key findings from this research.

#1 The overwhelming majority of youth who enter the adult court are not there for serious, violent crimes.

Estimates range on the number of youth prosecuted in adult court nationally. Some researchers believe that as many as 200,000 youth are prosecuted every year. Despite the fact that many of the state laws were intended to prosecute the most serious offenders, most youth who are tried in adult courts are *there no matter how minor their offense*. Most of the youth who enter the adult court are charged with non-violent offenses. For example, more than 10,000 young people in Connecticut enter the adult court system each year the vast majority for non-violent offenses. In 2002, in Wisconsin, there were almost 14,000 admissions of 17-year-olds to adult jails—only 15 percent of these youth were arrested for violent crimes such as murder, rape, aggravated assault, and robbery.

#2 Increasing numbers of young people have been placed in adult jails where they are at risk of assault, abuse, and death.

Currently, 40 states permit or require that youth charged as adults be placed pre-trial in an adult jail, and in some states they may be required to serve their entire sentence in an adult jail. According to the National Council on Crime and Delinquency, since 1990 the incarceration of youth in adult jails has increased 208%. On any given day, more than 7,000 young people are held in adult jails. This policy places thousands of young people at risk as it is extremely difficult to keep youth safe in adult jails.

#3 State laws may contradict core federal protections designed to prohibit confinement of juveniles with adults.

Federal protections approved by the Congress in 1974 to protect youth by prohibiting the placement of youth in adult jails (except in rare and limited circumstances) do not apply to youth who are prosecuted as adults.

#4 In contrast to growing numbers of youth incarcerated in adult jails, adult prisons' admissions of youth are declining.

On any given day, more than 2,000 youth are in adult prisons. With the exception of Connecticut, which led the nation in the number of youth in adult prison and experienced

a nearly 20% increase in the number of youth in adult prison in 2005, this number has declined significantly over the past decade. One analysis of the discrepancies in the numbers is that even while more and more youth are being prosecuted as adults, few are found to commit crimes serious enough to warrant time in adult jails. Many youth could be safely kept in the juvenile justice system. Youth in adult prisons are at risk of abuse, sexual assault, suicide, and death, which has led experts to conclude that “clearly, juveniles are a vulnerable population within adult correctional facilities.”

#5 The decision to send youth to adult court is most often not made by the one person best considered to judge the merits of the youth’s case—the juvenile court judge.

In most instances, juvenile court judges do not make the decision about whether a youth should be prosecuted in adult court, despite the fact that a juvenile court judge is a neutral player who is in the best position to investigate the facts and make the decision.

#6 Access to effective legal counsel is a deciding factor on whether a youth is prosecuted as an adult.

The effectiveness of a youth’s lawyer can be the difference between whether a youth is prosecuted as an adult or as a juvenile by the justice system.

7 Youth of color are disproportionately affected by these policies.

In every state profiled in this report for which data are available, youth of color are disproportionately affected by these statutes. For example, of the 6,629 youth who entered the custody of the California Department of Corrections for an offense committed prior to their 18th birthday, seventy percent were African-American and Latino, and less than 10 percent were white. In Illinois, youth of color are about a third of the youth population, but research has shown that they have represented 9 out of 10 young people in the adult system.

8 Female youth are affected too, but little is known about them.

Very limited data are available on girls in the adult criminal justice system. No recent, comprehensive national research studies have been undertaken that document the impact of the placement of girls in the adult criminal justice system. There are model approaches to serve girls in the juvenile justice system that could be more viable alternatives to placing girls in the adult justice system.

#9 The consequences for prosecuting youth in adult court “aren’t minor.”

Youth tried as adults face the same punishments as adults. They can be placed in adult jails pre- and post-trial, sentenced to serve time in adult prisons, or be placed on adult probation with few to no rehabilitative services. Youth also are subject to the same sentencing guidelines as adults and may receive mandatory minimum sentences or life without parole. The only consequence that youth cannot receive is the death penalty. When youth leave jail or prison, are on probation, or have completed their adult sentences, they carry the stigma of an adult criminal conviction. They may have difficulty finding a job or getting a college degree to help them turn their lives around. The consequences of an adult conviction aren’t minor; they are serious, long-term, life-threatening, and in some cases, deadly.

10 The research shows that these laws do not promote public safety.

Although research on the full impact of these laws is ongoing, the most current results reveal an ever-increasing negative impact on youth adjudicated in the adult criminal justice system. In addition, studies by researchers throughout the country show that sending youth to the adult criminal justice system doesn’t work to reduce crime. In one study comparing the recidivism of youth waived to criminal court with those retained in juvenile court, the research found that those in the “adultified” group were

more likely to be re-arrested and to commit more serious new offenses; they also re-offended more quickly. Another study that compared the recidivism rates of youth in two states (New York and New Jersey), that differed only by the age at which they prosecuted youthful offenders in the adult system: This study found that, youth tried in adult court were much more likely to re-offend more quickly and with more serious offenses.

11 These laws ignore the latest scientific evidence on the adolescent brain—the same evidence that informed the Supreme Court’s decision on barring the juvenile death penalty.

The Supreme Court’s decision relied heavily on new scientific research showing that certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20’s. State laws passed prior to these research studies do not take into account these findings. The laws need to be reexamined to reflect this latest scientific evidence on the adolescent brain.

12 Assessing the impact of youth incarceration is difficult because of a lack of available data.

As already mentioned, every year thousands of young people are tried, sentenced, or incarcerated as adults. Some researchers say that this could be as many as 200,000 youth every year. However, no one really knows how many young people this affects. There is no one single, credible, national data source that tracks all the youth prosecuted in adult courts. If researchers are not able to assess the magnitude of the impact of these state laws on youth, policymakers lack the information to make informed decisions. There is a need to collect more data so that we can understand just how many youth are affected.

13 The public should invest its dollars by strengthening the juvenile justice system.

The current juvenile justice system in states is a much more viable alternative than the adult criminal justice system in treating young people in conflict with the law. The long-term benefits to society nationwide of returning youth to the jurisdiction of the juvenile court far outweigh any short-term costs that may be incurred. New research shows that rehabilitative programs, including ones that treat serious, chronic, and violent offenders in the juvenile justice system, reduce juvenile crime. And, the cost of simply keeping the system as it is affects society in ways that cannot be calculated in dollars and cents.

THE OPPORTUNITY FOR CHANGE

#1 All the new research supports a change in policy direction.

State and local policymakers did not have the benefit of this new compelling research on recidivism, competency, adolescent brain development, and effective juvenile justice programs when they were considering changes to their state’s laws on trying youth as adults. Just as this research influenced the Supreme Court to eliminate the juvenile death penalty, this new research also provides a strong basis for re-examination of and substantial changes to state statutes and policies.

2 The nation recognizes the need for change, and some states are implementing reforms.

State legislators, juvenile and adult court judges, juvenile and adult detention, jail, and correctional administrators, and probation officials throughout the country are pushing for reforms nationally and in individual states. These public officials are supported by scores

of prominent national, state, and local organizations who are calling for major changes in national and state policy. A number of states have already begun to re-examine their state statutes and in some cases have implemented policy changes. In addition, youth, their parents, and their families, who have been most affected by these policies, are speaking out, organizing, and educating national and state policymakers.

3 When we invest in young people, they can succeed.

Researchers have not yet been able to quantify the benefits of helping individual youth, who may go on to make significant contributions to society, who directly benefited from the rehabilitative nature of the juvenile court include Olympic Gold Medalist Bob Beamon, U.S. Senator, Alan Simpson and entertainer Ella Fitzgerald, all who may not have made the contributions they went on to make if they had been treated like adults.

RECOMMENDATIONS

While experts from each state have developed their own state-specific recommendations on how the laws and policies in those states should be updated, the report findings support several recommendations that are national in scope. Federal, state, and local policymakers should consider these policies.

1. State and local policymakers should consider immediately adopting the reforms recommended in their state's section such as:
 - increasing the age of juvenile court jurisdiction to 18;
 - banning the placement of youth in adult jails and prisons;
 - providing waiver/transfer to adult court by judicial waiver only;
 - redirecting resources to expand developmentally appropriate treatment and services for youth in the juvenile justice system as an alternative to the adult criminal justice system; and
 - investing in quality and effective legal counsel for youth.
2. Federal policymakers should consider amending the Juvenile Justice & Delinquency Prevention Act (JJDP A) in 2007 by:
 - imposing a federal ban on placement of young people in adult jails and prisons; and
 - strengthening the federal "Disproportionate Minority Contact" provision by requiring states to invest federal and state resources in effective approaches to reducing racial disparities in the justice system.
3. Starting this year, federal, state, and local policymakers should make significant improvements in the juvenile justice system by investing in programs that are developmentally appropriate and evidence-based, through the JJDP A and other federal programs as well as through state appropriations.
4. This year federal, state, and local policymakers should invest in and undertake significant data collection efforts on the impact of prosecuting youth as adults.
5. Federal, state and local policymakers should commit to regularly visit youth in adult jails and prisons and hold public hearings on an ongoing basis to ensure that the youth and families most affected by these policies are involved in policy deliberations.

ABOUT THE ORGANIZATION--THE CAMPAIGN FOR YOUTH JUSTICE

The Campaign for Youth Justice (CFYJ) is dedicated to ending the practice of trying, sentencing, and incarcerating youth under the age of 18 in the adult criminal justice system. The goals of the campaign are:

- to raise awareness about the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating young people in adult jails and prisons;
- to reduce the number of youth who are tried, sentenced, and incarcerated in the adult system;
- to decrease the harmful impact of trying youthful offenders in adult court; and
- to promote research-based, developmentally appropriate rehabilitative programs and services for youth.

DEDICATION

This report is dedicated to the thousands of young people and their families across the country who have been affected negatively by state laws in the name of public safety.

ACKNOWLEDGMENTS

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WHAT IS THE LAW IN VIRGINIA?

Virginia allows for young people to be sent to the adult criminal justice system, including incarceration in jails and prisons, through a variety of legal mechanisms. Although Virginia's statutory scheme does not specifically reference *discretionary waiver*, *mandatory waiver*, and direct file, it does allow for these practices through processes it terms "juvenile transfer" and "certification."¹ The following include the key features of the way young people end up in the adult criminal justice system in Virginia.

Juvenile justice jurisdiction runs until youth turn 18.

Juveniles are defined as persons under age 18. There is no minimum age in Virginia for juvenile court jurisdiction, but youth must be at least 11 years old before they may be committed to the custody of the Department of Juvenile Justice.²

Transfer hearings.

Generally, youth who become the subject of juvenile delinquency petitions before their 18th birthday are subject to the jurisdiction of Virginia's Juvenile and Domestic Relations Court (J&DR Court).³ Before a youth may be transferred or certified to the adult Circuit Court, the J&DR Court must hold a preliminary hearing. Depending on the status of the case, the preliminary hearing can either be a full review of which court the young person can be tried in, or it can be a perfunctory hearing in which competence is presumed and the prosecutor only needs to establish probable cause to send the case to the Circuit Court.⁴

There are a series of factors the court can consider when determining if a young person should remain in the juvenile court. (These factors only apply to *judicial waiver* decisions and do not apply when the case is *statutorily excluded*.)

- The seriousness and number of alleged offenses;
- The record and previous history of the youth in this or other jurisdictions;
- The youth's age;
- Whether the youth has previously absconded from the legal custody of a juvenile correctional entity in any jurisdiction;

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- The extent, if any, of the youth's degree of mental retardation or mental illness;
- The youth's school record;
- The youth's mental and emotional maturity;
- The youth's physical condition and physical maturity;
- Whether the youth can be retained in the juvenile justice system long enough for effective treatment and rehabilitation; and
- The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the youth's problems.⁵

Judicial discretionary waiver.⁶

As stated, in some cases the juvenile court retains discretion over the transfer decision. To do so, the court must first conduct a transfer hearing.⁷ If a youth is alleged to have committed a crime that would be considered a felony if committed by an adult,⁸ the prosecutor may move to have the young person tried as an adult. There is a rebuttable presumption⁹ (i.e., it is taken to be true unless someone comes forward to contest it and proves otherwise) that the juvenile is competent to stand trial as an adult. The burden of proof rests on the young person to show that the state has not met the thresholds (that a young person is competent, 14 or older, written notice was given, and that there was probable cause that the youth committed the crime) for him or her to be tried as an adult. If a judge finds probable cause, the court must decide whether the youth is "not a proper person" to remain within the jurisdiction of the juvenile court. The court can then consider the above factors when making the decision.¹⁰

Prosecutorial waiver or certification.¹¹

In Virginia, the "certification procedure," which is similar to the direct file procedure in other states, places the choice of prosecution in an adult or juvenile forum solely in the hands of the prosecutor, who in Virginia is referred to as the "Commonwealth Attorney."¹² The prosecutor may elect to try a youth as an adult if the youth is charged with certain crimes.¹³ The prosecutor must provide "written notice of his intent" to try the youth as an adult,¹⁴ and a hearing must be held. Once again, it is up to the young person being charged to prove that he or she is not competent¹⁵ to stand trial as an adult. If the J&DR Court finds that the young person is at least 14 years old, that the prosecutor has provided written notice of wanting to try the young person as an adult, and that there is probable cause that the youth committed the crime, the charge is certified to Virginia's Circuit Court. If these thresholds are met, the court has no discretion to retain juvenile court jurisdiction.¹⁶ The transfer factors used in discretionary waiver proceedings have no bearing on this certification decision.

Statutory or legislative exclusion or mandatory waiver.¹⁷

If a youth is charged with certain forms of murder or aggravated malicious wounding, and the same legal thresholds are met in a hearing (that a young person is competent, 14 or older, written notice was given, and that there was probable cause that the youth committed the crime), the young person will be tried as an adult. Assuming that these thresholds are met, the juvenile court has no discretion to retain juvenile court jurisdiction. Again, the transfer factors described under the state's discretionary waiver have no bearing on this decision.

Reverse waiver.

If the young person is waived to the adult court under discretionary waiver, the youth may appeal the decision and try to get transferred back to the juvenile court. A young person has

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10 days to appeal the transfer decision. The adult Circuit Court has jurisdiction over this appeal and may decide to keep the case or return it to the juvenile court for adjudication and disposition.¹⁸ With the exception of the probable cause determination, which is not subject to review on appeal, the Circuit Court may review the J&DR Court's transfer decision to determine if it was in compliance with Virginia's transfer statute.¹⁹ Also, when a prosecutor's motion to transfer a youth to the adult court is denied, he or she may appeal this decision to the adult Circuit Court, if it is in the public interest to do so.²⁰

Virginia is a blended sentencing state.

In Virginia, youth tried as adults are entitled to jury trials, but are sentenced by Circuit Court judges. In most cases, young people who are tried as adults may be sentenced, at least partly, as youth, but the availability of some juvenile sentencing options turns upon whether the offense is categorized as a violent juvenile felony.²¹ If this threshold is met, a youth may serve a portion of the sentence in the juvenile justice system and serve the rest of the sentence in the adult system. Youth also may receive a suspended adult sentence if they successfully complete their juvenile term. If the offense is not categorized as a violent juvenile felony, the Circuit Court can then sentence the juvenile as either an adult or as a juvenile. This can include a commitment as a "serious juvenile offender," which allows the court to sentence a youth to a longer term in a juvenile correctional facility than is otherwise permissible under Virginia law. Typically, the maximum juvenile sentence is three years,²² but a "serious juvenile offender" may be sentenced for up to seven years, or until the juvenile's 21st birthday, whichever occurs first.²³ In these cases, the Court reviews the progress of the youth on an annual basis beginning on the second anniversary of the sentence, and has the authority, even when the youth has been sentenced as an adult to a blended sentence, to suspend the remaining juvenile and/or adult time if the young person has demonstrated necessary progress.²⁴

Other distinctive features of Virginia's adultification statutes.

In Virginia, prosecutors may move to certify a felony or misdemeanor offense not otherwise eligible for certification to adult court, to the adult court for trial if the offense is "ancillary" or related to another offense that is subject to certification.²⁵ "Ancillary charge" means that any delinquent act committed by a juvenile as a part of the same act or transaction, or which constitutes a part of a common scheme or plan with, a delinquent act which would be a felony if committed by an adult.²⁶ If the juvenile court determines at the preliminary hearing that a charge is ancillary to a certified charge, the charge will be sent to the adult court for prosecution and disposition with the certified charge.²⁷ Also, in Virginia, when certain offenses are tried in the adult court, they are subject to mandatory minimum adult prison sentences. For example, the crime of use of a firearm in the commission of a felony carries three years of mandatory adult prison time for a first offense, and trumps the ability of the Circuit Court Judge to order a juvenile sentence.²⁸

Once an adult, always an adult.

Virginia's *Once an Adult, Always an Adult* provision had created an alternative and unfortunate avenue to adult court jurisdiction for juveniles who were certified or transferred to the jurisdiction of the adult court in a prior proceeding. According to the Virginia Supreme Court's interpretation of this statute, the transfer of a youth to adult court would have kept all future charges in adult court, even if the charges first brought in Circuit Court were ultimately dismissed.²⁹ Additionally, this statute did not distinguish between subsequent felony and misdemeanor offenses.³⁰ Therefore, a misdemeanor offense, which could not normally be brought against a youth in circuit court, would have required prosecution in the adult court if the youth was tried or treated as an adult in a prior proceeding. As this report goes to press, a bill passed both houses of the Virginia General Assembly to change Virginia's law to provide that only youth 'convicted' of crimes in circuit court had to be tried again for subsequent offenses in circuit court. This amendment to the statute passed both houses unanimously and is an example of how advocates and legislators can work together to make common-sense improvements to the administration of juvenile justice.

In Virginia, when certain offenses are tried in the adult court, they are subject to mandatory minimum adult prison sentences.

Young people convicted in the adult court can end up in adult jails and prison.

Virginia permits, but does not require, that youth awaiting trial as adults can be housed with the general population in adult jails without the sight and sound separation benefits allotted to youth being tried as juveniles detained in adult jails.³¹ After a youth was brutally beaten in the Virginia Beach Jail, the law, which previously mandated that youth be placed in adult jails, was changed in 1997 to make this placement discretionary. According to a recent report by Amnesty International USA, of the 2,225 youth in the United States serving life without the possibility of parole, the adult Virginia Department of Corrections (DOC) houses 48 of them.³²

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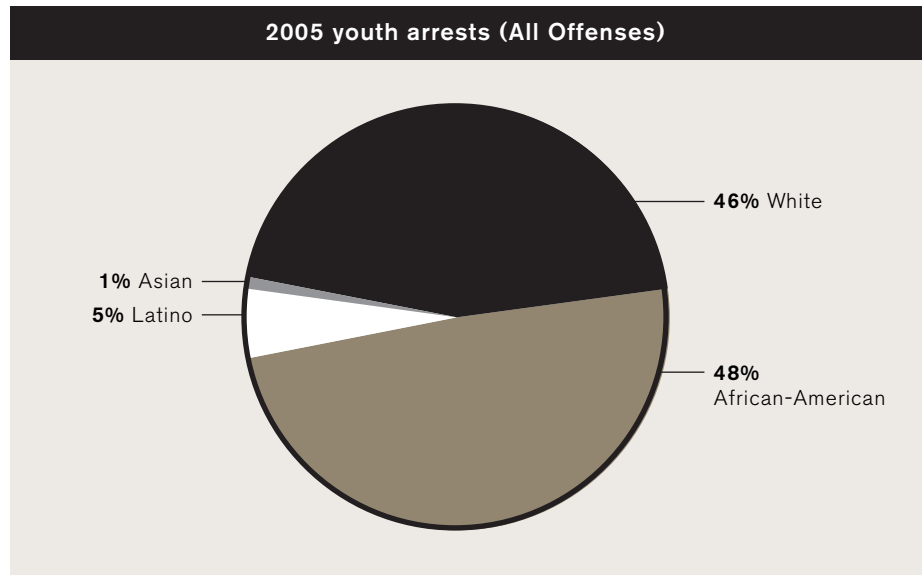
WHO IS AFFECTED BY THE LAWS IN VIRGINIA?

The Virginia Supreme Court, State Police, Department of Juvenile Justice, and Department of Corrections each keep data relating to juvenile transfer and certification. However, because youth who are tried as adults begin in the juvenile system, move into the adult system, and may then be sentenced as either adults or juveniles, the available data are not kept in one centralized or uniform depository. As a result, it is difficult to determine the number of youth who are affected each year by Virginia's transfer and certification laws. The following statistics provide the best available estimates of the number and characteristics of the young people who are affected by Virginia's laws.

Arrest and convictions data.

In 2005, there were 32,980 arrests of youth under the age of 18 in Virginia.³³ Of those arrests, just over 1,000 were for violent index offenses, classified by the Federal Bureau of Investigation as murder, rape, robbery, and aggravated assault.³⁴ African-American youth comprised fewer than half of all juvenile arrests in 2005.³⁵

Source: Virginia Incident-Based Reporting System, Virginia State Police. (2005).



According to the Virginia Sentencing Commission, 325 youth were convicted of a felony in adult circuit court in 2003, 306 youth were convicted in 2004, and 291 in 2005.³⁶ According to the Virginia Department of Juvenile Justice, in each year at least one-third or more of these youth were initially sentenced to the Department of Juvenile Justice to serve all or at least a portion of their sentence.³⁷ This percentage represents a much

larger percentage of sentenced juveniles than those who are placed directly into the Department of Corrections.

Specifically, according to the Virginia Department of Corrections,³⁸ in 2003, 75 youth were admitted to the adult corrections system. Seventy-two were sentenced in 2004 and 59 were sentenced in 2005. Since most young people who are sentenced are likely sentenced to the adult system for more than a year, there is probably little double counting in the sentencing figures.

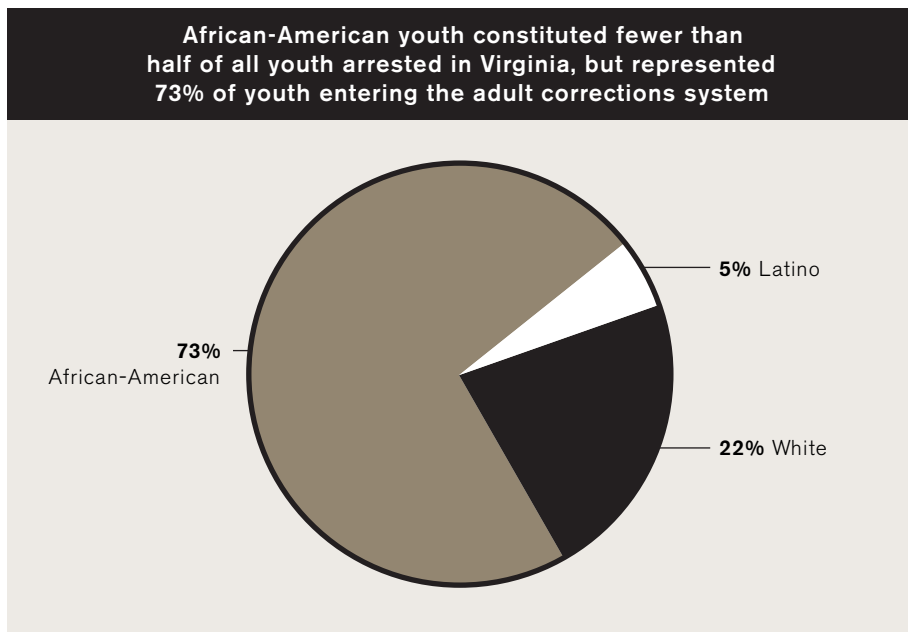
Even though many youth appear to be sentenced as juveniles, it is important to remember that all youth convicted as adults, regardless of where they are placed, face the same collateral consequences and barriers imposed by adult felony convictions.

The racial, ethnic, and offense profile of young people sent to the adult system.

In 2005, of the 59 new court commitments (youth transferred and convicted in adult court and sentenced to the DOC on an annual basis), 73% were African-American and 24% were for non-violent offenses. In 2004, 67% of new commitments were African-American and in 2003, 69% were African-American.

From 2003 to 2005, between 8% and 15% of youth incarcerated in adult prisons (the standing population of juveniles in adult prison on any given day) were serving time for non-violent offenses. Further, of those youth sentenced to serve time in the DOC from 2003 to 2005, approximately 4% were girls. Sixty-nine percent of new court commitments during this period were African-American.

In 2005, of the 59 new court commitments to the Virginia Department of Corrections, 73% were African-American and 24% were for non-violent offenses.



Source: 2005 New Court Commitments, All Offenses Data provided by Laura Cross, Virginia Department of Corrections (2006)

YOUNG PEOPLE AND FAMILIES AFFECTED BY VIRGINIA'S LAWS

The Reverend Jones,³⁹ the father of six adult children, became a big brother to Jim⁴⁰ when he was 11 years old. For several years, he took Jim with him to church group meetings, movies, and community activities. He was committed to providing Jim with a positive adult male role model. Shortly after Jim turned 14, he was arrested and, though these were his

first alleged offenses, tried as an adult. Reverend Jones had this to say about Virginia's practice of trying youth as adults:

... I feel Jim is a young black male now caught up in a legal system not really looking out for his best interest nor has taken the time to investigate the history of this young man.

My greatest fear about what has happened is that this criminal system is doing the opposite of what it is designed to do and Jim will end up being another angry young black male with no dream and no future. Because in his mind society has demonstrated that he is of little value. It's hard to believe we have a justice system that is designed to strip a young man of his self-worth at such a young age and call it rehabilitation. When and where does common sense come into play?

WHAT ARE THE POLICY OPTIONS IN VIRGINIA?

Raising attorney's fees: Findings of the American Bar Association assessment.

For several years, attorneys have advocated for an increase in payment for court-appointed attorneys and "issue-specific training" for attorneys who handle serious cases.⁴¹ In 2004, *A Comprehensive Review of Indigent Defense in Virginia* found that "Virginia's indigent defense system is deeply flawed."⁴² Specific findings from the ABA report include:

- "The unwaivable statutory fee caps for court-appointed counsel in Virginia are the lowest in the country."
- "The unreasonably low statutory fee caps act as a disincentive to many assigned counsel from doing the work necessary to provide meaningful and effective representation of their indigent clients. The judges, Commonwealth's Attorneys and juvenile court personnel...agree that low fees are a disincentive to zealous advocacy."
- "There is great disparity in resources afforded to public defenders and Commonwealth's attorneys."⁴³

Despite the advocacy work done to improve pay for defenders, the pay gains for court-appointed and public defenders have been minimal. The maximum total fee per juvenile charge is just \$120, while each Circuit Court felony charge is capped at \$445.⁴⁴

There is an exception for felonies punishable by more than 20 years in prison; the fee for representation in these cases is capped at \$1,235.⁴⁵ The fee caps are particularly onerous in juvenile transfer cases where lawyers should perform diligent investigation and preparation in advance of the transfer hearing, as well as the trial, but the fee—\$120—will remain the same.

A December 2005 newspaper editorial by Esther Windmueller, a Richmond, Virginia, attorney, noted that "[e]ven though many court-appointed lawyers and public defenders work tirelessly for their underprivileged clients, too often Virginians have received exactly what we've paid for: a system where, as the [American Bar Report] put it, 'substandard practice has become the accepted norm.'" The governor of Virginia, Tim Kaine, recently proposed increased funding totaling nine million dollars to address this problem, but this proposal awaits an uncertain fate in Virginia's General Assembly. In addition, the Virginia Indigent Defense Commission has recently approved rigorous standards for lawyers representing accused youth. The combination of more rigorous standards and improved compensation will address the persistent problems with Virginia's indigent defense system.

"The fee caps for court-appointed counsel in Virginia are the lowest in the country."
—A Comprehensive Review of Indigent Defense in Virginia, American Bar Association (2004)

Introducing legislation to remove youth from juvenile detention and send them to jail if they are awaiting trial as adults.

HB1332, legislation introduced in 2006, would have required that youth awaiting trial be transferred to the adult criminal justice system and placed in adult jails, as opposed to juvenile detention facilities. The bill failed to become law.

Conducting legislative studies on disproportionate minority contact and access to legal representation.

Representative Brian Moran (D-Alexandria) introduced legislation that has led to House Joint Resolution No. 136 which asked the Virginia State Crime Commission to examine the juvenile justice system, paying particular attention to the following issues: disproportionate minority contact, and quality access to legal representation in accordance with American Bar Association recommendations.⁴⁶ This study, due to the legislature in November of 2007, will report on the Crime Commission's findings.

VIRGINIA RECOMMENDATIONS

• **Organize the collection of data on youth tried and sentenced as adults.**

As mentioned, data relevant to studying the practice of trying and sentencing youth as adults are hard to access in Virginia. Different agencies have different pieces of information. It is very difficult to determine the exact number of youth tried in Circuit Court and the exact resolution of their cases. The initial data collected for this report suggest that Circuit Court Judges are, at least initially, treating more of the young people who come before them as youth rather than as adults. More information might confirm this trend and raise important questions for policymakers. In addition, it would be helpful for researchers to understand the relationship between geography and juvenile transfer. Given the latitude accorded prosecutors to decide which court will try juvenile offenders, it would be useful to learn more about how this discretion is exercised.

• **Ensure judicial discretion prior to certification to adult court.**

Virginia's legislature recognizes that there are varying degrees of criminal culpability and concludes that not all juveniles have equal rehabilitative potential. Seriousness of the offense is but one of 10 factors that a J&DR Court "shall" consider before determining if transfer to adult court jurisdiction is appropriate.⁴⁷ However, in certification cases, which tend to constitute the more serious offenses, judges have no discretion in determining if the adult forum is most appropriate for prosecution. In these cases, the juvenile court must certify juveniles to adult court merely upon finding probable cause. In contrast, transfer hearings provide a forum for these mitigating circumstances to be presented and assessed when determining the appropriate forum for prosecution. Providing discretion to J&DR Court judges, who typically occupy the bench for many years and review thousands of cases, would leave the transfer decision in the more appropriate hands of experienced evaluators of amenability to treatment and future dangerousness. Deputy prosecutors, who often serve very short tours of duty in juvenile court, do not have this type of experience.

• **Provide judges with discretion to sentence youth as youth, even if the charge carries mandatory minimum adult time for adults.**

In Virginia, mandatory minimum adult sentencing provisions trump those portions of the Virginia law that permit juveniles who are convicted by adult courts to be sentenced as juveniles or given suspended adult time. Offenses that carry mandatory minimum adult sentences, such as Virginia's use of a firearm statute, are intended to deter "violent criminal conduct" rather than reform "the most dangerous class of criminals."⁴⁸ Given the impulsive nature of most youth, the deterrent purpose may be of minimal value when

applied to juvenile offenders and likely would be far outweighed by the availability of appropriate rehabilitative services.

- **Keep youth out of adult jails.**

Jails are, by their very nature, short-term housing facilities. Because they do not tend to serve many youth at any one time, they often lack the education and mental health services so critical to a young person's rehabilitation. They do not have adequate staff, facilities, or experience to serve a juvenile population. By contrast, juvenile detention centers are well-versed in their obligations to provide educational services, mental health services, and other relevant services to juveniles.

- **Increase the quality of the defense afforded indigent youth facing transfer and certification.**

Specifically, Virginia should improve the pay provided to defense counsel who represent indigent juvenile defendants and waive the caps for those representing youth facing transfer to Circuit Court.

- **Require J&DR Courts to consider each of the statutory transfer factors before a transfer decision is made.**

The current statutory language states that although the J&DR Court "shall consider, but not be limited to" the statutory transfer factors, "no transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the[se] factors."⁴⁹ This qualifying language needlessly chips away at statutory transfer factors, including the age of the defendant, the number of prior court contacts, and the appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the youth's problems. These are factors that the legislature has concluded are relevant in determining whether transfer is appropriate.

- **Change the minimum age for prosecution of a youth as an adult.**

The minimum age for prosecution as an adult is currently 14. The minimum age should be raised to fit with what we now know about juvenile culpability. New research shows that differences exist in young people's brain functioning that contribute to their cognitive abilities. Although 16-year-olds may have the same intelligence or ability to reason as adults, in high-pressure crime situations, short-sighted decision-making, poor impulse control, and vulnerability to peer pressure may undermine a youth's decision-making capacity.⁵⁰ These developmental differences between youth and adults are key factors in justifying the special considerations made for youth and the existence of the juvenile justice system.⁵¹

NOTES

¹ Va. Code § 16.1-269.1.

² Va. Code §§ 16.1-228, 16.1-278.8(A)(14).

³ Va. Code § 16.1-241. This is true even if the delinquency petition is initiated after the juvenile's 18th birthday. However, juveniles who reach the age of 21 before they are charged with a felony that occurred before their 18th birthday are adjudicated as adults.

⁴ Va. Code § 16.1-269.1(A)(4).

⁵ Va. Code § 16.1-269.1(A)(4).

⁶ Va. Code § 16.1-269.1(A).

⁷ Va. Code § 16.1-269.1(A).

⁸ This provision relates to felony offenses that are not eligible for certification pursuant to Va. Code § 16.1-269.1(B) or (C) (typically less-serious felony offenses) or felony offenses that are eligible for certification pursuant to Va. Code § 16.1-269.1(C), but that the Commonwealth did not choose to certify to the Circuit Court. As a practical matter, Commonwealth

Attorneys tend to use the Va. Code § 16.1-269.1(C) procedure, where possible, as it is an easier standard to meet and puts the Commonwealth in a better bargaining position for possible plea negotiations.

⁹ Va. Code § 16.1-269.1(A) (3), (D).

¹⁰ Va. Code § 16.1-269.1(A).

¹¹ Va. Code § 16.1-269.1(C).

¹² Va. Code § 16.1-269.1(A).

¹³ Robbery, malicious wounding, abduction, carjacking, rape, or other specific charges set forth in Va. Code § 16.1-269.1(C).

¹⁴ Va. Code § 16.1-269.1(C).

¹⁵ Va. Code § 16.1-269.1(A) (3), (D).

¹⁶ Va. Code § 16.1-269.1(A) (1), (C), (D).

¹⁷ Va. Code § 16.1-269.1(B).

¹⁸ Va. Code § 16.1-269.4.

¹⁹ *Schwartz v. Commonwealth of Virginia*, 41 Va. App. 61, 70 (2003); Va. Code § 16.1-269.1(A).

- ²⁰ Va. Code § 16.1-269.3.
- ²¹ A "violent juvenile felony" is defined as any offense that is subject to certification to the adult court pursuant to Va. Code § 16.1-269.1(B) or (C). The statute reads that, under this provision, a juvenile may "serve a portion of the sentence as a serious juvenile offender ... and the remainder of such sentence in the same manner as provided for adults"; (ii) "... serve the entire sentence in the same manner as provided for adults"; or (iii) a suspended adult term "conditioned upon successful completion of such terms and conditions as may be imposed in a juvenile court upon disposition of a delinquency case..." [see Va. Code § 16.1-272(A)(1)].
- ²² Va. Code § 16.1-285.
- ²³ Va. Code § 16.1-285.1
- ²⁴ Va. Code §§ 16.1-285.1, 16.1-285.2.
- ²⁵ Va. Code §§ 16.1-269.1(D), 16.1-272.
- ²⁶ Va. Code § 16.1-228.
- ²⁷ Va. Code §§ 16.1-269.1(D). "If a juvenile is convicted of a violent juvenile felony, for that offense and for all ancillary crimes the court may order that" the juvenile be sentenced as an adult for a violent juvenile felony. Va. Code § 16.1-272(A)(1). If a juvenile is convicted by the Circuit Court of a felony offense, other than a violent juvenile felony, he may be sentenced as a juvenile or an adult. Va. Code § 16.1-272(A)(2). "If the juvenile is not convicted of a felony but is convicted of a misdemeanor," he will be sentenced as a juvenile. Va. Code § 16.1-272 (A)(3).
- ²⁸ Va. Code § 18.2-53.1.
- ²⁹ See, for example, *Cook v. Commonwealth*, 268 Va 111 (2004).
- ³⁰ Va. Code § 16.1-271.
- ³¹ Va. Code § 16.1-249(D).
- ³² Amnesty International and Human Rights Watch. (2005). *The rest of their lives: Life without parole for child offenders in the United States*. New York: Author.
- ³³ FBI Uniform Crime Reports, *Crime in the United States*, 2005.
- ³⁴ *Ibid.*
- ³⁵ Electronic data files from the Virginia Incident-Based Reporting System, compiled by the Virginia State Police.
- ³⁶ *Felony sentencing patterns for juveniles convicted in Circuit Court (FY2001-2005)*, presentation to the Virginia State Crime Commission by Richard Kern, Director of the Virginia Criminal Sentencing Commission.
- ³⁷ Virginia Department of Juvenile Justice report to the Virginia State Crime Commission. PowerPoint Presentation on Juvenile Justice Trends. (2006, October 18).
- ³⁸ Unless otherwise noted, all data from this section were provided by Laura Cross at the Virginia Department of Corrections, July 2006.
- ³⁹ Permission was obtained to use real names, except where otherwise noted.
- ⁴⁰ Jim is a pseudonym.
- ⁴¹ The American Bar Association Juvenile Justice Center and the Mid-Atlantic Juvenile Defender Center. (2002, September). *Virginia: An assessment of access to counsel and quality of representation in delinquency proceedings*. Washington, DC: Author.
- ⁴² Spangenberg, R. L. (2004, January). *A comprehensive review of indigent defense in Virginia* (Executive Summary). Washington, DC: American Bar Association Standing Committee on Legal Aid and Indigent Defendants. Retrieved January 29, 2007, from <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf>
- ⁴³ *Ibid.*
- ⁴⁴ Va. Code § 19.2-163.
- ⁴⁵ *Ibid.*
- ⁴⁶ House Joint Resolution No. 136 (2006).
- ⁴⁷ Va. Code § 16.1-269.1(A)(4).
- ⁴⁸ *Bullock v. Commonwealth*, 48 Va.App. 359, 377 (2006).
- ⁴⁹ Va. Code § 16.1-269.1(A)(4).
- ⁵⁰ MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. (2006, September). *Less guilty by reason of adolescence*. Philadelphia, PA: Author.
- ⁵¹ *Ibid.*