

**Congress of the United States  
House of Representatives  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism and Homeland Security**

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Hearing on H.R. 1279, April 5, 2005*

Mr. Chairman, Members of the Committee, I am Robert E. Shepherd, Jr., Emeritus Professor of Law at the University of Richmond Law School in Virginia, and a former Chair of the Juvenile Justice Committee of the American Bar Association. I am here to present testimony on H.R. 1279, the AGang Deterrence and Community Protection Act of 2005,<sup>@</sup> and I thank you for the opportunity to speak to you about this bill.

First, I would like to thank Congressman Frank Wolf of Virginia for his successful efforts in 2004 as part of the appropriation process to fund anti-gang activities, which has contributed greatly to efforts to suppress gangs in Virginia, especially in the northern part of the state. I also want to thank Congressman Bobby Scott of Virginia for his successful contributions through the years to bipartisan efforts in support of the Juvenile Justice and Delinquency Prevention Act (JJDP). That Act, originally enacted more than thirty years ago, has contributed greatly to the prevention of delinquency, to early intervention in the suppression of delinquency, to treating delinquent behavior and rehabilitating delinquent youth so as to prevent future delinquency, and to ensuring humane treatment of these young people in the juvenile justice system. The Act, and its programs, is still the best possible vehicle for protecting society from antisocial behavior by children and adolescents and for enabling these youth to become good citizens and successful adults.

Second, I urge the subcommittee and the Congress to reject the approaches taken in H.R. 1279 regarding juveniles, particularly in Section 115 concerning juveniles, as being counter-productive in protecting the safety of the community and as contrary to the best evidence of what works well with youth who may engage in serious and violent delinquent behavior. My first concern is about the continued federalization of the substantive criminal law, historically the domain of the states. State and local governments are best informed about what would be successful in addressing a crime problem locally or within a state, although there may be an important federal role in providing technical assistance and intelligence about unique problems. Virginia, for example, has enacted a number of laws in recent years to address gang-related criminal activity, including a gang registry, most of which apply to juveniles as well as adults. I share the concerns of the Judicial Conference of the United States, expressed in its letter of April 1, 2005, regarding the specific problems presented by federalizing criminal behavior by juveniles. Federal courts are really not equipped to address the particular issues and needs of adolescents, and federal correctional institutions do not have the programs suited to young people, as the Judicial Conference readily acknowledges. Indeed, most youth tried and convicted as juveniles in federal courts are placed in state juvenile correctional facilities because there is no federal counterpart.

Third, addressing specifically Section 115, the increased use of transfer to adult court of juveniles, even sixteen and seventeen-year-olds, is unwise and contrary to much evidence regarding the implications of transfer or certification. Several recent studies, by researchers in Florida, Minnesota, New York and New Jersey, and Pennsylvania, are consistent in showing that youth transferred to adult court and tried as adults had higher recidivism rates, they re-offended sooner after release from adult institutions, and their repeat offenses were more serious than similar youth retained in juvenile court for the same offenses in the same or comparable jurisdictions. (Lanza-Kaduce, Frazier, Lane & Bishop; Greene & Dougherty; Fagan; Mayers; Podkopacz & Feld; Coalition for Juvenile Justice) Thus, treatment as an adult created a greater risk for community safety in the long term than did juvenile treatment. A *Miami Herald* study of the Florida experience in 2001 concluded that A[s]ending a juvenile to prison increased by 35 percent the odds he=ll re-offend within a year of release.@ (Greene & Dougherty) Although there are no studies I know of on this particular point, it seems logical that sending a juvenile tried as an adult for gang-related offenses to an adult facility dominated by gangs would intensify that reported effect.

Juveniles incarcerated in adult correctional institutions are also at greater risk of assaults, both sexual and physical. Studies show that such youth are five times as likely to report being a victim of rape, twice as likely to be beaten by staff, and 50% more likely to be assaulted with a weapon than youth in juvenile facilities and they are eight times more likely to commit suicide. (Audi; Forst, Fagan & Vivona) Would not the fear of such assaults drive the youth even further into the arms of adult gang members in the same institution for protection?

Policies that increase the transfer of juveniles to adult court also have a disproportionate impact on children of color. Recent studies have shown that more than seven out of every ten youth admitted to adult facilities across the country were youth of color, and minority youth are more likely to be treated as adults than white youth charged with the same offenses. (Poe-Yamagata; Ziedenberg; Males & Macallair; Coalition for Juvenile Justice)

Making the decision whether to transfer a youth charged with gang-related violent behavior to the federal court for trial as an adult solely a prosecutorial decision which is not reviewable by a court is also unwise, and violates our basic concepts of due process and fair play. The legislation also allows any other offenses committed that are not covered by the Act to be tried as adult offenses, including lesser included offenses, thus putting some perhaps trivial charges in federal district courts as well. The bill provides no exception to non-reviewability for jurisdictional issues such as non-age--a fifteen-year-old mistakenly identified as being older--or for young people who may not be competent to stand trial as an adult, a high risk scenario as many youth who engage in risky behaviors have mental health problems. The Virginia statute that allows a prosecutor to seek adult handling provides that the juvenile court still has to find the presence of probable cause and that the juvenile is competent to stand trial. And the adult court can reconsider the prosecutor=s decision and treat the youth as a juvenile in making sentencing decisions.

Fourth, the mandatory minimum provisions in HR 1279 are also problematic, especially for adolescents. Judges should have broad discretion in sentencing adolescents, even when they are tried and treated as adults. As noted above, Virginia does this as part of its statutory framework for transfer. Juveniles involved in gang-related activity frequently have less culpability than the adults they associate with in antisocial behavior, they may be a lookout rather than a triggerman, and yet the legislation denies the court the power to discriminate among different levels of involvement and different kinds of behavior. As Bob Schwartz of the Juvenile Law Center in Philadelphia is fond of saying, Oliver Twist, the Artful Dodger, Bill Sikes, and Fagin were not equally culpable in their criminal activity in Dickensian London, but they would be under this bill. Also, longer sentences are not necessarily better and more protective of society, especially where juveniles are concerned.

Fifth, although juveniles charged as adults with capital offenses cannot be sentenced to death under the federal death penalty statute or *Roper v. Simmons*, does this legislation still expose them to a death-qualified jury, especially if they are tried jointly with adults? That question seems to linger in the air, without any clear answer provided in the bill.

Recent data show a stark reduction in the rate and seriousness of juvenile delinquency in the past nine or ten years, contrary to the dire predictions of many experts whose ominous writings shocked legislators into abandoning the core principles of the juvenile system. Those principles, separating delinquent youth from hardened criminals, treating youth as developmentally different from adults, and viewing young people as being inherently malleable and subject to change in a rehabilitative setting, are still fundamentally sound. Indeed, as we have learned more from the developmental and brain research in recent years, we know better what does work in turning around these young lives and correcting their behavior. Several treatment programs for juvenile offenders, even those charged with serious and violent offenses, have been thoroughly evaluated and work well in reducing recidivism. (E.g., Functional Family Therapy, Multidimensional Treatment Foster Care, and Multisystemic Therapy are community-based and deal with the youth in several different dimensions of his or her life.) And we know that trying them as adults is destructive and counter-productive, especially with mandatory minimum sentences.

A report released last year by Fight Crime: Invest in Kids, a law enforcement-based group, points to the effectiveness of many current programs in preventing gangs at the local and state level and in interdicting violent gang activity. That report, *CAUGHT IN THE CROSSFIRE: ARRESTING GANG VIOLENCE BY INVESTING IN KIDS*, offers much useful advice about programs that work with the help of federal investment in anti-gang programs through the JJDP and other entities.

I respectfully urge you to continue your historical focus on funding delinquency prevention and intervention programs through the Juvenile Justice and Delinquency Prevention Act, supplemented by further technical assistance to, and collaboration with, local authorities by the Justice Department and its entities, rather than increasing federal district court jurisdiction over young people with their different perspectives and characteristics. The Office of Juvenile

Justice and Delinquency Prevention, utilizing JJDPF funds, is assisting in the sponsorship of the National Youth Gang Symposium in early June in Orlando, Florida to focus on effective anti-gang strategies with juveniles, and this is an example of the more effective federal role in addressing gangs..

## References

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