

Chapter 3

Current Dimensions of the Criminal Prosecution of Juvenile Offenders

ABSTRACT

Chapter 3 accomplishes a critical exercise for this book and the field of transfer to criminal court (CC). That exercise entails specifying what transfer is and what it is not, as well as how it works and how it doesn't work. Although this should be a relative no-brainer, this task has been complicated by misleading statutory wording, and by misrepresentations of the phenomenon in the literature. Before attacking or defending transfer to CC, it is essential that everyone be on the same page. It is (or should be) impossible to research and analyze transfer when there is serious variation in how it is defined. This chapter carefully details the two (and not three or more) types of transfer that exist, and the difference between transfer (or discretionary exclusion) from mandatory exclusion. The latter is often misunderstood and falsely portrayed as an example of transfer. It isn't, as this chapter explains.

INTRODUCTION

The criminal prosecution of juvenile offenders (defined here as anyone under the age of eighteen) requires their *exclusion from juvenile court (JC)*. Youths can end up in CC only if they have been removed from the forum created to address their misbehavior, the JC. Due to the variety of the ways in which it can occur (i.e., the topic is broader than transfer), it is best to call the removal of youths from JC (or denial of entrance to JC) as *exclusion* from that forum.¹ Although this topic is straightforward and not complex, the exclusion of youths from JC has been misrepresented in the literature. The resulting confusion and misidentification of the material is so extensive that it is essential to first explain *what exclusion and transfer are and what they are not*.

MANDATORY EXCLUSION (ME)

Simply put, not all exclusion is created equal. There are two vastly different versions of it, each having its own rationale/justification, and each having unique implications for juvenile offenders. The first type is *mandatory exclusion* (hereinafter ME) where the choice of selecting a court in which to prosecute the juvenile was made *before* the youth committed the offense at issue. There is *no choice* in selecting the court, which is why this exclusion must be considered *mandatory* in nature. What has happened in this situation is that the “juvenile” has been redefined to be on a level legally equal to that of an adult (at least with respect to being prosecuted for crimes), and this transpired *prior to* the current criminal incident. When these juveniles left their homes the day of the current crime, they had already been converted to an adult-like status. Thus, there is only one forum in which these “juveniles” can be prosecuted, namely CC. Since mandatory exclusion does not involve any relocation of a case from one forum to another (the trial has only one place in which it can occur), it is not a matter of, and should never be referred to as, transfer.

There are two major ways in which mandatory exclusion can occur. The first is practiced in three states that have adopted a maximum JC age of sixteen instead of the more customary maximum age of seventeen. The thinking in these few states appears to be that seventeen-year-old offenders across the board deserve to be prosecuted for all offenses in CC; they apparently deserve to be denied any advantages potentially stemming from a JC prosecution.

The plain and simple truth is that it is the prerogative of a state’s legislature to decide the proper parameters of or boundaries between JCs and CCs, and even whether to maintain a JC in the first place. Whether the boundary decision of an age younger than seventeen is wise or appropriate is a matter of personal/political judgment. Unlike transfer, this method of exclusion has been ignored in the way of research or discussion/debate.

Historically, this method of exclusion accounted for the vast majority of defendants younger than eighteen who were subjected to criminal prosecution. This is easy to understand since this type of exclusion means *every criminal offense* committed by individuals of these ages must be resolved in CC.² This exclusion is mandatory and is not an example of transfer. Rather, the charges have *only one path* that can be taken. Nevertheless, this brand of mandatory exclusion has been incorrectly labelled transfer (see Chapter 6 and Table 38 I). Most important, resolving any problems related to transfer (including its elimination) will have no effect whatsoever on this example of mandatory exclusion.³

The second brand of mandatory exclusion has been adopted by most jurisdictions. It involves considering all juveniles who previously have been transferred to and convicted in CC as having been permanently removed from JC jurisdiction for any crimes committed by them from that point forward.⁴ This approach represents a “you can’t go home again” attitude towards offenders upon whom JC has given up on trying to help.⁵ By 2020, at least 34 states and Washington, D.C. had adopted it (Szymanski, 1996; OJJDP, 2020).

These youths are in the same legal context as those “juveniles” whose age is higher than the JC’s maximum age. By virtue of their previous record, they are permanently regarded as criminals once they have achieved that CC conviction. Trial for these offenders’ future criminal actions *must* occur in CC. Their cases have not been transferred to CC; JC never had jurisdiction over these current charges. These cases have been incorrectly referred to as transfer (see Chapter 6 and Table 38 J).

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