

# Chapter 10

## The Limitation Argument, Part 1: Minimizing the Transfer Target

### ABSTRACT

*Chapter 10 deals with the anti-transfer crowd (ATC) tactic of limiting the reach of transfer to criminal court (CC), assuming its elimination proves unattainable. The ATC mission, here, is to limit the target of transfer, especially in terms of age, offense, and disposition. A common claim is that only older (typically 16 and 17) delinquents should be transfer eligible. Inasmuch as the vast majority of transfers involves youths of this age the claim is mostly moot. Another argument is that only violent and person-related crimes should be transferred. This Chapter emphasizes that the chronic offender, the most prevalent subject of transfer, would very likely be beyond transfer's reach under this formula, which was probably the ATC's goal. Finally, the ATC demands that transfer be limited to youths who "require" a sentence longer than that available to JC. Although this is a critical reason for transfer, it is far from the only/primary reason to transfer.*

### INTRODUCTION

While some ATC members are *no-transfer* types, some concede some transfer is needed.

*No scholar or practitioner or advocate denies that it is sometimes necessary to transfer adolescents to criminal court. The public must be protected from dangerous youth who are not likely to be helped by treatment-oriented or supervisory sanctions... (Fagan, 2008, pp. 37-38).*

It would appear, then, that total inclusion types are neither scholars nor practitioners. In the alternative, perhaps Fagan has simply not encountered these folks or read their works.

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## **The Age Focus**

The claimed necessary circumstances for transfer vary. Sometimes it is a matter of a minimum age. Some ATC representatives simply emphasize that transfers should be “older” (NRC, 2013). Other ATC members concentrate on an age below which transfer is unacceptable, such as 12 due to ramifications of incarcerating these youths with adults, (Deitch, Barstow, Lukens, & Reyna, 2009), or 13 due to CST concerns (Steinberg, 2000; Steinberg & Cauffman, 2000), or 14 due to culpability limits (Hoeffel, 2013), or 15 due to fairness requirements (see Drizin & Tanenhaus, 2002, p. 690), or 16/17 due to a desire to preserve “life chances” (Zimring, 2000a, 2000b; see, also, IJA/ABA, 1980, pp. 15-16; NAC, 1980, p. 303). Feld (2000) identified the choices as among 14, 15 or 16 years of age (p. 112). More recently, Feld chose a minimum age of 16 (2017a). The ABA originally recommended 16, but later reduced it to 15 (Flicker, 1983, p. 11). DPs admit that youths “as young as 9 have the capacity for intentional behavior and know the difference between right and wrong (Steinberg, 2000, p. 6).” More important, perhaps, nearly all transfers are at least 15, and the vast majority are either 16 or 17; ATC age-related limitations, then, are mostly irrelevant, if not unnecessary.

## **The Offense Focus**

### **The Never Nonserious Offense Policy**

The ATC has reached a consensus in drawing a red line around nonserious offenses. These transfers are simply improper and unacceptable to the ATC. Feld (1987) observed:

*To the extent that organizational or political considerations result in youths being waived for less serious offenses, the inconsistency between juvenile and adult criminal sentencing practices is further aggravated (p. 504).*

Similarly, Zimring (2000b) complained that nonserious offenses have unnecessarily been transferred:

*Of course, not all of the cases transferred out of juvenile court are super-serious. In this regard, it is necessary to distinguish between the type of case that makes transfer necessary and the much wider variety of cases that get transferred. Once transfer out of juvenile court is institutionalized, the practice is often not restricted to the superserious cases that rendered it necessary. All manner of older, recidivist, and recalcitrant juveniles are pushed into criminal courts once the channel between the two institutions has been opened.... (p. 211, citations omitted; see, also, Cintron, 1995; Juskiewicz, 2000; Shook, 2005).*

Zimring implied here that the transfer of nonserious cases is both unnecessary and a violation of transfer laws. It is neither. Never have “super serious” cases been the *only* ones either subjected to transfer or considered necessary to be transferred. This policy completely ignores a major focus of transfer policy: chronic offenders who are beyond JC treatment capabilities. This offender may have committed a serious offense, which alone may have qualified for transfer, but typically, it is the chronic offending and persistent treatment failures that merit transfer in these cases. In some jurisdictions, these beyond-treatment transfers far outnumber the “super serious” group.

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