Prosecution in Superior or Juvenile Court:

The Proposed Model Code's Approach

A primer on history, policy, effectiveness, and related research

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Nobody likes to change a law that has been around for a decade and a half. Therefore, if the Legislature of Georgia is going to substitute the harsh penalties and adult prosecutions of juvenile offenders set up by 1994's Senate Bill 440 ("SB 440") for the Proposed Model Code's presumption that the vast majority of juveniles should be processed in juvenile court, lawmakers must be convinced both that the approach of SB 440 is not a time-honored "tradition" and that practical experience as well as legal and scientific principles show the Proposed Model Code's approach to be preferred. This white paper begins with a bit of history of juvenile law in Georgia, tracing the efforts of our lawmakers to give juveniles the benefits of accountability and mercy. It goes on to question whether SB 440 has had a positive impact on the citizens of Georgia and has constituted a wise use of taxpayer resources, and it discusses some of the more recent legal and scientific developments suggesting it may be time for a change. Finally, this paper concludes with recommendations for further studies that would help policymakers better understand just how SB 440 has functioned and help them determine whether a new approach is needed.

Hard Time for Juvenile Crime in Georgia: A Brief History Lesson

The More Things Change . . .

The issue of whether to try children as juveniles or adults is nothing new. Policymakers and judges in Georgia have long attempted to shield children from the sharper edges of the criminal law's sword. And for just as long, actors on the court stage have debated whether children should be prosecuted in adult court or given treatment and discipline in juvenile court.

Under common law, children over seven and under 14 years in age could be held criminally responsible only if the State proved “by the strongest and clearest evidence” that the child had the capacity to form criminal intent, and the Legislature eventually raised the minimum age from 7 to 10.[1] The General Assembly as early as 1908 created a juvenile court system, but whether the case would go to juvenile or superior court was an uncertain proposition. Some child offenders were found to have “capacity” and thus were subject to criminal prosecution, but the standards were unclear.

On two different occasions the Georgia Supreme Court held the juvenile code unconstitutional, ruling that its grant of jurisdiction to juvenile judges could not overcome the then-existing constitutional provision giving exclusive jurisdiction over felonies to the superior courts.[2] Thus, three years after the 1966 U.S. Supreme Court decision in Kent v. United States,[3] which held that a juvenile court "should have considerable latitude within which to determine whether it should retain jurisdiction over a child”[4] and which set out judicial guidelines for when a juvenile case should be transferred to adult court, the Georgia Supreme Court took the opposite route. In Foster v. Caldwell,[5] our state supreme court had no qualms in rejecting a request for juvenile court treatment from a 15-year-old with no prior record who was arrested for burglary, convicted in superior court, and sentenced to eight years in prison.[6] No legislative

[1] McRae v. State, 163 Ga. 336, 337 (Ga. 1926); Clemmons v. State, 66 Ga.App. 16, 19 (Ga. 1941).
[2] Lucy S. Henritze, Persisting Problems of Georgia Juvenile Court Practice, 23 Mercer L. Rev. 341, 349 (1972). See Jackson v. Balkcom, 210 Ga. 412 (Ga. 1954). The current Georgia Constitution, in Art. VI, § IV, Para. I, gives the superior courts exclusive jurisdiction in felony cases “except in the case of juvenile offenders as provided by law.”
[3] 383 U.S. 541 (86 SC 1045, 16 LE2d 84) (1966).
[4] In re C.M.M., 244 Ga. 787, 787-788 (Ga. 1979).
[5] 225 Ga. 1 (Ga. 1966).
[6] Henritze, *supra* note 2, at 357, citing Foster, *supra*.

preference for juvenile court treatment could overcome the Constitution's grant of jurisdiction to the superior courts, the Court held.

In 1968, the Georgia Legislature abandoned the traditional approach to children of "tender years" in favor of a bright line: children 13 and over are considered to have criminal capacity, and those under thirteen may not be charged with an adult crime.[7] This change came as part of the General Assembly's adoption of an entirely revised criminal code. As Professor Henritze noted, the drafters' and legislators' decision to put the age of capacity at 13 came as a compromise between those who thought children 12 years of age and below were too young to be prosecuted and the political dilemma of shielding children thirteen and over from criminal responsibility.[8] Still, the legislative committee that adopted this change reasoned that young teens "continue to be entitled to the benefits which are provided by the Juvenile Court Act."[9]

Forty years later, only the names have changed. Professor Lucy Henritze, who in 1972 wrote in the Mercer Law Review about the "new" juvenile code and the need to treat juveniles *as juveniles*, is now Professor Lucy McGough, one of the reporters for the Proposed Model Code. And, once again, the subject at hand is a "new" juvenile code and its focus on treating juvenile offenders in juvenile court.

"Mission Creep," the Spirit of the 1990s, and SB 440

Tough laws providing adult sentences for juvenile offenders are often attributed to the "tough on crime" policies of the 1990s. Certainly, few would dispute that policymakers in the 1990s were concerned with returning to certain values and principles. As baby-boomers matured, they focused on fiscal and societal discipline. President Bill

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[7] Ga. Code Ann. § 16-3-1 (2007) (enacted 1968).
[8] Henritze, *supra* note 2, at 353.
[9] *Id.*

Clinton promised to "end welfare as we know it" and Congress sought to enforce familial obligations with such laws as the "Deadbeat Parents' Punishment Act of 1998" that imposed federal prison time on parents in serious child support arrears.[10]

The perceived need for these laws can also be attributed to the myth of the "super-predator."[11] In the early 1990s, juvenile violence increased for a few years; however by 1995 the rate of juvenile violence returned to its traditional level.[12] Nonetheless, individuals highlighted this brief increase, classifying juveniles as "severely morally impoverished…super-predators" who committed homicidal violence in "wolf packs."[13] Fear was ignited that the number of these super-predators would only continue to increase because "more boys begets more bad boys" who would be three times as dangerous as the generation prior.[14] The fear of the super-predator led to an assault on the legitimacy of the juvenile court, with claims that the court was not designed to deal with "serious and violent juvenile offenders."[15] As a result, between 1990 and 1996 forty states passed laws to make it easier to prosecute juveniles as adults, and even though juvenile crime declined from 1994 to 2000, prosecutors and politicians continued to call for tougher juvenile laws.[16]

State legislatures across the country reacted to these trends by enacting tougher penalties for crimes committed by youth.[17] Georgia's contribution to the new spirit was

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[10] 18 U.S.C. § 228.
[11] John J. Dilulio, The Coming of the Super-Predators, The Weekly Standard, Nov. 27, 1995.
[12] Office of Juvenile Justice and Delinquency Prevention, Challenging the Myths, 1999 National Report Series Juvenile Justice Bulletin (2000). http://www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf
[13] Dilulio, *supra* note 11.
[14] *Id.* at 2, 3.
[15] David S. Tanenhaus & Steven A. Drizin, Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide, 92 J. Crim. L. & Criminology 641, 642 (2002).
[16] *Id.*
[17] Megan C. Kurlychek &Brian D. Johnson, The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court, 42 Criminology 485, 486 (2004).

the law still known by its bill number, SB 440, now codified at Official Code of Georgia Annotated (O.C.G.A.) § 15-11-28 (b). Exploring Georgia's history of tough sentences for juveniles, however, requires going back to the beginnings of our current juvenile code.

The juvenile code of 1971 set forth a clear policy that offenders under the age of eighteen should be handled in juvenile court, and a 1972 constitutional amendment clarified that the General Assembly could carve out juvenile offenders from the exclusive jurisdiction of superior court.[18] Almost immediately thereafter, lawmakers began diluting these mandates. In a 1973 bill implementing that constitutional amendment, the Georgia Legislature lowered the age for adult criminal responsibility to seventeen[19] and gave the superior court concurrent jurisdiction over "any child alleged to have committed a delinquent act that would be a crime if tried in superior court and for which he could receive loss of life or life in prison."[20] That law also expanded the juvenile court's transfer powers. The 1971 code had allowed the juvenile court to transfer to superior court the case of any child over fifteen who met a number of factors showing he was not amenable to treatment in juvenile court,[21] but the 1973 law allowed such transfers for children as young as thirteen if they committed crimes for which the death penalty or life in prison could be given an adult.[22]

The 1980s saw the rise of the "designated felony" laws, through which juvenile court judges were given the authority to sentence children to a mandatory juvenile

[18] 1972 Ga. L., p. 1544, currently codified at Ga. Const. 1983 Art. VI, § IV, Para. I.
[19] 1973 Ga. L., p. 882, § 2.
[20] *Id.* at pp. 883-884, § 1.
[21] 1971 Ga. L., p. 713, at 737.
[22] 1973 Ga. L., p. 882, at 887, § 5.

incarceration of 12 to 18 months.[23] Although the first enactment in 1980 limited the designated felony laws' scope to charges such as murder, rape, kidnapping, aggravated assault, and armed robbery,[24] by 1987 the list had expanded to recidivist juvenile burglars and fourth-time juvenile felons.[25]

While the juvenile code's mission of rehabilitating juveniles had experienced some "creep" towards a punitive approach over the 20 years since its enactment, 1994 was a watershed year. SB 440, "The School Safety and Juvenile Justice Reform Act" of 1994,[26] had the stated purpose of ensuring school safety by treating "certain violent juvenile offenders" as adults and by focusing the work of what is now the Department of Juvenile Justice on "the care, treatment, and rehabilitation of less violent and nonviolent juvenile offenders and [on] developing community based treatment programs and aftercare programs for less violent or nonviolent juvenile offenders."[27] The 1994 law created several major changes in juvenile penalties:

1. Henceforth, in addition to its concurrent jurisdiction over crimes carrying a life or death sentence, the superior court would have <u>exclusive</u> jurisdiction over charges of murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation; aggravated sexual battery; or armed robbery if committed with a firearm;
2. Before indictment, the district attorney could for "extraordinary cause" decline to prosecute a child charged with one of these crimes in superior court, with the

[23] 1980 Ga. L., p. 1013.
[24] *Id.* The entire list was: murder; rape; kidnapping; arson in the first degree by a child 13 or above; aggravated assault; voluntary manslaughter; aggravated sodomy; arson in the second degree; armed robbery by a child 13 or above; and attempted murder or attempted kidnapping by a child 13 or above.
[25] 1982 Ga. L., p. 1871; 1987 Ga. L., p. 1012.
[26] 1994 Ga. L., p. 1012.
[27] *Id.* at § 2

proviso that in juvenile court the child would be subject to the enhanced penalties of the designated felony law; and

3. After indictment, the superior court could transfer to juvenile court for "extraordinary cause" only those crimes that did not carry a penalty of life in prison or death. Any cases transferred to juvenile court must be considered as designated felonies.[28]

4. Additionally, the law increased the authority of the juvenile court to sentence a juvenile as a designated felon to a maximum of 60 months, up from the maximum of 18 months allowed by the prior law.[29]

The Effects of SB 440 and More Current Changes to the Law

Between 1994 and 2005, approximately 4,500 children were charged as adults with an SB 440 offense. Of those, 72% were African-American. Armed robbery constituted 41% of the arrests, while the serious sexual offenses of aggravated sodomy, aggravated child molestation, and aggravated sexual battery accounted for approximately 37% of those arrests. Only 7% of SB 440 juvenile defendants were charged with murder.[30]

While there are no official statistics indicating how many of those juveniles' cases were later transferred to or prosecuted in juvenile court, there is some data to indicate a significant number of those youth end up in juvenile court. Last year, DeKalb Public Defender Larry Schneider noted that according to his unofficial count of dispositions in his county involving youth charged with aggravated child molestation under SB 440,

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[28] 1994 Ga. L., p. 1012, § 4 at 1034-1035, codified at current Ga. Code Ann. § 15-11-28(b) (2007).
[29] *Id.* at p. 1043-1045, § 22, codified at current Ga. Code Ann. § 15-11-63 (e)(1)(B) (2007).
[30] Ga. Public Defender Standards Council, Juveniles Arrested as Adults Under SB 440: Final Report, Fiscal Year 2005, *available at* http://www.gpdsc.org/docs/cpdsystem-reports-sb440-FY2005F.pdf

88% were either not indicted by the grand jury or were eventually prosecuted in juvenile court.[31]

While there are no firm statistics showing outcomes for juveniles charged as adults in Georgia, statistics do indicate there are numerous SB 440 youth housed in regional youth detention center (RYDC) facilities while awaiting superior court trial or disposition. As of March 2008, juveniles awaiting adult court occupied over 200 of the 1,287 RYDC beds.[32] In other words, juveniles charged as adults were occupying 15% of RYDCs' capacity. Anecdotal evidence indicates that many juveniles spend up to a year in RYDCs awaiting adult disposition.[33] According to Georgia Department of Corrections statistics, there are actually fewer juveniles – including 17-year-olds – in adult corrections custody post-conviction than there are in RYDCs awaiting trial. As of April 2008, state youthful offender prisons held three 15-year-olds, sixteen 16-year-olds, and 98 seventeen-year-olds for a total of 117.[34]

Other changes in the law enhanced the punitive nature of SB 440 as well. For example, in 2006 the Legislature increased the penalty for aggravated child molestation to life in prison.[35] In so doing, the Legislature took a crime that the superior court previously had power to transfer to the juvenile court, post-indictment, and turned it into

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[31] Telephone interview with Larry Schneider, reported in Rawlings, Child Sex Offenders Need Help, Not Jail, Fulton County Daily Report, (March 23, 2007).
[32] Interview with Albert Murray, Ga. Dept. of Juvenile Justice Commissioner, (March 27, 2008). RYDCs are intended to be short-term facilities and generally hold juveniles pre-adjudication. Ga. Code Ann. § 17-7-50.1 (2007) provides that juveniles who remain unindicted for 180 days of their detention should be transferred to juvenile court. It is unclear to what extent this statute is being invoked by defense counsel.
[33] See, e.g, Southern Juvenile Defender Center factsheet on SB 440, *available at* http://childwelfare.net/SJDC/gasb440.html
[34] Ga. Dept. of Corrections, Inmate Statistical Profile: Juveniles in Adult Prison System. (2008, May), p. 5, *available at* http://www.dcor.state.ga.us/pdf/juv08-04.pdf. Of those, two had been sentenced at age 14, seven had been sentenced at age 15, 30 had been sentenced at age 16, and 78 had been sentenced at age 17. *Id.* at 17. Of those juveniles, 43% were in prison for armed robbery and 7% for sex crimes. The mean sentence was 9.28 years. *Id.* at 64-66.
[35] 2006 Ga. L., p. 379, § 11 (codified at Ga. Code Ann. § 16-6-4 (d) (2007).

a charge for which the District Attorney has sole discretion to determine whether the juvenile should be charged as an adult.[36] Thus, a legislative enactment enhancing the penalty for a crime can have the possibly unintended effect of completely denying to a juvenile the possibility of juvenile court treatment.

How the Model Juvenile Code Proposes to Change Things

Proposed Model Code § 15-11-738 would make the juvenile court the first stop for *all* juveniles charged with an act that would be a crime if they were adults. This proposed code section states clearly that no person shall be prosecuted in superior court for a crime he or she committed as a juvenile "unless the case has been transferred as provided in this article."

After a petition has been filed in juvenile court charging the juvenile with an offense, the juvenile's case may be transferred to superior court for adult prosecution following a hearing held on the motion of the prosecutor or on the juvenile court's own motion.[37] Transfer is possible only if:

1. The juvenile is at least 15 years of age and has committed the equivalent of a felony; or
2. The juvenile is at least 14 years of age and has committed either a felony carrying a possible life sentence or aggravated battery resulting in serious bodily injury to the victim.[38]

[36] Thus, a 13-year old charged with performing oral sex on an eight-year old is subject to a life sentence or, at a minimum, 25 years incarceration followed by life on probation. Ga. Code Ann. § 16-6-4 (d) (2007). Because the charge is one carrying a potential life sentence, the superior court has exclusive jurisdiction. Ga. Code Ann. § 15-11-28 (b)(2)(A) (2007). The superior court has no authority to transfer the matter to juvenile court because the crime is one punishable by life in prison. Ga. Code Ann. § 15-11-28 (b)(2)(B) (2007).
[37] Model Code § 15-11-738 (a).
[38] *Id.*

At the transfer hearing, the court should determine whether, because of the child's prior record or the seriousness of the offense, the welfare of the community requires the matter be tried in superior court.[39] Among the evidence the court should consider is a report to be prepared by the Department of Juvenile Justice.[40] In its ruling, the court should consider factors including:

a) The age of the child;

b) The seriousness of the alleged offense and whether the protection of the community requires waiver of jurisdiction;

c) Whether the alleged offense involved violence or was committed in an aggressive or premeditated manner;

d) Whether the alleged offense was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

e) The culpability of the child including the level of planning and participation in the alleged offense;

f) Whether the alleged offense is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation in the juvenile justice system;

g) The desirability of trial and disposition of the entire offense in one court when the child's associates in the alleged offense are adults who will be charged with a crime;

[39] Model Code § 15-11-738 (c).
[40] *Id.*

h) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

i) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

j) The program and facilities available to the juvenile court in considering disposition; and

k) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court.[41]

In sum, the Proposed Model Code puts all juvenile transfer to adult court decisions squarely in the hands of the juvenile court, with a process that appears very similar to current O.C.G.A. § 15-11-30.2.

No longer would the superior courts have exclusive jurisdiction over the "seven deadly sins" of current O.C.G.A. § 15-11-28 (b).[42] Rather, the Proposed Model Code would classify those crimes as designated felonies.[43] The Proposed Model Code preserves, with some modifications, the stiff penalties of the designated felony law. Those sentenced to restrictive custody as designated felons continue to be eligible for up to 60 months in mandatory secure juvenile detention.[44]

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[41] Model Code § 15-11-739.
[42] "Seven deadly sins" is the colloquial term used in Georgia to describe the seven offenses over which superior court has exclusive jurisdiction under the automatic transfer provisions of Ga. Code Ann. § 15-11-28(b) (2007).
[43] Model Code § 15-11-702 (5).
[44] Current Ga. Code Ann. § 15-11-63 (2007); Model Code § 15-11-751.

Why Change Anything?

These provisions of the Proposed Model Code would place squarely in the juvenile court the determination whether a juvenile should be tried as an adult. Such a significant change in Georgia criminal law should not be made without very good reasons: reasons that are quantifiable, based in research, and backed by solid evidence. This section explores the possible rationales for the change by asking some basic questions. First, what problem did SB 440 seek to remedy, and how has that remedy been working?[45] Second, do we know anything now that we didn't know when SB 440 was adopted in 1994 that might indicate this change is needed?

The Purpose of SB 440: Has It Worked?

In the purpose clause to the "School Safety and Juvenile Justice Reform Act," the Legislature stated its belief that sentencing certain violent juveniles as adults would (1) enhance school and community safety and (2) allow the Department of Juvenile Justice to focus on treating and rehabilitating less violent offenders and developing community-based treatment.[46] As noted previously, in the 1990s Georgia was not alone in attempting to improve community safety by expanding its options for trying juveniles as adults. During that decade, 49 States and the District of Columbia passed laws making it easier to try juveniles in adult court.[47] Since then, a number of studies have tried to determine whether these laws have served their purposes of reducing crime and improving community safety.

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[45] *See* Ga. Code Ann. § 1-3-1 (2007), ("In all interpretations of statutes. . . look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.").
[46] 1994 Ga. L., p. 1012 § 2.
[47] Kurlychek et. al., *supra* n. 11.

One of the first studies in Georgia was conducted within a few years of SB 440's passage. Comparing the two years prior to the adoption of SB 440 with the two years after the law took effect, Professor Edwin A. Risler and his colleagues at the University of Georgia found no indication that trying these juveniles as adults reduced crime.[48] More recently, the independent Task Force on Community Preventive Services, whose members are appointed by the director of the Centers for Disease Control, has issued strong recommendations against transferring juvenile offenders to adult court.[49] The Task Force's 2007 studies and recommendations show that "transfer of juvenile offenders to adult courts is harmful as a matter of public health because it increases rather than decreases levels of criminal violence."[50] The Task Force found that even when background, prior record, and other factors are accounted for, evidence suggests that juveniles transferred to the adult system have greater rates of recidivism than similarly-situated juveniles retained in the juvenile justice system.[51] Given the early Georgia study and the more recent CDC Task Force recommendations, the effectiveness of SB 440 as a deterrent to juvenile crime is questionable, and further studies are warranted to determine exactly what outcomes are achieved by trying juveniles in Georgia as adults.

The other stated legislative purpose of SB 440 was to allow the Department of Juvenile Justice to focus its efforts on "less violent and nonviolent" juvenile offenders.[52]

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[48] Edwin A. Risler, et al., Evaluating the Georgia Legislative Waiver's Effectiveness in Deterring Juvenile Crime, 8 Res. on Soc. Work Prac. 657 (1998).
[49] Task Force on Community Preventive Services, Recommendation Against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence, 32 Am. J. Prev. Med. S5 (2007).
[50] Michael Tonry, Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy if Ever There Was One, 32 Am. J. Prev. Med. S3 (2007).
[51] Angela McGowan et al., Effect on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review, 32 Am. J. Prev. Med. S7, S15 (2007).
[52] See discussion *supra*. p. 6.

Statistics accumulated over the past decade bring into question whether the bill has had such an effect.

First, the data brings into question whether the processes of SB 440 result in juveniles receiving adult sentences in superior court or merely result in delayed adjudication and disposition in juvenile court. The statistics cited above suggest that at any given time, there may be more juveniles in RYDC awaiting trial as adults (over 200) than there are juveniles who have been sentenced as adults by the superior court (117). The author is aware of no studies showing clearly what percentage of those juveniles arrested for SB 440 crimes are transferred to juvenile court by the District Attorney prior to indictment or are transferred to juvenile court after indictment. Nor have detailed studies been found showing the effects of that delayed transfer to juvenile court on the juvenile system's ability to treat and rehabilitate those youth.

The limited statistics available suggest that SB 440 may have a detrimental effect on the juvenile system's ability to treat and rehabilitate at least one class of juvenile offender: the child charged with aggravated sodomy or aggravated child molestation. Schneider's unofficial statistics on juveniles charged as adults with aggravated child molestation suggest that the SB 440 process is merely creating delay.[53] These juvenile offenders are charged and detained for long periods of time in an RYDC, after which the vast majority of them are finally transferred back to juvenile court for adjudication. But research consistently shows that juvenile sex offenders are amenable to treatment and will likely not recidivate, especially if they receive treatment that is appropriate and timely.[54] When SB 440 results in such an alleged offender being jailed for many months

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[53] See discussion pp. 7-8, *supra*.

[54] See, e.g., The Effective Legal Management of Juvenile Sexual Offenders,

prior to trial without being found guilty by the court or treated by a professional, it probably is not serving the ends the Legislature intended.

Further research should be done to determine whether SB 440 is effectively clogging the juvenile detention system – especially the YDCs – with designated felons who might otherwise be amenable to treatment in a community or nonsecure residential setting. As discussed above,[55] SB 440 requires that all juveniles who are charged with a crime within the superior court's exclusive jurisdiction then later transferred to juvenile court must be considered for restrictive custody pursuant to the designated felony law with possible mandatory juvenile incarceration of up to 60 months.[56] Given that anecdotal evidence suggests many of these superior court cases eventually find their way to juvenile court, and further given the fact that designated felons have gone from 20% of the YDC population to 80% in the span of seven years,[57] one must question whether SB 440 is driving some part of this increase. The question is especially relevant given the Legislature's hope that SB 440 would allow DJJ to concentrate on developing community resources. When the Department is faced with 80% of its YDC space occupied by juveniles who remain incarcerated in excess of two years at an average daily cost approaching $190 per inmate, it is forced to focus its efforts on expanding secure facilities rather than creating community-based programs.[58]

Have We Learned Anything Since 1994?

Adopted by the ATSA Executive Board of Directors on March 11, 2000, *available at* http://www.atsa.com/ppjuvenile.html; Hunter, J. and Becker, J., Motivators of Adolescent Sex Offenders and Treatment Perspectives, in J. Shaw (Ed.), Sexual Aggression, American Psychiatric Press, Inc. (Washington, DC, 1998). http://www.stopitnow.org/csafacts.html

[55] See discussion p. 7, *supra*.

[56] Ga Code Ann. §§ 15-11-28 (b), 15-11-63 (2007).

[57] *Supra* p. 9 and n. 32-33.

[58] Department of Juvenile Justice budget presentation, *supra* at n. 32. Compare the cost of a secure bed at $186 per day to the cost of intensive supervision at $38 per day.

The political argument in favor of SB 440 is as true today as when the Legislature made it in its 1994 legislative statement of purpose: "There is a need for secure placement of certain violent juvenile offenders who constitute a significant threat to the safety of students enrolled in schools, to the citizens of Georgia, and to themselves."[59] After all, statistics show that youth younger than 18 have been responsible for committing 20% of all violent crime and 40% of serious violent crime in the past 20 years.[60] If the citizens of Georgia reject the research showing long-term incarceration of juveniles is ineffective and want juvenile offenders severely punished, that statistic remains their best argument. What has changed since 1994, however, is the scientific and legal view of just how much punishment we can fairly and reasonably dispense to a child of 13, 14, 15, or 16 and still uphold the constitutional rights of due process and fundamental fairness to which children are entitled.[61] Much of our current knowledge on that issue has arisen from studies in brain development and juvenile competency.

Neurologists studying the developing adolescent brain have concluded that children of 13-16 years simply have not fully developed the prefrontal cortex – the seat of judgment. As one commentator has stated:

> "It seems apparent from the research that the impulsivity, disregard of long-term consequences, irresponsibility, vulnerability to peer group pressure, tendency to risk-taking, and other characteristics of adolescents, especially in those who commit delinquent and criminal acts, are not just reflections of emotional immaturity, but are products of neurological immaturity as well. These characteristics are built in--literally hard-wired

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[59] 1994 Ga. L. p. 1012 § 2.
[60] McGowan, *supra* n. 49, at S8.
[61] See generally In re Gault, 387 U.S. 1 (87 S. Ct. 1428, 18 L. Ed. 2d 527) (1967).

into the adolescent brain--and are not aberrant symptoms of moral weakness."[62]

The fact that a juvenile, because of his or developmental situation, lacks the ability to fully control his or her actions should give us pause to consider whether deterring future bad conduct by that juvenile requires adult sanctions and a long prison term. The U.S. Supreme Court reached a similar conclusion in Roper v. Simmons,[63] in which it outlawed the death penalty for juveniles. Reviewing this same brain development research, Justice Kennedy held that juveniles could not be reliably classified among the "worst offenders" because their lack of maturity often leads them to "impetuous and ill-considered" actions. "The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult."[64]

Given both the scientific evidence that juveniles are not fully in control of themselves and the legal principle that they are less morally culpable than adults, it may be time to reconsider whether stopping violent juvenile crime requires adult criminal punishment. After all, our state law already recognizes that some individuals may be less morally culpable because they acted on impulse.[65] Our juvenile courts already are prohibited from transferring a child's case to superior court if the child is "commitable to an institution for the mentally retarded or mentally ill."[66] The research seems to support this approach, and further indicates that a child's moral responsibility for crime should

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[62] Robert E. Shepherd, The Relevance of Brain Research to Juvenile Defense, 19 Crim. Just. 51, 52 (2005).
[63] 543 U.S. 551 (2005).
[64] Roper, 543 U.S. at 570 (citations omitted)
[65] E.g., Ga. Code Ann. § 16-3-3 (2007) (defense of delusional compulsion due to congenital defect); Ga Code Ann. § 16-5-2 (2007) (voluntary manslaughter where killing based on a "sudden, violent, and irresistible passion).
[66] Ga Code Ann. § 15-11-30.2 (a)(3)(B) (2007).

not be determined based on his or her age alone.[67] This is consistent with the method advocated by the Proposed Model Code, in which the juvenile court has a hearing to determine the necessity of adult criminal punishment, allowing a full examination of the juvenile's moral responsibility and possible need for severe sanctions.[68] Such a procedure, Woolard argues, meets the purpose of juvenile transfer laws by ensuring "the removal of a small number of serious offenders . . . who indeed represent the mature, hardened criminal for whom developmental differences are nonexistent or irrelevant."[69]

In addition to issues of fundamental fairness, prosecuting juveniles as adults raises due process concerns. The State is not permitted to subject a child to trial and punishment – especially adult punishment – without observing basic rights guaranteed by the Constitution. "Without question, these include the right to adequate notice of the charges, appointment of counsel, the constitutional privilege against self-incrimination, and the right to confront opposing witnesses," as the Georgia Court of Appeals held in the 1996 case of In the Int. of S. H.[70] But, as the Court there held, those rights mean nothing if the juvenile does not have sufficient understanding to participate in his or her own trial:

> We believe the cornerstone of these substantive rights is competence to understand the nature of the charges and assist in a defense. A want of competence renders the other rights meaningless. Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against

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[67] Jennifer L. Woolard, et al., Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations, 4 Int. J. Forensic Mental Health 1 (2005).
[68] Model Code § 15-11-738, discussed *supra* pp. 9-10.
[69] Woolard, supra n. 65, at 8.
[70] 220 Ga. App. 569, 571 (1996).

> him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Principles of fundamental fairness require that this right be afforded in juvenile proceedings."[71]

Rejecting a bright-line "age of competency," the Court held that a child's "developmental" age should be considered in determining whether he or she was competent to stand trial.

Following the Court of Appeals' suggestion, in 1999 the Legislature approved a statutory scheme for determining whether juveniles are "competent" to stand trial.[72] The statute provided for a competency evaluation whenever the court had reason to believe the child was not mentally competent. It requires that the child be able to understand the nature and objectives of the proceedings and to assist the defense attorney in the preparation and presentation of his or her case.[73]

Georgia was, to some extent, on the front end of courts and legislatures recognizing "developmental immaturity" incompetence among juvenile offenders. The chief architect of much of the work in this field is Dr. Thomas Grisso, whose extensive research shows that children under 15 are significantly different from adults in their ability to understand the trial process.[74] And while some adolescents between the ages of 14 and 16 show adult-like competence, there are such significant variations among them that no bright line age can be drawn.[75] A MacArthur Foundation study showed that almost one-fifth of 14- and 15-year-olds given a court competency examination

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[71] *Id.* (internal citation and punctuation omitted).
[72] 1999 Ga. L., p. 507 (codified at Ga Code Ann. § 15-11-150 *et. Seq*).
[73] Ga. Code Ann. § 15-11-151 (5) (1999 version).
[74] Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 Psych. Pub. Pol. and L. 3, 14 (1997).
[75] Thomas Grisso, Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform, *available at* http://www.abanet.org/crimjust/juvjus/12-3gris.html.

performed at the level of mentally ill adults who have been found incompetent to stand trial.[76]

The post-1994 legal developments in this state suggest the Georgia Courts and the General Assembly have now recognized that subjecting developmentally immature juveniles to prosecution as adults could at times be inappropriate. Despite that recognition, the automatic transfer and exclusive jurisdiction provisions of the 1994 law remain on the books. The research strongly recommends that states re-examine their laws automatically placing a juvenile's fate in the hands of the adult court system without at least some procedural safeguards, such as an automatic competency evaluation.[77] In 2005, a national group of experts convened by the National Council of Juvenile and Family Court Judges (NCJFCJ) conducted a comprehensive view of the legal, sociological, criminological, and scientific research and the juvenile justice practices and policies of all 50 states and concluded:

> "[T]he determination as to whether a juvenile charged with a serious crime should be handled in juvenile delinquency court or transferred to criminal court is best made by a juvenile delinquency court judge in a judicial hearing with the youth represented by qualified counsel. . . . [W]aiver and transfer decisions should only be made on an individual, case-by-case basis, and not on the basis of the statute allegedly violated. . . . [T]ransfer

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[76] Laurence Steinberg, Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question, Criminal Justice Magazine, Fall 2003, *available at* http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html

[77] Steinberg, *supra* n. 72, writes: "Our findings suggest that states should reexamine the age at which it is permissible to try juveniles as adults. States may wish to consider making competence evaluations mandatory before a young adolescent is tried in the adult system, or to create a legal presumption of incompetence below a certain age."

of juveniles to adult court should be rare and only after a very thoroughly considered process."[78]

These NCJFCJ recommendations were created in consultation with the National Center for State Courts and the Conference of Chief Justices.[79] The Proposed Model Code's provision for a juvenile transfer hearing in all cases involving youth who might be tried as adults matches the NCJFCJ recommendations.

Conclusion

Rather than representing a radical departure from accepted tradition, the Proposed Model Code's provisions for presuming that juveniles should be processed in juvenile court unless shown otherwise has solid foundations in Georgia law and jurisprudence. For hundreds of years, the common law presumed that a child under the age of 14 was, in modern terms, "incompetent to stand trial due to developmental immaturity."[80] The Legislature itself throughout the early and mid-twentieth century tried to keep juveniles out of superior court, only to have those attempts invalidated by the Supreme Court. And even when the Legislature in 1973 set the minimum age of criminal responsibility at 13 years, it noted that these youth would continue to have the benefits of juvenile court treatment.[81]

Even SB 440 itself was designed to target very violent offenders and leave those less violent youth to the care of the juvenile court system. Instead, what appears to have happened in many cases is that SB 440 merely creates delay. Receiving neither adult punishment nor juvenile treatment, these youth are arrested and detained, remaining in a

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[78] National Council of Juvenile and Family Court Judges, Juvenile Delinquency Guidelines (2005), p. 101. *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf
[79] *Id.*
[80] See, e.g., Clemmons v. State, 66 Ga. App. 16, 19 (1941).
[81] See discussion *supra* at p. 4.

juvenile lockup for months until their cases are finally tried or transferred back to juvenile court. In the interim, time that could have been spent assuring accountability, discipline, and treatment is wasted. The State, saddled with the enormous financial burden of housing these juveniles, loses the ability to focus on giving treatment and help for those juveniles squarely within its bailiwick. A decade's worth of research and practical experience suggests that SB 440 may not be serving the purpose for which it was intended.

To fully determine the effects of this old law, and to see whether the Proposed Model Code's approach might be better for our state, more research is needed. Specifically, studies such as the following would produce valuable information:

- A comprehensive study of the final court outcomes for all children charged as adults under SB 440. How many of these juveniles were eventually remanded to juvenile court? What punishment did they receive? What are the recidivism rates for SB 440 juveniles tried and sentenced as adults compared with those disposed of by the juvenile justice system?
- What has been the effect of SB 440 on the designated felony population of our state's YDCs? Are we inadvertently placing an unbearable financial burden on a juvenile justice system based on our original goal of transferring some of that burden to the adult criminal justice system?
- Is our law demonstrating fundamental fairness and equal treatment when a child charged as a juvenile may receive quick attention, a competency evaluation and services within the juvenile court process, while a child charged as an adult may remain in juvenile detention for months awaiting adjudication? What exactly is

happening with regard to each group of juveniles? What are the various services they are receiving or not receiving based on their status as juvenile or adult detainees?

The Proposed Model Code raises these and many more questions. Unless we take the time and effort needed to study and answer them, we are not doing our duty to the at-risk and troubled children of this state, nor are we fulfilling our obligation to ensure the best use of our resources to keep our streets, schools, and communities free of juvenile crime.