

## Chapter 6

# Misidentifying Transfer: The Terms and Concepts Battle

### ABSTRACT

*Chapter 6 begins to undo the damage done by the numerous ways in which transfer has been misidentified and mishandled; offense exclusion (OE) is the type of transfer that is most often and extensively mischaracterized. The literature guilty of spreading this disinformation is massive, which the Tables included in this Chapter reveal. The most prevalent misidentification is probably the most understandable, namely, that transfer means juveniles are being tried as adults. The first mission of the Chapter is to lay this notion to rest. Juveniles are not chronically transformed due to being transferred to criminal court (CC). There are actual transformations that do occur, and they are explained fully. The second and more sustained objective is to remedy the many misidentifications of OE; there are at least nine of these. This Chapter also details the two types of mandatory exclusion (ME) and distinguishes them from transfer, which often doesn't happen in both research and literature.*

### 1. CHILDREN ARE BEING PROSECUTED AS ADULTS

The first misidentification is the one found most often in the literature: *children* being transferred *en masse* to CC and being forced to stand trial *as adults*. That sounds inappropriate since children are being treated as adults, which is probably the point. This should not occur.

Before this aspect of the anti-transfer crowd's (ATC's) campaign is examined, we need definitions of child, adolescent, juvenile, and adult; these definitions vary considerably from one source to another. For purposes of this book, a *child* is considered as someone between infancy and the onset of puberty (10-11 for girls and 11-12 for boys); for simplicity and equal treatment, a *child* will be regarded as anyone *younger than 13 years of age*. Those *youths between 13 years of age and 18 years of age* (the most common definition of adulthood) are regarded as *adolescents* herein. Nevertheless, some sources declare that adolescent runs from 12 or 13 until 20 or 21 years of age. The term, *juvenile*, presents its own problem in that it overlaps both child and adolescent identities. Typically, today, any person younger than 18 is a juvenile; three states (GA, TX, WI), however, have adopted 16 years of age as the maximum JC age

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for criminal prosecution purposes, meaning, in this context, their “adults” start at age 17. A *juvenile* in this text is considered as anyone younger than 18 years of age; typically, and in this book, the age at the time of the offense controls. An *adult* in American society, then, usually is legally defined as 18 years old, the legal voting age. That age, however, is two years beyond driving eligibility in most states (i.e., 16 years old), but still three years too young for the legal consumption of alcohol and the purchase of tobacco products. Since criminal liability is “automatic” for all offenders beyond the age of 18 (except for Vermont that uses 19 for this category), *adult* in this text applies to anyone *18 years of age or older*.

In the literature, *children* are frequently identified as the transferred youth (see Table 38 A). *Oh no*, massive numbers of *children* are headed to CC.

*Waiver laws attempt to reconcile the contradictory impulses engendered when the **child is a criminal and the criminal is a child**... (Feld, 1999a, p. 209, emphasis added).*

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*Are the youngsters transferred to criminal courts **no longer children** in the eyes of the law as a result of that decision?... (Fagan & Zimring, 2000, p.3, emphasis added; see, also, Fagan, 2002, p.9)*

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*The language used to describe the process of transferring defendants to criminal court is itself an invitation to what psychiatrists call “magical thinking,” in which it is imagined that changing the location of a case will suddenly remove the characteristics that cause conflict and ambivalence. The physical reality of jurisdictional transfer is rather mundane—to try an accused **as an adult** in a criminal court changes only the location of the hearing; it does not change the characteristics of the defendant... (Zimring, 1998a, p. 132, emphasis added).*

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*Jurisdictions with legislative waiver have effectively created an irrebuttable presumption that **children** of a certain age who are charged with certain crimes are not really **children**... (Marrus & Rosenberg, 2005, p. 1178, emphases added).*

Contrary to reports in the literature, children are exceedingly rarely prosecuted in CC. Instead, the vast majority of those transferred are at least 16 years old. These youths are not children.

We do not know the actual nature or number of transfers accomplished via prosecutorial decisions. Offense exclusion (OE) and direct file (DF) provisions, however, overwhelmingly set a minimum age of 15 or 16 as the minimum age qualifying for transfer, unless a capital or life-in-prison earning crime is involved (see Sanborn & Salerno, 2005, pp. 523-526). Percentages are more available for judicial transfer (JT). Many states have a minimum age of 14 for juvenile defendants to qualify for JT, barring a very serious offense (see Sanborn & Salerno, 2005, pp. 519-523). According to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) reports, the percentage of defendants 16 years of age and older transferred by a judge between 1985 and 2018 ranged from 85% (2005) to 94% (1985) (See Table

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