

# RE-EXAMINING INDIA'S JUVENILE JUSTICE FRAMEWORK: A CALL TO RECOGNIZE A JUVENILE'S MITIGATED CULPABILITY AND POTENTIAL FOR REFORM

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*The Juvenile Justice (Care and Protection of Children) Act of 2015 was introduced with the intention of strengthening the Indian juvenile justice system. The law, passed primarily in response to the Nirbhaya incident in 2012, was intended to propagate the welfare and rehabilitation of children in conflict with the law. However, certain provisions of the legislation governing juvenile justice, are antithetical to its stated intentions, since they focus on the nature of the alleged offence. Specifically, the transfer mechanism that allows 16 to 18-year-olds to be tried as adults based on the offence alleged is contrary to our understanding of adolescence as a period of transition. Moreover, while the principle of 'fresh start' that would expunge juvenile records is well-intentioned, the exception of 'special circumstances' circumvents the ability of juveniles to fully reintegrate post-justice system involvement. Both these provisions represent a deterrence framework model which presumes that juveniles are able to rationalize their decisions in the same way as adults. This paper expands on the critiques of these provisions and provides alternate options for the prevention of juvenile crime and treatment of juveniles already in contact with the justice system. These suggestions are rooted in social scientific research that calls for recognizing the situational circumstances of adolescents and their rehabilitative potential.*

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## I. INTRODUCTION

The Juvenile Justice (Care and Protection of Children) Act, 2015 ('the 2015 Act') is the primary legislation governing juvenile delinquency in India. The 2015 Act was introduced in response to the brutal gang rape and subsequent death of a para-medical student in the National Capital ('the Nirbhaya case') by six assailants including a juvenile. Still, the 2015 Act was promulgated with the aim of being a child friendly regulation promoting the development, protection and treatment of children.<sup>1</sup> Additionally, the Act's objectives include the social rehabilitation of children with aid from governmental institutions and other organizations.<sup>2</sup> This paper identifies and critiques two provisions of the Act that are contrary to the objectives of these rehabilitative ideals of juvenile justice.

Part I of this paper traces the evolution of juvenile justice in India. Part II provides the preceding context leading up to the passage of the 2015 Act. A detailed examination and critique of provisions antithetical to the principles of juvenile justice are presented in Part III. Part IV draws on the U.S. as an example of jurisprudential recognition of adolescence to mitigate a youth's criminal culpability. The next part of the paper makes the argument that provisions examined in Part III are contrary to the principles of recognizing the mitigated culpability of juveniles and their rehabilitative potential. Part VI provides alternative recommendations in lieu of the discussed provisions. The authors conclude with the hope of a shift towards a juvenile legislation rooted in social and scientific research.

## II. A BRIEF HISTORY OF INDIAN JUVENILE JUSTICE

The trajectory of India's stint with juvenile legislations started in the 19<sup>th</sup> century, which coincided with an increased understanding of childhood as a distinctive period of social and individual development.<sup>3</sup> Several post-colonial scholars have identified the Euro-centric theory of children as 'possessors of human rights' as a reason for the recognition of juvenile justice.<sup>4</sup> The shift across South Asian colonial countries from a 'welfare to rights' regime contributed towards

<sup>1</sup> The Juvenile Justice (Care and Protection) Act, 2015, No 2 of 2016, Preamble.

<sup>2</sup> Ibid.

<sup>3</sup> Shailesh Kumar, 'Shifting Epistemology Of Juvenile Justice In India', (2019) 41(1) CONTEXTO INTERNACIONAL <[https://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0102-85292019000100113](https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-85292019000100113)> accessed 30<sup>th</sup> November 2020, 113 ('Kumar').

<sup>4</sup> Eugene Verhellen, 'The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective' (eds), *Routledge Handbook of Children's Rights Studies* (Taylor & Francis 2015), 43-59.

intensifying the juvenile justice framework in India by considering children to be the 'possessors' of rights.<sup>5</sup>

The foundation of Indian juvenile justice legislation can be traced to the promulgation of the Apprentices Act of 1850 ('the 1850 Act'). The 1850 Act was passed almost three years after its British counterpart, the Children's Act of 1847, which provided different modes of trial for adults and children.<sup>6</sup> The intention of the 1850 Act was to regulate the relationship between employers and employees.<sup>7</sup> However, the legislation imposed punitive terms for juveniles from the ages of 10 to 12 who had committed petty offences.<sup>8</sup> The 1850 Act was the first in a series of laws that gave special legal recognition to juveniles as a distinct legal category capable of being held criminally responsible.<sup>9</sup> Still, the 1850 Act emphasized the need for reformation and rehabilitation.<sup>10</sup>

A few years later, the Reformatory Schools Act of 1876 ('the 1876 Act') was passed where both judges and magistrates were given discretionary powers in recommending a juvenile to a reformatory school.<sup>11</sup> The 1850 and 1876 Acts fixed the applicable age to below sixteen years, as it was believed that any juvenile above sixteen was extremely hardened and could not be reformed at all.<sup>12</sup> The 1876 Act even warranted that the juvenile inmates be separated at night since sexual abuse of younger children by the older ones was rampant.<sup>13</sup> This required the presence of adequate infrastructure and means, the absence of which was the primary reason behind the downfall of this Act.<sup>14</sup>

However, both colonial era legislations were discriminatory as females were kept outside the purview of the laws. The 1850 Act legitimately empowered judges and magistrates to apprentice a female to a 'private master' who had the duty to

<sup>5</sup> Nour Dados & Raewyn Connell, 'The Global South', (2012) 11(1) JARGON – KEY CONCEPTS IN SOCIAL RESEARCH <<https://journals.sagepub.com/doi/full/10.1177/1536504212436479>> accessed 30<sup>th</sup> November 2020, 12 -13.

<sup>6</sup> Ibid [36].

<sup>7</sup> Ibid [37]; The Apprentice's Act, 1850, Preamble.

<sup>8</sup> Ibid.

<sup>9</sup> K.K. Sreekala, 'Juvenile Delinquency: An Overview', (*Shodhganga*, 27<sup>th</sup> February 2013) <[http://14.139.116.20:8080/jspui/bitstream/10603/7114/14/14\\_chapter%202.pdf](http://14.139.116.20:8080/jspui/bitstream/10603/7114/14/14_chapter%202.pdf)> accessed May 1, 2020.

<sup>10</sup> Satadru Sen, 'A Separate Punishment: Juvenile Offenders in Colonial India', (2004) 63(1) THE JOURNAL OF ASIAN STUDIES <<https://www.cambridge.org/core/journals/journal-of-asian-studies/article/abs/separate-punishment-juvenile-offenders-in-colonial-india/BCBoF5DFFD014404F2A3F1A14EC4D90B>> accessed 30<sup>th</sup> November 2020, 81 – 104.

<sup>11</sup> Ibid.

<sup>12</sup> Ved Kumari, 'Juvenile Justice: Securing the Rights of Children During 1998 – 2008', (2009) 2 NUJS LAW REVIEW <<http://nujlawreview.org/2016/12/03/juvenile-justice-securing-the-rights-of-children-during-1998-2008/>> accessed 30<sup>th</sup> November 2020, 558 ('Kumari').

<sup>13</sup> Kumar (n 3) 117.

<sup>14</sup> Kumar (n 3) 118.

discipline her.<sup>15</sup> Since young females in conflict with the law were fewer in number, they were kept outside the domain of rightful conviction, to protect them from the possibility of a male convict's lust.<sup>16</sup> Moreover, several young females were sent to the Andaman Islands to be married off to male convicts.<sup>17</sup> On the other hand, the 1876 Act did not apply to females at all. The justification provided at the time was that the 'institutionalization of young girls by strange men' would ruin their future marriage prospects.<sup>18</sup> Viewed together, these legislations reflected the Indian colonial state's intention of disciplining child delinquents lest they become a threat to the existence of their regime.<sup>19</sup>

In the early part of the 20<sup>th</sup> century, a special juvenile court emerged in England. With suggestions from the Indian Jail committee and evidence of the working of a juvenile court, the First Children's Act was enacted, in the State of Madras, in the year of 1920, followed by similar enactments in several provincial states.<sup>20</sup> In 1960, the Union Government, enacted the Children's Act of 1960 ('the 1960 Act') which was seen as the first breakthrough regulation post-independence that established a framework different from the general criminal justice system and aided in providing means for re-integration of juveniles into society.<sup>21</sup> The 1960 Act empowered heads of Union Territories to make laws suitable to their region whereas the States had their respective laws, as subject matters concerning 'juvenile justice' were placed in the State list.<sup>22</sup> This led to several States promulgating their own legislations, reflecting a fractured approach to the treatment of children in conflict with the law. Some laws empowered Children Welfare Boards to try juveniles in conflict with the law whereas others directed juveniles to be dealt with by the established Children's Courts.<sup>23</sup> To put an end to the fractured application of juvenile justice, the Supreme Court in *Sheela Barse v Union of India*<sup>24</sup> requested the Central Government to enact a law that would provide a uniform umbrella protection for juveniles.<sup>25</sup>

The Supreme Court's decision in *Barse* did not emerge in a vacuum. The Indian government had at the time ratified the United Nation's Standard Minimum Rules for the Administration of Juvenile Justice ('UNSM Rules') in the

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<sup>15</sup> Sen (n 10).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Sen (n 10); Kumar (n 3) 117.

<sup>19</sup> Kumar (n 3) 117.

<sup>20</sup> Kumari (n 12); B.B. Pande, 'Setting the Juvenile Justice Course Right: A Critique of Pratap Singh v. State of Jharkhand', (2005) 6 SCC J-1 <[https://www.ebc-india.com/lawyer/articles/2005\\_6\\_1.htm](https://www.ebc-india.com/lawyer/articles/2005_6_1.htm)> accessed 30<sup>th</sup> November 2020, 1.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid; Kumar (n 3) 119.

<sup>23</sup> Ibid.

<sup>24</sup> *Sheela Barse v Union of India* (1986) 3 SCC 596 : AIR 1986 SC 1773.

<sup>25</sup> Ibid.

year prior to the *Barse* decision.<sup>26</sup> The UNSM Rules proposed a comprehensive framework recognizing juvenile justice as an integral building block for the overall development process of Member States.<sup>27</sup> Keeping in mind their global obligation and commitment towards international agreements, the Parliament passed the Juvenile Justice Act, 1986 ('the 1986 Act') under Article 253 of the Constitution<sup>28</sup> and Entry 14 of the Union List,<sup>29</sup> which together empower the government to pass a legislation in light of any international covenants.<sup>30</sup> The 1986 Act was the first comprehensive juvenile justice legislation applying to the entire country.

However, the 1986 Act had an imbalance with respect to different age standards for male and female child delinquents.<sup>31</sup> Borrowing from colonial legislations, the 1986 Act carried forward a lineage of such differential standards. The term 'child' in these legislations was defined to be a female below eighteen years of age and males below sixteen, who came under the purview of this Act.<sup>32</sup> The justification was rooted in a paternalistic notion that females needed more protection than males.<sup>33</sup>

The gendered framework of the 1986 Act produced the need to define a juvenile in conflict with the law more holistically. International acceptance of children as equal seekers of human rights in the early half of the 20<sup>th</sup> century<sup>34</sup> further consolidated the need for equitable juvenile justice. Several international declarations and rules sought to provide children with legislative and constitutional protections. India, like other emerging nations during this period, was not far behind in adopting these conventions.<sup>35</sup> For instance, with the inclusion of the United Nations Convention of the Rights of the Child, 1989 ('UNCRC') into its domestic framework, India ended its fight with laws that were not gender

<sup>26</sup> Kumari [n 12] 559.

<sup>27</sup> UNSM Rules, Adopted by the General Assembly of the United Nation 40/33 of November 29, 1985, Principle 1.4.

<sup>28</sup> Constitution of India, art 23:

"Legislation for giving effect to international agreements notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

<sup>29</sup> The Union List, entry 14, Seventh Schedule:

"Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

<sup>30</sup> Kumar [n 3] 119.

<sup>31</sup> Ibid.

<sup>32</sup> The Juvenile Justice Act, 1986, s 2(h).

<sup>33</sup> Rajya Sabha Debates for the Children Bill, 1959, Speech of K.L. Shrimali, available at Page 685, available at <[http://rsdebate.nic.in/bitstream/123456789/561487/1/PD\\_28\\_15021960\\_6\\_p683\\_p766\\_11.pdf](http://rsdebate.nic.in/bitstream/123456789/561487/1/PD_28_15021960_6_p683_p766_11.pdf)>, (Last visited on April 30, 2020); Kumar [n 3] 119.

<sup>34</sup> Kumar [n 3] 118.

<sup>35</sup> Ved Kumari, *The Juvenile Justice System in India: From Welfare to Rights* (OUP 2004), 34.

neutral.<sup>36</sup> The stint to adopt the guidelines under the UNCRC ended with the promulgation of the Juvenile Justice (Care and Protection of Children) Act, 2000 ('the 2000 Act') aiming to move towards a uniform regime for juvenile protection.<sup>37</sup> Article 1 of the UNCRC which defined a 'child' to be below the age of eighteen, irrespective of gender, was adopted as Section 2(k) of the 2000 Act. Hence, the 2000 Act guaranteed the equal treatment and protection to every juvenile in conflict with the law, without any distinction.

### III. CONTEXT PRECEDING THE 2015 ACT

Unfortunately, the brutal Nirbhaya case changed the legal narrative and outlook on juvenile justice and set off the debate on age limits in juvenile justice legislations.<sup>38</sup> Public outrage and subsequent demands for legal reform followed, with an emphasis on more stringent punishment for the involved juvenile.<sup>39</sup> In response, the government established a Committee that was required to give their views on the current state of the criminal justice system.<sup>40</sup>

The Committee headed by Justice (Retd.) J.S. Verma provided several recommendations ('the Verma Report') on several subjects including gender justice, child abuse and juvenile protection in the justice system.<sup>41</sup> Specifically, the Nirbhaya case presented an argument for reducing the age of juvenile court jurisdiction to sixteen years. The Verma Report categorically rejected this proposal and opined that a major fault with the juvenile justice framework was not the laws, but effective enforcement and active implementation of existing legislations.<sup>42</sup> The Verma Report went one step further by stating that the manner of ineffective enforcement showed a complete failure of the State.<sup>43</sup> The State was inadequate in its efforts in establishing institutions and training personnel. The Report perused social circumstances and opined that any environment other than the protective custody of an observation homewould be extremely detrimental to the development and the subsequent re-integration of the juvenile into society.<sup>44</sup> Moreover,

<sup>36</sup> United Nations Convention on the Rights of Child, U.N. Doc. A/RES/44/25 (September 2, 1990), art 1. (Being a signatory to this International convention, India enacted the 2000 Act which fixed the age of the juvenile irrespective of any gender, keeping the applicability of the Juvenile Justice Act uniform across spectrums).

<sup>37</sup> Opening Statement of the Juvenile Justice (Care and Protection of Children) Act, 2000.

<sup>38</sup> Gauri Pillai & Shrikrishna Upadhyay, 'Juvenile Maturity and Heinous Crimes: A Re-look at Juvenile Justice Policy in India', 10(1) NUJS LAW REVIEW, 50 (2017). (Pillai & Upadhyay).

<sup>39</sup> Ibid.

<sup>40</sup> Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law, (PRS India, January 23<sup>rd</sup> 2013)* <<https://www.prsindia.org/uploads/media/Justice%20overma%20committee/js%20overma%20committe%20report.pdf>> accessed May 2, 2020.

<sup>41</sup> Ibid., [Table of Contents].

<sup>42</sup> Ibid [51].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

the absence of a protective institution as envisaged by the 2000 Act would add to the manipulation and ultimately, wrongly influence children.<sup>45</sup>

The Verma Report also examined other aspects of implementation, ranging from the segregation of juveniles to the absence of training provided to Welfare Boards.<sup>46</sup> Analyzing orders passed by the Juvenile Justice Board in various states, the Verma report highlighted the hostile atmosphere for juvenile delinquents, violating every principle of a fair trial.<sup>47</sup> The Report conclusively determined that the law was sufficient to deal with juveniles (i.e., the 2000 Act) and instead directed the central and state governments to improve infrastructure and services for juveniles in conflict with the law.<sup>48</sup> In 2015, the Government disregarded the recommendations and gave in to the popular demand of the people by successfully passing its latest comprehensive legislation on juvenile justice, that was intended to focus on children in need of care and protection as well as those in conflict with the law.

#### IV. A CRITIQUE OF SELECT PROVISIONS OF THE 2015 ACT

The 2015 Act has been heralded as a harbinger of adopting international standards and tailoring domestic laws to protect juveniles. It provides for the special care and treatment for juveniles that are in conflict with the law. Diverse institutions ranging from welfare personnel<sup>49</sup> to committees<sup>50</sup> have been established and adequately empowered to promote the rehabilitation of a juvenile delinquent. A Juvenile Justice Board ('Board') was set up<sup>51</sup> in order to introduce child – friendly provisions in the legislation and prevent the further exploitation of juveniles through the imposition of the 'adult adversarial system'.<sup>52</sup> The adversarial system that adults are subjected to is not victim centric and it is imperative that juveniles accused of crimes are exposed to a child friendly atmosphere. The adult adversarial court system highlights the 'fear and the awe of law' that might be detrimental to the conduct of the juvenile.<sup>53</sup> Hence, there existed a further need to alter the procedural framework of juvenile justice. This exact motivation was present way back in 1960, initially leading to the very creation of these Boards. These provisions have thus been substantially accentuated by the 2015

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid., [52].

<sup>47</sup> Ibid., [53].

<sup>48</sup> Ibid.

<sup>49</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, ss 2(17) & 2 (18).

<sup>50</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 27.

<sup>51</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 4, ch 3.

<sup>52</sup> N.W. Spaulding, 'The Enclosure of Justice: Courthouse Architecture, Due Process and the Dead Metaphor of Trial', (2012) 24(i) YALE JOURNAL OF LAW & THE HUMANITIES <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1390&context=yjllh>> accessed on 30<sup>th</sup> November, 2020, 311 – 343.

<sup>53</sup> Kumar (n 3) 123.

Act, which aims to ensure that certain protections are granted to juveniles under the assumption that they are child delinquents and should not be subjected to the same “adversarial legalism” as adults.<sup>54</sup> However, the 2015 Act encapsulates provisions that contradict the basic tenet of rehabilitation inherent to juvenile justice systems, as discussed below.

### A. TRANSFER BASED ON ‘HEINOUS OFFENCES’

Section 15(1) of the 2015 Act empowers the Board to conduct a preliminary assessment with respect to the maturity of a juvenile between the ages of 16 and 18 if they have allegedly committed ‘heinous offences’.<sup>55</sup> The Act defines “heinous offences” as crimes for which the minimum punishment is a term of imprisonment of seven years or more.<sup>56</sup> In *Shilpa Mittal v State of NCT of Delhi*<sup>57</sup>, the Supreme Court clarified a crime which does not carry a minimum sentence of 7 years cannot be treated as a heinous offence. Further, the decision noted a fourth category of “serious offenses” where the maximum sentence is more than 7 years of imprisonment, but no minimum sentence is prescribed.<sup>58</sup>

In making the preliminary assessment per Section 15 of the 2015 Act, the Board can use the support of professional psychologists<sup>59</sup> to render a decision in three months.<sup>60</sup> In essence, the Board will determine whether juveniles have the mental acumen and physical capabilities of an adult to commit a heinous offence or serious offence and try them accordingly. Relatedly, under Section 18(3) of the 2015 Act, the Board is empowered with the power of transferring the case to the Children’s Court if they conclude that the juvenile is mature enough to commit a heinous offence and can be tried as an adult.<sup>61</sup>

The assessment of whether the child who has committed the offence should be tried as if they were an adult is evaluated based on their level of maturity. However, prior research has found that there is no exact method of discerning the maturity of a juvenile through any process of evaluation.<sup>62</sup> A juvenile’s lack of maturity increases the risk of error in fact-finding and assessments of culpability,

<sup>54</sup> Kumar (n 3) 122.

<sup>55</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 15 (1).

<sup>56</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(33).

<sup>57</sup> *Shilpa Mittal v State of NCT of Delhi* (2020) 2 SCC 787.

<sup>58</sup> *Ibid.*

<sup>59</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 15(1).

<sup>60</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 14(3).

<sup>61</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 18(3).

<sup>62</sup> Elizabeth Scott & Laurence Steinberg, ‘Adolescent Development and the Regulation of Youth Crime’, (2008) 18(2) *THE FUTURE OF THE CHILDREN* <<https://ccoso.org/sites/default/files/import/Adol-dev-and-reg-of-crime.pdf>> accessed on 30<sup>th</sup> November 2020 24 – 25; S Rakshit, ‘Missing the “Justice” in the Juvenile Justice (Care and Protection of Children) Bill, 2014’, (2014) 8(1) *LAW & POLICY BRIEF* <<https://jgu-dev.s3.ap-south-1.amazonaws.com/law-and-policy-brief-aug-2015-issue-8.pdf>> accessed on 30<sup>th</sup> November 2020, 2 - 3; Pillai & Upadhyay [n 38] 53.



irrespective of the serious nature of the offense.<sup>63</sup> There is also some evidence in other jurisdictions where courts focus exclusively on the gravity of the crime, and ignore the situational reasons that should mitigate the culpability of juveniles.<sup>64</sup> Furthermore, exposure to the adult adversarial system could undermine the rehabilitative and child-friendly underpinnings of the 2015 Act. As expanded in Section V of this paper, the transfer to the adult criminal justice system legitimizes the use of labels that can increase the risk to reoffend.<sup>65</sup>

Additionally, trial by the Children's Court is an iron fist in a velvet glove. As noted, the evaluation of the Board regarding the maturity of the child is the first step of the trial after which the juvenile is transferred to the Children's Court.<sup>66</sup> The Children's Court works under the prejudicial notion that the juvenile is 'capable of committing the crime' even before the guilt is conclusively established, questioning the constitutional guarantee of procedural fairness.<sup>67</sup> Hence, before even appreciating the evidence and the arguments, the Board can make a decision with respect to the maturity of a child under the erroneous assumption that the alleged offence is committed. The Board's assessment may bias the decision of the Children's Court, affecting the basic presumption of innocence.

## B. PRINCIPLE OF "FRESH START"

Section 3 of the 2015 Act envisages providing a 'fresh start' to a juvenile delinquent, directing the removal and deletion of records of delinquency except in 'special circumstances'.<sup>68</sup> Though espousing the need of repatriating a juvenile back into the society, the exception of 'special circumstances' takes us a step backwards. This exception has not been explained at all, leaving it extremely-open-ended and vague.<sup>69</sup> The absence of defining the contours of such an imperative exception highlights the potential for misuse by authorities.<sup>70</sup> Additionally,

<sup>63</sup> Barry C. Feld, 'Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount', (2013) 31(2) *LAW & INEQUALITY: A JOURNAL OF THEORY AND PRACTICE* <[https://scholarship.law.umn.edu/faculty\\_articles/296/](https://scholarship.law.umn.edu/faculty_articles/296/)> accessed on 30<sup>th</sup> November 2020, 263, 299.

<sup>64</sup> Barry C. Feld, 'Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences', (2007) 10 *Journal of Law and Family Studies* <[https://scholarship.law.umn.edu/faculty\\_articles/300/](https://scholarship.law.umn.edu/faculty_articles/300/)> 11, 64 (cites a state appellate court ruling that age need not be taken into account given the nature of the crime).

<sup>65</sup> Kumar [n 3] 127.

<sup>66</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 19.

<sup>67</sup> The Juvenile Justice (Care and Protection of Children) Act [n 60].

<sup>68</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, s 3 (xiv).

<sup>69</sup> Pinky Virani, 'Crimes and Commensurate Punishment', (*The Hindu*, July 22, 2015) <<https://www.thehindu.com/opinion/op-ed/the-juvenile-justice-bill-and-rights-of-children/article7448576.ece>> accessed May 11, 2020.

<sup>70</sup> *Ibid.*, Pillai & Upadhyay [n 38] 61.

this open – ended exception could be used to discriminate on the basis of caste and gender.<sup>71</sup>

A recent Supreme Court case highlights the importance of the ‘fresh start’ principle. The respondent, Ramesh Bishnoi, was denied a job appointment due to his previous record that highlighted his conviction as a juvenile, which was not sealed or removed.<sup>72</sup> Upholding the High Court of Rajasthan’s order of reinstating Bishnoi’s appointment, the Supreme Court held that the principle of fresh start read with the rehabilitative objective of the 2000 and 2015 Act should ensure that an individual is not prevented from securing a job. The Supreme Court further noted that “even if he had been convicted, the same could not have been held against him for getting a job, as admittedly he was a minor when the alleged offences were committed and the charges had been framed against him.”<sup>73</sup> But since the charges were filed prior to the 2015 Act, the Supreme Court did not clarify what would count as a ‘special circumstance’, and it is unclear whether juveniles who are presumed to have committed heinous offences could be categorized under that exception.

## V. PRIOR RESEARCH: THE U.S. EXPERIENCE

Similar to the response to the Nirbhaya case, a crime control model was introduced across U.S. states starting in the early 1990s. For example, following extensive media coverage of violent sex crimes committed by juveniles, several states introduced sex-offender registry laws to include children convicted of sex offences.<sup>74</sup> Other substantial changes were made to criminal provisions related to the treatment of adolescents who committed violent crimes.<sup>75</sup> Most of the violent crimes that received media attention were rare, though the political response was to appear “tough on crime.”<sup>76</sup>

Some mechanism of a transfer to a criminal court was always available to juvenile court judges, but this was an option used sparingly and based on individual assessments.<sup>77</sup> Since youth crime received extraordinary amount of media

<sup>71</sup> Ibid.

<sup>72</sup> *Union of India v Ramesh Bishnoi* (2019) 19 SCC 710.

<sup>73</sup> Ibid. [9].

<sup>74</sup> Stuti Subbaiah Kokkalera, ‘Rethinking the Indian Sex Offender Registry’, (2017) 4(t) NLUJ LAW REVIEW <<http://nlujodhpur.ac.in/uploads/16851709020309.pdf>> accessed on 30<sup>th</sup> November 2020, 56.

<sup>75</sup> Sarah Alice Brown, ‘Trends in Juvenile Justice State Legislation: 2001–2011’ (*National Conference of State Legislatures*, 5 June, 2012) <<https://www.ncsl.org/documents/cj/trendsinjuvenilejustice.pdf>> accessed on 30<sup>th</sup> November 2020.

<sup>76</sup> Donna Bishop and Barry Feld, *Juvenile Justice in the Get Tough Era*, In *Encyclopedia of Criminology and Criminal Justice* (eds., G. Bruinsma and D. Weisburg 2014) 2865-2773; see also John Hagan, *Who are the Criminals? The Politics of Crime Policy from the Age of Roosevelt to the Age of Hagan* (Princeton University Press 2010).

<sup>77</sup> Ibid.

attention, states responded by widening the net for transferring juveniles to criminal courts. More states introduced automatic transfer laws, where juveniles charged with a specific serious offence were sent to criminal court directly, instead of a juvenile court.<sup>78</sup> In such states, juveniles were categorized by the charges that were filed and the charges filed against a juvenile determined which court was selected.<sup>79</sup> The expansion of transfer laws increased the number of juveniles appearing in criminal courts, shrinking the authority of the juvenile court.<sup>80</sup> At present, 29 states have passed statutory exclusion laws that provide some form of exclusive jurisdiction for specified offences committed by juveniles.<sup>81</sup> States have also created other avenues of transferring youth including giving prosecutors the power to decide if a case should be tried in criminal court.<sup>82</sup>

Though transfer laws were supported by state legislatures as a way to deter juvenile crime<sup>83</sup>, research has shown that they have not been effective in reducing recidivism. A systematic review of published studies found that transfer of juveniles to criminal court was associated with higher rates of violence among the transferred youth.<sup>84</sup> Another study noted that transfer into criminal court increased the possibility for short-term recidivism.<sup>85</sup> Other studies have further reported race and gender disparities to the detriment of minority youths, especially African-Americans.<sup>86</sup> The variation in states' transfer mechanisms is an

<sup>78</sup> Patrick Griffin, Sean Addie, Benjamin Adams and Kathy Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, (Juvenile Offenders and Victims: National Report Series, 11<sup>th</sup> September 2011) <<https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>> accessed on 30<sup>th</sup> November 2020.

<sup>79</sup> Frank Zimring, 'The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s', (2010) 70 *LOYOLA OF LOS ANGELES LAW REV.* <<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6352&context=lalrev>> accessed on 30<sup>th</sup> November 2020, 1.

<sup>80</sup> Bishop & Feld [n 78].

<sup>81</sup> Josh Rovner, 'How Tough on Crime became Tough on Kids: Prosecuting Teenage Drug Charges in Adult Court', *THE SENTENCING PROJECT* <<https://www.sentencingproject.org/publications/tough-crime-became-tough-kids-prosecuting-teenage-drug-charges-adult-courts/>> accessed on 7<sup>th</sup> December 2020 (2016).

<sup>82</sup> Griffin, Adams & Firestine [n 80] 2.

<sup>83</sup> Barry C. Feld and Donna M. Bishop, 'Transfer of Juvenile to Criminal Court', in B. Feld & D. Bishop (Eds.), *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, (OUP 2012) 801-842.

<sup>84</sup> Angela McGowan, Robert Hahn, Akiva Liberman, Alex Crosby et. al, 'Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review', (2007) 32(4) *AMERICAN JOURNAL OF PREVENTIVE MEDICINE* <<https://pubmed.ncbi.nlm.nih.gov/17386331/>> accessed on 30<sup>th</sup> November 2020, 7-28.

<sup>85</sup> Donna M. Bishop, Charles E. Frazier, Lonn Lanza-Kaduce, & Lawrence Winner, 'The Transfer of Juveniles to Criminal Court: Does it make a difference?', (1996)42(2) *CRIME & DELINQUENCY* <<https://journals.sagepub.com/doi/10.1177/0011287996042002001#:~:text=Recidivism%20of%202%2C738%20juvenile%20offenders,retained%20in%20the%20juvenile%20system.&text=By%20every%20measure%20of%20recidivism,than%20among%20the%20matched%20controls>> accessed on 30<sup>th</sup> November 2020, 171, 183.

<sup>86</sup> Sara L. Bryson and Jennifer H. Peck, 'Understanding the Subgroup Complexities of Transfer: The Impact of Juvenile Race and Gender on Waiver Decisions', (2020) 18(2)

additional complication in verifying their efficacy in terms of preventing juvenile crime.<sup>87</sup> Transfer laws also assume that juveniles are aware that certain crimes can land them in criminal court, though many youths are unaware of them.<sup>88</sup>

Along with transfer laws, states adopted harsher sentencing guidelines that emphasized on offence seriousness determinate sentencing, and “blended sentencing”, and required juvenile court judges to impose adult sentences for certain crimes committed by juveniles.<sup>89</sup> Sociologist David Matza foretold the consequences of criminalizing juveniles, where decisions to punish would be guided more by the “principle of offence” as opposed to the “principle of individualized justice.”<sup>90</sup> This meant that decision-makers would more likely judge a juvenile based on the “heinous” nature of the offence rather than their situational circumstances.

More importantly, when juveniles are transferred into the criminal justice system, they become eligible for the same punishments as adults, including lengthy terms of incarceration such as life imprisonment with or without the possibility of parole.<sup>91</sup> In the last fifteen years, a series of U.S. Supreme Court cases have examined juvenile sentencing schemes as violative of the Constitution’s Eighth Amendment<sup>92</sup> protection against cruel and unusual punishment. First, in the case of *Roper v Simmons*,<sup>93</sup> a majority of the judges held that the death penalty was unconstitutional when applied to juveniles.<sup>94</sup> The majority opinion cited an adolescent’s developmental state as a relevant factor that mitigated their culpability for even serious acts of violence.<sup>95</sup> The decision further explained that an adolescent’s culpability could be mitigated based on their lack of maturity and underdeveloped sense of responsibility; susceptibility to negative influences and transitory personalities.<sup>96</sup>

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YOUTH VIOLENCE AND JUVENILE JUSTICE <<https://journals.sagepub.com/doi/abs/10.1177/1541204019869398>> accessed on 30<sup>th</sup> November 2020,135-155.

<sup>87</sup> Griffin, Adams and Firestone (n 80), 26.

<sup>88</sup> Richard E. Redding, ‘Juvenile Transfer Laws: An Effective Deterrent to Delinquency?’, (*OJJDP Juvenile Justice Bulletin*, 7<sup>th</sup> June 2010) <<https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>> accessed on 30<sup>th</sup> November 2020.

<sup>89</sup> Kokkalera [n 76].

<sup>90</sup> David Matza, *Delinquency and Drift*, (John Wiley & Sons 1964).

<sup>91</sup> Neelum Arya, ‘State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System. Campaign for Youth Justice: Washington DC’, (*National Criminal Justice Reference Service*, 2011) <<https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=256079>> accessed on 30<sup>th</sup> November 2020.

<sup>92</sup> U.S. Constitution (adopted in 1791), Am. VIII:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

<sup>93</sup> 2005 SCC OnLine US SC 12 : 543 US 551 (2005).

<sup>94</sup> *Ibid.* [579].

<sup>95</sup> *Ibid.* [573-74].

<sup>96</sup> *Ibid.* [569-571].

A few years later, in *Graham v Florida*<sup>97</sup>, the U.S. Supreme Court reiterated its holding in *Roper* to establish that a sentence for life without the possibility of parole is unconstitutional. Parole is a form of discretionary release that enables an incarcerated individual to serve the rest of their sentence in the community.<sup>98</sup> As such, a sentence of life-without-parole condemned juveniles to die in prison.<sup>99</sup> Considering the diminished culpability of juveniles, sentencing them to die in prison for a non-homicide offence was deemed to be excessively punitive.<sup>100</sup> The decision did not prohibit life sentences for juveniles but disallowed states from determining that juveniles are incapable of rehabilitation.<sup>101</sup> The *Graham* Court directed states to give juvenile defendants “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”.<sup>102</sup>

Two years later, in *Miller v Alabama*,<sup>103</sup> a narrowly split Supreme Court extended the Eighth Amendment’s proportionality clause to mandatory life-without-parole sentences for juveniles convicted of homicide offences. Before 2012, twenty-eight states had laws that directed judges to impose a sentence of life-without-parole for juveniles if they were convicted of murder offences.<sup>104</sup> The majority of the five judges relied on prior decisions that had held that sentencing authorities must consider the characteristics of defendants before sentencing them to death.<sup>105</sup> In addition, prior decisions in *Roper* and *Graham* makes “youth (and all that accompanies it) irrelevant to the imposition of that harshest prison sentence.”<sup>106</sup> Specifically, Justice Elena Kagan’s majority opinion reinforced the situational aspects of a juvenile’s crime. The decision elaborates that a juvenile are generally less culpable due to “family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional...[and] the circumstances of the homicide offence, including the extent of his participation in the conduct and the way familial and peer pressures

<sup>97</sup> 2010 SCC OnLine US SC 47 : 560 US 48 (2010).

<sup>98</sup> Joan Petersilia, ‘Parole and Prisoner Reentry in the United States’, In: G. Bruinsma and D. Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice*, Springer, New York 3440-3449.

<sup>99</sup> American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* <<https://www.aclu.org/issues/juvenile-justice/youth-incarceration/false-hope-how-parole-systems-fail-youth-serving-extreme>> accessed on December 7<sup>th</sup> 2020, (2016).

<sup>100</sup> Perry Moriarty, ‘The Trilogy and Beyond’, (2017) 62 SOUTH DAKOTA LAW REV. <<https://www.questia.com/library/journal/1G1-523137268/the-trilogy-and-beyond>> accessed on 6<sup>th</sup> December 2020, 539.

<sup>101</sup> Cara Drinan, *The War on Kids: How American Juvenile Justice Lost its Way*, (Oxford University Press 2017).

<sup>102</sup> *Graham v Florida* 2010 SCC OnLine US SC 47 : 560 US 48 (2010).

<sup>103</sup> 2012 SCC OnLine US SC : 567 US 460 (2012).

<sup>104</sup> Josh Rovner, ‘Slow to Act: State Responses to 2012 Court Mandate on Life Without Parole’, THE SENTENCING PROJECT <<https://www.sentencingproject.org/publications/slow-to-act-state-responses-to-2012-supreme-court-mandate-on-life-without-parole/>> accessed on December 7<sup>th</sup> 2020, (2014).

<sup>105</sup> *Woodson v North Carolina* 1976 SCC OnLine US SC 171 : 49 L Ed 2d 944 : 428 US 280 (1976); *Lockett v Ohio* 1978 SCC OnLine US SC 159 : 57 L Ed 2d 973 : 438 US 586 (1978).

<sup>106</sup> *Miller v Alabama* 2012 SCC OnLine US SC 68 : 567 US 460 at 479 (2012).

may have affected him.”<sup>107</sup> Culpability is further mitigated by a juvenile’s inability to provide for their own legal assistance.<sup>108</sup> As such, *Miller* afforded all juveniles a meaningful opportunity to present reasons for a shorter term of imprisonment.

## VI. RE-EVALUATING PROVISIONS OF THE 2015 ACT

It is important to note that the overall rate of youth offending in India remains low. In 2018, the National Crime Records Bureau reported a total of 29,024 cognizable IPC crimes and 2,567 cognizable special laws crimes committed by juveniles.<sup>109</sup> As noted, the Supreme Court recently clarified that there is a distinction between “heinous offences” and “serious offences”, where the latter includes those crimes that carry a maximum sentence that is more than seven years of imprisonment.<sup>110</sup> However, many juvenile crimes may go unreported due to individual states failing to furnish data, as a result of political pressures.<sup>111</sup> In particular, sexual crimes, especially those committed by juveniles within residential institutions, are often settled through internal mechanisms instead of reporting to official authorities.<sup>112</sup> Self-reported data also suggests that the rates of offending in India are low, relative to other countries.<sup>113</sup> More importantly, a deterrence-based framework for preventing juvenile crime neglects the situational circumstances and the rehabilitative potential of youths. We, therefore, highlight two ways of re-orienting specific provisions of the 2015 Act.

### A. TRANSFER IS VIOLATIVE OF OUR UNDERSTANDING OF ADOLESCENCE

The sections related to transfer based on the nature of the offence underscores a principle of general deterrence, where the possibility of facing an adversarial process would deter a juvenile from committing a ‘heinous offence.’<sup>114</sup> The principle of general deterrence posits that individuals will refrain from

<sup>107</sup> *Ibid.*, 478

<sup>108</sup> *Ibid.*

<sup>109</sup> National Crime Records Bureau, *Crime in India 2018, Statistics Volume 1 (Ministry of Home Affairs, 2018)* <<https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>>, accessed May 9, 2020.

<sup>110</sup> *Shilpa Mittal v State (NCT of Delhi)* (2020) 2 SCC 787.

<sup>111</sup> Saju Parackal and Rita Panicker, *Children and Crime in India: Causes, Narratives and Interventions*, (Palgrave MacMillan, 2019), 54.

<sup>112</sup> Mannat Mohanjeet Singh, Shradha S. Parsekar and Sreekumaran N. Nair, ‘An Epidemiological Overview of Child Sexual Abuse’, (2014) 3(4) *Journal of Family Medicine and Primary Care* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311357/>> accessed on 7<sup>th</sup> December 2020, 430.

<sup>113</sup> Stuti S. Kokalera, Ineke H. Marshall and Chris E. Marshall, ‘How Exceptional is India? A Test of Situational Action Theory’, (2020), 15, *Asian Journal of Criminology*, <<https://link.springer.com/article/10.1007/s11417-020-09312-5?shared-article-renderer>> accessed on 7<sup>th</sup> December 2020, 207-208.

<sup>114</sup> Anne L. Schneider, *Deterrence and Juvenile Crime: Results from A National Policy Experiment, Research in Criminology Series*, (Springer, New York 1990).

committing criminal acts when they are aware of the punishment that is applicable for those acts.<sup>115</sup> A deterrence-based framework suggests that juveniles exercise rational judgment and are reasonably aware of the potential costs of punishment and benefits of committing the crime.<sup>116</sup> However, the purported deterrent effect neglects two important features of juveniles— (1) their reduced culpability by virtue of their developmental state and (2) their increased potential for reform.

First, sections 15(1) and 18(3) of the 2015 Act assume that a juvenile's maturity can be discerned from the facts of the offense. However, juveniles are less likely to make deliberate choices, including indulging in acts of violence. The unpredictability of adolescent behaviors is explained by the continuing changes in the prefrontal cortex of the brain.<sup>117</sup> The prefrontal cortex is the part of the brain that controls imperative functions such as reason, while the amygdala is responsible for controlling aggression and fear — both of which are in development at the time of adolescence, and can continue to develop well into an individual's early 20s.<sup>118</sup> Since adolescents are less risk-averse, they are unable to make decisions in the same way as adults.<sup>119</sup> Though serious crimes involving personal injury arguably warrant treating adolescents as adults, current empirical research indicates that adolescents are “less” culpable for their criminal actions.<sup>120</sup> They are not only less culpable based on neuro-scientific evidence, but also due to the situational circumstances leading up to the crime.<sup>121</sup> A majority of juvenile crimes are situationally driven, occurring in the heat of argument.<sup>122</sup> Juvenile crimes are also largely a group phenomenon since adolescents are more likely to engage in

<sup>115</sup> Kelli D. Tomlinson, 'An Examination of Deterrence Theory: Where Do We Stand?', (2016) 80(3) FEDERAL PROBATION <<https://www.questia.com/library/journal/1P4-1917879090/an-examination-of-deterrence-theory-where-do-we-stand>> accessed on 7<sup>th</sup> December 2020, 33.

<sup>116</sup> Bishnoi [n 74].

<sup>117</sup> Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence*. Boston, (MA: Eamon Dolan/Houghton Mifflin Harcourt 2014); Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, (MA: Harvard University Press 2008).

<sup>118</sup> S.B. Johnson, R.W. Blum & J.N. Giedd, 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy', (2009) 45(3) JOURNAL OF ADOLESCENT HEALTH <[HTTPS://WWW.NCBI.NLM.NIH.GOV/PMC/ARTICLES/PMC2892678/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/)> accessed on 7<sup>th</sup> December 2020, 216 - 218.

<sup>119</sup> Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents may be Less Culpable than Adults', (2000) 18 BEHAV. SCI. LAW <<https://pubmed.ncbi.nlm.nih.gov/11180420/>> accessed on 6<sup>th</sup> December 2020 741.

<sup>120</sup> Tomlinson [n 117].

<sup>121</sup> Laura Cohen, 'Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida', (2014) 35 CARDOZO LAW REVIEW, <<http://cardozolawreview.com/freedoms-road-youth-parole-and-the-promise-of-miller-v-alabama-and-graham-v-florida/>> accessed on 7<sup>th</sup> December 2020, 1031.

<sup>122</sup> Gerard Glynn & Ilona Vila, 'What States Should do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential', (2012) 24 ST. THOMAS LAW REV., <<https://www.questia.com/library/journal/1G1-294505843/what-states-should-do-to-provide-a-meaningful-opportunity>> accessed on 7<sup>th</sup> December 2020, 310.

troubled behaviors in the company of peers.<sup>123</sup> In sum, teenagers are cognizant of the consequences of their risk-taking behaviors but lack the emotional maturity to deal with the consequences.<sup>124</sup> As the American jurisprudential recognition of adolescence suggests, decision-makers should acknowledge a juvenile's mitigated culpability. The saliency of mitigated culpability should prevent the transfer of adolescents to the criminal justice system.

Second, the principle of rehabilitation further suggests that maturity is not fixed at the time of the offense. Childhood and adolescence are periods of transition. In particular, the transiency in adolescent development is associated with an increased likelihood of responding appropriately to treatment services.<sup>125</sup> Potential for reform is noted in social scientific evidence of the “age-crime” curve of desistance where adolescents are more likely to naturally desist from offending as they get older.<sup>126</sup> Therefore, transfer to adversarial trials based on the nature of the offence is antithetical to the principle of rehabilitation enshrined in the 2015 Act.

## B. AVOIDING THE ILL EFFECTS OF FORMAL LABELS

The criminological theory of labelling postulates that every individual has certain labels based on their life experiences.<sup>127</sup> The labeling of an individual as a “criminal” or “delinquent” produces a stigma—one that can lead to different ways of coping, including repeating criminal behaviors.<sup>128</sup> Attaching the label of “delinquent” portrays juveniles delinquents as perpetrators of crimes when they are often victims of poverty and discrimination.<sup>129</sup> Several studies have highlighted the juvenile justice framework itself to be the primary labeling agent and support minimization of court intervention in cases of juvenile offending.<sup>130</sup>

Categorizing juveniles based on the nature of their offences inherently produces a label that can affect their inter-personal relationships and interactions with the system.<sup>131</sup> Empirical studies have repeatedly shown the negative effect of formal justice system involvement. For instance, a study found that juvenile justice intervention positively affects subsequent involvement in serious

<sup>123</sup> Mark Warr, *Companions in Crime: The Social Aspects of Criminal Conduct*, Cambridge, (Cambridge University Press 2002).

<sup>124</sup> Tomlinson [n 117].

<sup>125</sup> *Graham v Florida*, 2010 SCC OnLine US SC 47 : 560 US 48 (2010) at 75.

<sup>126</sup> Alex Piquero, David P. Farrington and Alfred Blumstein, ‘The Criminal Career Paradigm’, (2003)30 CRIME AND JUSTICE <<https://www.jstor.org/stable/1147702?seq=1>> accessed on 7<sup>th</sup> December 2020, 359.

<sup>127</sup> Anne Rankin Mahoney, ‘The Effect of Labelling upon Youths in the Juvenile Justice Framework: A Review of the Evidence’, (1974) 8 (4) LAW AND SOCIETY REVIEW <<https://www.jstor.org/stable/3052885?origin=crossref&seq=1>> accessed on 7<sup>th</sup> December 2020, 583.

<sup>128</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, (Touchstone, 1963).

<sup>129</sup> Drinan [n 103][583], [586].

<sup>130</sup> *Ibid.*, [587] – [590].

<sup>131</sup> *Ibid.*, [587] – [588].



delinquency.<sup>132</sup> Youth who come into contact with the legal system reported increased involvement in subsequent delinquency because “official labeling creates a trajectory of cumulative disadvantage that elevates the probability of involvement in crime and delinquency.”<sup>133</sup>

Even if official labels do not reproduce criminal acts, recognition as a former delinquent can impact an individual’s daily life. The stigma of being involved in the justice system at any point in time can affect the ability to secure employment, housing and other services.<sup>134</sup> The assumption of criminality based on a prior record can lead to shunning of people from all walks of public life.<sup>135</sup> As Ramesh Bishnoi’s case in Part III of this paper illustrates, the effect of “labeling” cannot be discounted. Though the inclusion of the principle of fresh start is commendable, the possibility of accessing records publicly and to make future judgments in ‘special circumstances’ dilutes the rehabilitative ideal of the juvenile justice system. Furthermore, the ability to transfer a juvenile based on the nature of the offence attaches a formal label—one that may not be exempted by the principle of fresh start if deemed to be a ‘special circumstance.’

## VII. PRESENTING ALTERNATIVES: FOCUSING ON PREVENTION AND REHABILITATION

### A. THE IMPORTANCE OF PREVENTING JUVENILE CRIME

Adoption of prevention programs may be more beneficial than a categorical rule of transferring youths based on the type of offence allegedly committed. In the U.K., prevention is accomplished in a number of ways, including targeted programming in neighborhoods where youth are at risk to offend, providing parenting workshops and inter-agency collaborations with schools.<sup>136</sup> In the U.S., each state has complete jurisdiction over their juvenile justice system producing a variety in the type of treatment and programming available for children. For example, in the state of Indiana, a bill was advanced to establish a preventive

<sup>132</sup> Jon Gunnar Bernburg, Marvin D. Krohn and Craig J. Rivera, ‘Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory’, (2006) 43 *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* <<https://journals.sagepub.com/doi/10.1177/0022427805280068>> accessed on 6<sup>th</sup> December 2020, 67.

<sup>133</sup> Eric A. Stewart, Ronald L. Simons, Rand D. Conger and Laura V. Scaramella, ‘Beyond the Interactional Relationship Between Delinquency and Parenting Practices: The Contributions of Legal Sanctions’, (2002) 39 *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* <<https://journals.sagepub.com/doi/10.1177/002242780203900102>> accessed on 6<sup>th</sup> December 2020, 36, 52.

<sup>134</sup> Eric Rasmusen, ‘Stigma and Self-fulfilling Expectations of Criminality’, (1996) 39 (2) *THE JOURNAL OF LAW AND ECONOMICS* <<https://www.journals.uchicago.edu/doi/abs/10.1086/467358>> accessed on 6<sup>th</sup> December 2020, 519.

<sup>135</sup> *Ibid* [522] – [525].

<sup>136</sup> Ian Blakeman, *The Youth Justice System of England and Wales*, 139<sup>th</sup> International Training Course Visiting Experts Papers. Resource Material Series No. 78 <[https://www.unafei.or.jp/publications/pdf/RS\\_No78/No78\\_13VE\\_Blakeman.pdf](https://www.unafei.or.jp/publications/pdf/RS_No78/No78_13VE_Blakeman.pdf)>, accessed on 7<sup>th</sup> December 2020 (n.d.).

pilot program.<sup>137</sup> The voluntary program aims to target the juveniles who are deemed as ‘at-risk’ of becoming delinquents. Juvenile court judges in five major Indiana cities are tasked to conduct this scheme successfully.<sup>138</sup> Similarly, the state of Michigan opened a request in early 2020 for proposals from organizations that could assist in running preventive programs, focusing on providing evidence-based reforms to at-risk youth.<sup>139</sup> The project’s stated objective emphasized that the goal was to reduce recidivism by providing “an opportunity to set at-risk youth on a new path with the goal of reducing repeat offences, and building alternatives to help them develop better and safer outcomes for all.”<sup>140</sup>

Despite the utility of such programs, some issues remain. In qualifying youth who are “at-risk”, studies in the U.S. have noted that characteristics such as race, sex, age or prior criminal history are taken into account and can have adverse impacts on a segment of youth.<sup>141</sup> For example, younger males in late adolescence are more likely to be deemed at risk even if they do not commit a serious offense.<sup>142</sup> Studies along those lines have highlighted that young males are more likely to be viewed as aggressive than their female counterparts, resulting in them being identified as at risk of delinquency.<sup>143</sup> Additionally, research has indicated that African-American children are at a higher risk of delinquency.<sup>144</sup> Complex actuarial risk assessment tools can be further relied upon for identifying at-risk youth. Risk assessment scores based on information provided by individual youths allow state authorities to intervene and take adequate steps for prevention.<sup>145</sup> Other, more categorical assessments could also be made. For example, programs can specifically target youth from poor socio-economic backgrounds to increase certain protective factors and offset offending risk<sup>146</sup>, potentially widening the net of youth who are viewed as “at-risk” even if they are not.

As such, we are mindful that in recommending preventive programs in the Indian context, they may be similarly prone to biases based on socio-economic

<sup>137</sup> Sen. Victoria Spatz et al, ‘Senate Bill 596’, (*Indiana General Assembly*, 28<sup>th</sup> February 2019) <<http://iga.in.gov/legislative/2019/bills/senate/596>> accessed on May 12<sup>th</sup>, 2020).

<sup>138</sup> Katie Stancombe, ‘Prevention-Based Pilot Program for at-Risk Juveniles Advances’, (*Indian Lawyer*, 20<sup>th</sup> March 2019) <<https://www.theindianlawyer.com/articles/49768-prevention-based-pilot-program-for-at-risk-juveniles-advances>> accessed on May 12, 2020.

<sup>139</sup> Lynn Sutfin, ‘MDHHS issues Request for Proposals for Juvenile Justice Diversion Pilot Programming’, (*Michigan.Gov*, January 16<sup>th</sup> 2020) <[https://www.michigan.gov/som/0,4669,7-192-29942\\_34762-517313--,00.html](https://www.michigan.gov/som/0,4669,7-192-29942_34762-517313--,00.html)> accessed on May 12, 2020).

<sup>140</sup> Ibid.

<sup>141</sup> Office of Juvenile Justice and Delinquency Prevention, *Characteristics and Patterns of ‘At-Risk’ Juveniles and Factors that Contribute to Violence Committed by or Against Juveniles* <<https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/jvrt1.html>>, accessed on 7th December 2020 (n.d.).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid., [8].

<sup>146</sup> Ibid.

class, caste and religious identity. But, by recognizing the shortfalls in other countries, we advocate the need to adopt a system of checks and balances in creating tools to identify which youth are at risk of offending.<sup>147</sup> Scholars and academicians have accumulated years of research that can be drawn upon to create more balanced actuarial tools and more qualitative, individualized assessments of youth who require actual intervention. Though examination of risk factors could include static factors like sex, age that correlate with delinquency rates, they should also take into account dynamic, situational factors unique to each individual youth.<sup>148</sup> Additionally, factors must only be considered if there is demonstrated evidence that these characteristics have led to the increase of recidivism and violence.<sup>149</sup> In the end, the most effective method is constant modification and surveillance over prevention programs.<sup>150</sup> In the Indian scenario, prevention programs could be generalized workshops conducted by credible professionals from governmental and non-governmental sectors as well as enabling targeted options such as parenting workshops, group counseling and therapeutic services in schools.

## B. REVISITING THE TREATMENT OF JUVENILES IN THE SYSTEM

For youth already in contact with the justice system, the focus should be on rehabilitation and eventual re-integration into the community. Previous analysis of the 2015 Act suggested the adoption of restorative justice practices in dealing with juveniles who commit crimes.<sup>151</sup> Restorative justice is a “process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>152</sup> Restorative justice practices include several types of programs, and can be adapted to a wide range of issues including serious violent crime committed by youths.<sup>153</sup> Several countries have formally recognized the use of restorative justice practices. In New Zealand, the Children, Young Persons and Their Families Act of 1989 along with the Sentencing Act of 2002, Parole Act of 2002 and the Victim Rights’ Act of 2002 introduced restorative justice practices in the juvenile and criminal justice systems at various stages, with the most common form being

<sup>147</sup> Randy Borum, ‘Managing At Risk Juvenile Offenders in the Community: Putting Evidence – Based Principles Into Practice’, (2003) 19 (1) JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE, <<https://journals.sagepub.com/doi/abs/10.1177/1043986202239745>> accessed on 6<sup>th</sup> December 2020, 116.

<sup>148</sup> Ibid., [117].

<sup>149</sup> Ibid., [118].

<sup>150</sup> Ibid., [128].

<sup>151</sup> Pillai and Upadhyay [n 38]72.

<sup>152</sup> Tony F. Marshall, ‘Restorative Justice: An Overview, UK Home Office Research Development and Statistics Directorate’, (*Home Office Research Development and Statistics Directorate*, 1999) <[http://www.antoniocasella.eu/restorative/Marshall\\_1999-b.pdf](http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf)> accessed on 6<sup>th</sup> December 2020.

<sup>153</sup> J. Doak and D. O’ Mahoney (Eds.), *Restorative Justice and Practice in Encyclopedia of Criminology and Criminal Justice*, ( Bruisna and Weisburd 2014) 4422-4430.

pre-sentencing conferences through court referrals. In Ireland, the Children Act of 2001 formalized restorative justice for juveniles in the form of restorative conferences and cautions as part of a diversion program or through court referrals delivered by Probation departments. Restorative justice practices are also thriving in Australia with youth conferencing available in all states and territories, adult conferencing and circle sentencing in two territories, and victim-offender mediation in six out of eight territories.<sup>154</sup>

The growing popularity for the use of restorative justice models is supported by empirical research showing greater satisfaction for offenders and victims, as well as lower recidivism rates.<sup>155</sup> It is possible to redefine restorative justice principles within the realm of crime control.<sup>156</sup> Specifically, the involvement of victim input can in still accountability from juveniles, even if they are less culpable. In the Indian context, the principles of restorative justice can be adapted to involve families of the victims, the alleged accused juvenile and the larger community who has an interest in resolution instead of only doling out punishment.<sup>157</sup> Indeed, some organizations have initiated restorative justice programs such as groups circles in state observation homes that have produced promising results.<sup>158</sup> Organizers also note that victims feel more heard and empowered through restorative practices than through the criminal justice system.<sup>159</sup>

Though detention should be a last resort option, when ordered, other rehabilitative options should be made available in juvenile institutions. A popular treatment is Cognitive Behavior Therapy (CBT) which focuses on appropriate emotional regulation and addresses a host of risk behaviors.<sup>160</sup> A pilot study conducted for females involved in the justice system highlighted that the usage

<sup>154</sup> Jacqueline J. Larsen, *Restorative Justice in the Australian Criminal Justice System*, Research and Public Policy Series No. 127, (Canberra: Australian Institute of Criminology, 2014) <<https://www.aic.gov.au/sites/default/files/2020-05/rpp127.pdf>> accessed on 6<sup>th</sup> December 2020.

<sup>155</sup> M.S. Grigoryeva and Ross L. Matsueda, 'Rational Choice, Deterrence and Crime: Sociological Contributions' (Eds.), *Encyclopedia of Criminology and Criminal Justice* (Bruinsma and Weisburd, 2014) 4316-4327.

<sup>156</sup> Steels and Goulding, 'Restorative Justice in the Asia-Pacific Region: Acting Fairly, Being Just' (Eds.), *Handbook of Asian Criminology* (Liu, Heberton and Jou 2013), 379-391.

<sup>157</sup> Vijayalakshmi A., 'Scope and Applicability of Restorative Justice for Juveniles in Conflict with the Law' (Eds.), *Restorative Justice in India : Traditional Practice and Contemporary Applications* (Thilagaraj and Liu 2017).

<sup>158</sup> Geetika Mantri, 'Will restorative justice help Indian Sexual Crime Survivors Where Legal System Lacks?', (*The News Minute*, 9<sup>th</sup> February 2019) <<https://www.thenewsminute.com/article/will-restorative-justice-help-indian-sexual-crime-survivors-where-legal-system-lacks-96477>> accessed on 6<sup>th</sup> December 2020.

<sup>159</sup> Ibid.

<sup>160</sup> Daniel David, Ioana Cristea and Stefan G. Hofmann, 'Why Cognitive Behavioral Therapy is the Current Gold Standard of Psychotherapy', (2018)9 FRONTIERS IN PSYCHIATRY <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5797481/>> accessed on 6<sup>th</sup> December 2020, 4.

of cognitive behavioral approaches leads to a much lower crime rate.<sup>161</sup> The study recommends the amalgamation of prevention based programs with juvenile courts and personnel.<sup>162</sup> But it is equally important to maintain support from these rehabilitative programs once youth re-enter their communities.<sup>163</sup>

While restorative justice practices, cognitive behavioral therapy and related programs have been advocated in other countries, it remains to be seen the extent to which these policies could be implemented in India. First, it requires political agencies at the state and central levels to buy into the rehabilitative capacity of all youths, even those who commit the most serious crimes. Next, it assumes that victims of crimes are equally invested in ensuring that their juvenile perpetrators are capable of reform. In some cases, it may be possible for victims who participate in restorative justice practices to ask for a punishment that is more severe, based purely on valid retributive needs.<sup>164</sup> Even if victims, their family and other advocates are supportive of alternate mechanisms of dealing with juveniles, resources in the form of funds, infrastructure and personnel are crucial in building programs. Finally, sensitizing police, lawyers and judges to the diminished culpability and rehabilitative potential of youth is equally important.

## VIII. CONCLUSION

The Parliament passed the 2015 Act that allowed for different standards for juvenile delinquents based on the nature of their offence. The promulgation of this legislation was seen as an indicator of appeasing 'mobocracy'.<sup>165</sup> The legislature succumbed to society's expectations that the gravity of the offence must be commensurate with length of punishment.<sup>166</sup> But, juvenile decision-making tends to be driven by emotion rather than adequate reasoning and logic.<sup>167</sup> Psychosocial capabilities enable adolescents to buy into short term gratifications rather than

<sup>161</sup> Sarah C. Walker, Mylien Duong, Christopher Hayes, et al, 'A Tailored Cognitive Behavioral Program for Juvenile Justice-Referral Females at Risk of Substance Use and Delinquency: A Pilot Quasi-Experimental Trial', PLOS ONE, <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0224363>>, accessed on 7<sup>th</sup> December 2020, (2019).

<sup>162</sup> Ibid.

<sup>163</sup> See Jamie Fader, *Falling Back: Incarceration and Transitions to Adulthood among Urban Youth*, (Rutgers University Press 2013).

<sup>164</sup> Pillai & Upadhyay [n 38] 81.

<sup>165</sup> Shivangi Misra, An interview with Dr. Ved Kumari on her latest book 'The Juvenile Justice (Care and Protection of Children) Act 2015, Critical Analyses' and the state of juvenile justice in India in the aftermath of Nirbhaya, (*Leaflet*, May 23<sup>rd</sup>, 2018) <<http://theleaflet.in/an-interview-with-driven-kumari-on-her-latest-book-the-juvenile-justice-care-and-protection-of-children-act-2015-critical-analyses-and-the-state-of-juvenile-justice-in-india-in-t/>> accessed on May 3, 2020.

<sup>166</sup> Ibid.

<sup>167</sup> KT Thompson, 'States of Mind/States of Development', (2003) 14 STANFORD LAW AND POLICY REVIEW <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/stanlpt4&div=13&cid=&page=>> accessed on 7<sup>th</sup> December 2020, 155 –157 (2003).

foreseeing long-term consequences.<sup>168</sup> It is probable that a juvenile engages in offending not due to levels of ‘maturity’ but as a result of attendant influences. Crimes are often perpetrated in an environment streaked with “circumstances of neglect, exploitation and abuse”<sup>169</sup> and encouragement towards the successful commission of the crimes.<sup>170</sup> Therefore, assessments of “maturity” as related to the type of offence would be inconclusive without recognizing a juvenile’s biological, developmental and socio-economic circumstances. Furthermore, even though formal labels in the form of criminal records involve community recognition to potentially deter more criminal acts, they can instead have deleterious effects on all aspects of an individual’s life.

As illustrated in the first half of this paper, India’s juvenile justice initiatives have been far more progressive in terms of its treatment of youth who commit even the most serious of offences. Thus, it is perplexing to see the adoption of a juvenile transfer system based exclusively on the type of offence—similar to what was introduced in the U.S. But, unlike India, the U.S. is yet to ratify the UNCRC.<sup>171</sup> The transfer of Indian youth to the criminal justice system based on the nature of the offence and a categorical presumption of culpability is a quick fix to placate public anxiety. The well-intentioned principle of fresh start is compromised by the loosely constructed term ‘special circumstances’ which leaves open the possibility of discrimination based on the reported offence. If the true goal is to prevent juvenile crime, then we must look beyond deterrence frameworks that discount the situational circumstances of adolescents and deny their rehabilitative potential.

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<sup>168</sup> Pillai & Upadhyay [n 38] 53.

<sup>169</sup> Pillai & Upadhyay [n 38] 55.

<sup>170</sup> Kevin Wright & Karen Wright, *Family Life and Delinquency and Crime: A Policymakers’ Guide to the Literature*, <<https://www.ncjrs.gov/pdffiles1/Digitization/140517NCJRS.pdf>>, accessed on 7<sup>th</sup> December 2020 (1994); Donna M. Bishop & Narry C. Field, ‘Trends in Juvenile Justice and Policy’, *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, (OUP 2011), 374.

<sup>171</sup> Sarah Mehta, ‘There’s Only One Country that hasn’t Ratified the Convention on Children’s Rights: US’, (*ACLU*, 20th November 2015) <<https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>> accessed on May 12, 2020.