TIME OUT FOR TRANSFER: YOUTH TRANSFER AS PUNISHMENT

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The confidentiality of the juvenile court, while laudable in protection of the children charged, often means that people, in general, have little understanding of the inner workings of the court. One of the opaquest practices in juvenile court is how, when, and under which circumstances youth are prosecuted as adults. The cases that do reach the headlines are the most salacious, which leads to a confirmation bias on both the need and the appropriateness of the practice of transfer.

Many scholars have discussed the undeniable impact of adolescent development research on juvenile legal jurisprudence and a general reimaging of diminished culpability for youth with criminal offending behavior. The United States Supreme Court, through Roper v. Simmons *and its progeny, has declared that youth under age eighteen will no longer face the death penalty or mandatory life in prison sentences, meaning that more individuals who were sentenced in criminal court as children to lengthy prison sentences and grew up in prison will return, decades later, to a changed world. This adoption of adolescent development research by the Supreme Court cases which addressed cruel and unusual punishment for youth has led to state legislative changes, driving campaigns around raising the minimum age of prosecution, against the use of solitary confinement and indiscriminate shackling, and amending procedures in police interrogation. This research has led to isolated changes in transfer practice, yet little attention has been dedicated to considering whether youth should be tried as adults full stop.*

Advocates that ground transfer abolition conversations in adolescent development have earned isolated and hard-fought victories on aspects such as minimum age, elimination of mandatory transfer, or enhanced due process protections in the process of transfer decisions. However, high profile cases involving youth offending behavior or perceived upticks in crime frequently place these victories in jeopardy of retrenchment to more permissive transfer practices. Regardless of the role that adolescent development should play in significantly limiting or abolishing transfer, no state seems poised currently to end the practice entirely. And indeed, most scholars assume that some form of transfer must, should, or will continue to exist, likely because it always has existed.

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While transfer is generally categorized as a jurisdictional decision, between juvenile court prosecution and adult criminal court prosecution, this Article contributes to the dialogue in exploring the ways in which transfer operates more as a form of punishment. Such a discussion on transfer as a form of punishment invites a conversation about reform or abolition with those individuals currently unpersuaded by adolescent development science alone. By exploring the more curious aspects of the lack penological support for transfer, not only in the practice, but in the decision of selection for children to transfer, this discussion acts as a bridge to transfer reform or abolition that adolescent development on its own has been unable to successfully traverse.

The decision to try a child as an adult acts as a punishment—it enhances exposure to incarceration, brings additional collateral consequences, and removes children from a system which purports to be for their protection, to a system focused on their punishment. It has an origin story and expansion history specifically focused on punishment. And while there has been expanded focus by the United States Supreme Court on adolescent development research, its focus retroactively, only after youth have grown into adults while incarcerated, is often too little, too late. This Article's exploration of the transfer determination as punishment offers intermediate novel, concrete, and immediate reforms that would align theory with practice and invite a more nuanced exploration about the "need" for transfer.

Transfer mirrors the death penalty in the seemingly polarizing nature of discussions between those for and against the practice. And while previously explored for the death penalty, a moratorium has never been previously explored for transfer. However, what transfer ultimately needs is a time out, a moratorium, to study the practice, recognize system failures, and explore abolition.

We don't advocate that immature adults be prosecuted as children. Time has come to re-examine what justice means for young people who face prosecution as adults and to question the legitimacy of trying children as adults.

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INTRODUCTION

Transfer, the criminal prosecution of youth in an adult criminal court, differs widely based on jurisdiction. Each state and the District of Columbia have at least one mechanism that allows the state to subject a subset of youth to criminal

prosecution based on age, offense, or a combination of the two.[1] The procedures, ages, and offenses vary widely from state to state.[2] And from unfettered discretion to due process failures to the shortcomings of rehabilitative delivery, critique of the juvenile legal system—and transfer specifically—is not new. Indeed, the malleability of the operation paired with varied juvenile court procedures contribute to the longevity of transfer schemes.[3] Scholars have cited the dearth in due process protections for youth in individual state transfer schemes and have called for increased substantive and procedural due process protections or abolition of the transfer scheme in question entirely.[4] And while there have been pockets of hard-fought reform, youth who face transfer considerations have not seen the tectonic shift seen in post-transfer jurisprudence from adolescent development research. This includes cases such as in *Roper v. Simmons*, which categorically ended the death penalty, or in *Miller v. Alabama*, which ended mandatory life in prison without the possibility of parole sentences for those under 18 years

[1] For an overview of the state-by-state breakdown of transfer laws, see HUM. RTS. WATCH, APPENDIX: STATE TRANSFER LAWS (2024), https://www.hrw.org/sites/default/files/related_material/2014_US_StateTransferLawsAppendix.pdf [https://perma.cc/3P8G-DAF2].

[2] *See id.*

[3] Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 33 (2013) (citing PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 9 (2011) ("Despite the steady decline in juvenile crime and violence rates since 1994, there has as yet been no discernible pendulum swing away from transfer.")); *see also* Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 207, 216–17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (arguing that the best outcome to the balance between society's preference to process youth in the juvenile system and the "hard cases" is to allow transfer for the very serious crime committed by a sixteen or seventeen-year-old whom the juvenile court cannot easily accommodate). "Over time, the rhetoric also focused on the superior justiciability of criminal courts and the necessary punishment for heinous crimes." Beck Roan, *Ignoring Individualism: How a Disregard for Neuroscience and Supreme Court Precedent Makes for Bad Policy in Idaho's Mandatory Juvenile Transfer Law*, 52 IDAHO L. REV. 719, 729 (2016). In one study in 1989, 70 percent of those questioned said that violent youth crime was caused by lenient treatment in juvenile courts. U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990 157 (Kathleen Maguire & Timothy J. Flanagan eds., 1991); *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 835–39 (2003) (arguing for, among other things, "categorical recognition of the mitigating impact of maturity [which] provides the conceptual framework for a separate justice system for juveniles . . . ", rather than eliminating transfer from juvenile to adult court fullstop).

[4] Rachel Jacobs, Note, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 992 (2013) ("[T]he juvenile waiver decision making process must be reformed because of its failure to take account of juveniles' capacity for rehabilitation, decreased culpability, and individual life circumstances, thereby violating the due process rights of juveniles."). For an example in South Dakota, see Wendy N. Hess, *Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 317–18 (2014). For an example in Arkansas, see Gerard F. Glynn, *Arkansas' Missed Opportunity for Rehabilitation: Sending Children to Adult Courts*, 20 U. ARK. LITTLE ROCK L.J. 77, 80–81 (1997).

old at the time of the crime.[5] Justice Abe Fortas's concerns regarding youth[6] who face transfer in *Kent v. United States* in 1966 appear to continue to today: "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[7]

The juvenile court, cloaked in *parens patriae*,[8] or "parent of the country," is purportedly aimed at rehabilitating the youth without leaving the stain of criminal prosecution.[9] And while it is the image of children, held in cells alongside adults, which is credited as the impetus for the creation of the first juvenile court over 125 years ago in Illinois, the belief continued that not all children would,

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[5] Roper v. Simmons, 543 U.S. 551, 568 (2005); Miller v. Alabama, 567 U.S. 460, 479 (2012).

[6] While youth and children who are criminally charged are often referred to as "juveniles," this Article purposefully chooses to use youth, children or adolescents based in part on FAIR & JUST PROSECUTION ET AL., SEEING WHAT'S UNDERNEATH: A RESOURCE FOR UNDERSTANDING BEHAVIOR & USING LANGUAGE IN JUVENILE COURT (2023). *See* Charles Puzzanchera, Melissa Sickmund & Hunter Hurst, *Youth Younger Than 18 Prosecuted in Criminal Court: National Estimate*, *2019 Cases*, NAT'L CTR. FOR JUV. JUST. (2021).

[7] Kent v. United States, 383 U.S. 541, 555–56 (1966).

[8] "[*P*]*arens patriae* language appears in thirty-eight of the statutory purpose clauses of the juvenile court or juvenile law." Esther K. Hong, *A Reexamination of the* Parens Patriae *Power*, 88 TENN. L. REV. 277, 298, 298 n.122 (2021) ("stating that the purpose clauses in the states of Alabama, Arkansas, California, Delaware, Florida, Illinois, Iowa, Louisiana, Massachusetts, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming contain *parens patriae* language"); *see also Purpose Clauses for Juvenile Justice Systems*, OFF. JUV. JUST. & DELINQ. PREVENTION (Apr. 18, 2022), https://www.ojjdp.ojp.gov/statistical-briefing-book/structure_process/faqs/qa04205 [https://perma.cc/N2P5-RWCQ] (noting the same and discussing the specific language in each state's purpose clause). In addition to these statutes, the purpose clauses of twelve more states (Connecticut, Georgia, Indiana, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, Tennessee, Texas, and West Virginia) also contain *parens patriae* language regarding the care, protection, treatment, or supervision of children. *See, e.g.*, CONN. GEN. STAT. § 46b–121h (2018); GA. CODE ANN. § 15-11-1 (2013); IND. CODE ANN. § 31-10-2-1 (2025); MONT. CODE ANN. § 41-5-102 (2005); NEB. REV. STAT. ANN. § 43-246 (2019); NEB. REV. STAT. § 43-402 (1999); N.H. REV. STAT. ANN. § 169-B:1 (1999); N.M. STAT. ANN. § 32A-2-2 (2007); OHIO REV. CODE ANN. § 2152.01(A) (West 2000); OR. REV. STAT. § 419b.090(2)(b) (2021); TENN. CODE ANN. § 37-1-101(a)(1)–(3) (2018); TEX. FAM. CODE ANN. § 51.01 (1995); W. VA. CODE § 49-1-105(b)(6)–(11) (2015). *Miller v. Alabama* and *J.D.B. v. North Carolina* are vital contributors to this conversation, nonetheless. Miller v. Alabama, 567 U.S. 460, 476–77 (2012); J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011). Each of the decisions expanded adolescent development research citations by the Supreme Court discussed in greater detail below. *J.D.B.*, which adopted the reasonable child standard for consideration of the custody prong for custodial interrogation inquiry for *Miranda* purposes, is relevant because it stands for the premise that adolescent development science is relevant at legal stages other than sentencing.

[9] *Parens Patriae*, BLACK'S LAW DICTIONARY (12th. ed. 2024); Gerald Hill & Kathleen Hill, *Parens Patriae*, LAW.COM, https://dictionary.law.com/Default.aspx?selected=1444 [https://perma.cc/7N2T-KK89] (last visited Mar. 1, 2026); *see* Hong, *supra* note 9, at 278–88 (providing a robust explanation of the foundation of parens patriae and a call to modernize the theory).

could, or should be afforded the "rehabilitative cocoon" of the juvenile court.[10] The court formed in 1899 was not a harbinger of equal treatment.[11] It was fifty-five years before *Brown v. Board of Education*[12] and closer in time to the Emancipation Proclamation.[13] And unlike racial disparities in the criminal court system, which are frequently sloughed off as regrettable byproducts of a system containing discretion, the youth court has a more troubling origin story.[14] Jane Addams, the matriarch of social work and the face of the movement, also lauded the role of eugenics[15] and the "inheritance of well-born children."[16] As discussed below, the juvenile court was premised on the rehabilitation of only some children and the criminal punishment of others. And while the juvenile legal system may not be a bastion of rehabilitation, there exists a far more punitive reality for some youth who are transferred to the adult criminal court for prosecution.[17]

Part I discusses transfer through the lens of classical punishment theory, conceptually weaving transfer with penological discourse.[18] While other scholars have discussed transfer and its failure to align with punishment theory, this Article focuses on an unaddressed oddity of the practice which makes it particularly

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[10] Hong, *supra* note 9, at 288; *see* PATRICIA YEOMANS SALVADOR & JOI TAYLOR POWELL, OHIO JUVENILE LAW § 1.2 (2025 ed.).

[11] Hong, *supra* note 9, at 288.

[12] Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

[13] Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

[14] Ben Smart, *Discretion Cannot Be Replaced. It Must Be Improved.*, L.J. FOR SOC. JUST. (Mar. 16, 2022), https://lawjournalforsocialjustice.com/2022/03/16/discretion-cannot-be-replaced-it-must-be-improved/ [https://perma.cc/333H-8UKB].

[15] Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63, 79 (1998).

> When this new science makes clear to the public that those diseases which are a direct outcome of the social evil are clearly responsible for race deterioration, effective indignation may at last be aroused, both against the preventable infant mortality for which these diseases are responsible, and against the ghastly fact that the survivors among these afflicted children infect their contemporaries and hand on the evil heritage to another generation.

JANE ADDAMS, A NEW CONSCIENCE AND AN ANCIENT EVIL 130–31 (1914).

[16] ADDAMS, *supra* note 16, at 131; *see* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 98 (2d ed. 1977) (providing for a recasting of the movement from that of social progressives to child savers hyper focused on assimilating youth). Ida B. Wells responded to an article written by Jane Addams which denounced lynching of Black men but also assumed that they were guilty of the crimes which purported to lead to the lynching. Stacy Lynn, *Jane Addams, Ida B. Wells, and Racial Injustice in America*, JANE ADDAMS PAPERS PROJECT (Aug. 22, 2018), https://janeaddams.ramapo.edu/2018/08/jane-addams-ida-b-wells-and-racial-injustice-in-america/ [https://perma.cc/2Z64-YG5B].

[17] *See* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 163, 165 (1993) (defense of a juvenile court to calls for abolition despite recognition of its failures).

[18] *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEG. (Aug. 21, 2024), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws [https://perma.cc/E7B7-GNFL] (appendix of 50-state grid of transfer provisions).

misaligned—that transfer occurs prior to a finding of guilt.[19] Rather than focus on individual transfer schemes, this Article focuses on the adult prosecution of youth more generally, as well as categorical reforms. There are wide variations among state and jurisdictional transfer schemes, and, under the same set of facts, an eleven-year-old child charged with murder: (a) could not be charged at all, in either the adult or juvenile court; (b) could only be charged in the juvenile court and would not face transfer; (c) could only be charged in the juvenile court and may face transfer; (d) could only be charged in the juvenile court and must face transfer; (e) could be charged in either the adult or juvenile court at the discretion of the prosecutor; or (f) could only be charged in the adult court. It all depends on the state. Such vast procedures make a national consensus difficult. What is seen as reform in one state is seen as retrenchment in another. The reforms suggested in this Article can be implemented in each jurisdiction, while specifics such as the court of original jurisdiction and procedure would need specific jurisdictional attention.

Part II sets the Article in the landscape of scholarship, alongside juvenile court and transfer adolescent development reformists and abolitionists. This Article cites scholars who have deeply explored the role of adolescent development on transfer specifically and the juvenile carceral system generally, contributing to the discussion by advancing novel, tangible, and immediate reforms in two ways. First, the Article determines that we must delay decisions on transfer until after a finding of guilt. And second, this Article determines that we must consider if transfer schema align with prevailing notions of science and consider abolition if they do not. These are categorical reforms which can act as a counterweight to a history of failing to recognize the immaturity of Black youth, including the

[19] In this Article, I refer to the adult prosecution of youth as "transfer" to cover all the various methods in which states prosecute youth as adults. Statutory exclusion and direct file schemes would not technically fall within the umbrella of transfer since the youth are never part of the juvenile court. Given that this Article speaks of theory and reform, I believe all schemes are part of this conversation. In some jurisdictions, transfer has a more specific definition and may refer only to the transfer of a youth to adult criminal court, while waiver refers to a youth being transferred from criminal court to juvenile court. *E.g.*, *Juvenile Justice Glossary*, JUD. BRANCH OF CA., https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb25-1d-05.pdf [https://perma.cc/67FA-5VWD]. The process is known in different states by different names: waiver, transfer, bind over, auto-decline, 707, MAP (motion for adult prosecution) among others and varying procedures defined statutorily, by court rule, in case law and state constitution. *E.g.*, HUM. RTS. WATCH, *supra* note 2; Maddison Story, *"Superpredator" Is Super Racist—The Case for Abolishing Auto Declines in Washington State*, 21 SEATTLE J. SOC. JUST. 495, 495 (2023). A discussion about the differences in every state would easily swallow this entire Article, for example: minimum age for transfer alone ranges from sixteen in California to no minimum age in other states; there are differences in which party moves for transfer, who bears the burden, what the burden is, if there are crimes for which it is mandatory or if it is discretionary and if discretionary, whose discretion; and what procedural protections the youth may have in advance or at the hearing vary from state to state. In reading this Article, please consider or choose to consider a transfer mechanism, but the hope is to engender a conversation more broadly that would be relevant to each jurisdiction that tries youth as adults.

"original sin" of the super-predator myth in transfer expansion.[20] Part II sets the foundation for the exploration of these reforms in Part III.

Part III explores the proposed reforms which are functional and immediately responsive to the issues with transfer raised in Parts I and II. The Article ends by suggesting a transfer moratorium as a means of excising flawed foundational axioms for transfer and allowing space for a fulsome study of the practice and the penological support for its continued use. A moratorium would explore and address the perceived limits of the juvenile court and the continued "good" of transfer. Centering our discussion among scholars who have explored the role that adolescent development plays in youth offending behavior and classical punishment theory and transfer, this Article examines the role that a moratorium could play in a nuanced study of the transfer practice and procedure.[21]

I. TRANSFER IS PUNISHMENT, THEORETICALLY

A. Transfer Defined, Generally

1. Transfer Schema

As there is no recognized constitutional right to be treated as a child (yet), states have the discretion to choose how they prosecute their young citizens.[22] Forty-four states have a juvenile legal system that extends, for most charges, until a youth is eighteen years old.[23] Presently, Vermont is the only state to extend past the age of eighteen and until age nineteen for some offenses.[24] Five states—Georgia, Louisiana, North Carolina, Texas, and Wisconsin—end juvenile court jurisdiction at age sixteen.[25] While each state has a juvenile legal system, each state and the District of Colombia all have at least one mechanism by which to prosecute youth as adults.[26] They fall into four main categories of transfer: (1) statutory exclusion, (2) judicially controlled, (3) prosecutorial discretion, and (4) "once an adult, always an adult."[27]

States who have adopted a statutory exclusion transfer scheme "exclude[]" a certain population of youth from their juvenile court jurisdiction.[28] In statutory

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[20] The phrase "original sin" borrows from the reference of the death penalty's failure to address racism. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 3 (2016).

[21] MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 3 (2010) (Punishment generally requires a justification and we do not punish merely just to punish.).

[22] *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 19.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Cara H. Drinan, *Conversations on the Warren Court's Impact on Criminal Justice:* In Re Gault *at 50*, 49 STETSON L. REV. 433, 444 (2020).

[28] *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 19; *see* Drinan, *supra* note 28, at 443.

exclusion schemes, youth bypass the juvenile court's jurisdiction based on the charged offense or a combination of the offense and their chronological age.[29] In this scheme, the adult criminal court is the court of original jurisdiction.[30] For this population of youth, the focus is exclusively on the type of offense charged, rather than an individual focus on the youth as a person, including their maturity or prospect of rehabilitation.[31] While certain criminal offenses might be subject to mandatory or minimum punishment, statutory exclusion delivers the punishment of transfer prior to a determination on guilt or an individualized consideration by the juvenile court as to the appropriateness of a youth being tried as an adult.[32]

States with judicially-controlled transfer schemes direct judges to decide on the appropriate jurisdiction: adult or juvenile court.[33] These schemes fall into two types of judicial control, discretionary or mandatory, and dictate conditions upon which a judge may transfer a youth or dictate conditions upon which a judge must transfer a youth.[34] These states indicate by legislation, state constitution, case law, or court rule how the hearing proceeds and the standard of proof.[35] States may also identify factors which the prosecutor must consider prior to the decision to file a motion or that a court must consider prior to deciding a motion to prosecute a youth as an adult.[36] These transfer schemes may consider a finding of probable cause prior to transfer; however, the decision occurs prior to a finding of guilt beyond a reasonable doubt on the charges and, more often than not, prior to a determination on the admissibility of evidence.[37] This means that a youth may be transferred relying solely on a statement which may be ultimately suppressed, which would be dispositive of the merits of the criminal prosecution.[38] While these criminal charges might eventually be dismissed, the youth would

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[29] Drinan, *supra* note 28, at 443.

[30] *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, *supra* note 19.

[31] Marisa Slaten, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 853 (2003). Barry C. Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195, 207 (1983). Statutory exclusion typically applies to serious and violent crimes. Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 97–98 (1994) (listing murder, forcible rape, and robbery as examples of common excluded offenses).

[32] *See* Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 260 (2018) (providing a review of substantive due process concerns in statutory exclusion transfer schemes).

[33] *Id.*

[34] *Id.* at 214.

[35] *Id.*

[36] *Prosecutor Discretion Offense and Minimum Age Criteria*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Apr. 18, 2022), https://ojjdp.ojp.gov/statistical-briefing-book/structure_process/ [https://perma.cc/8CSN-ZVLZ].

[37] Darden, *supra* note 33, at 254.

[38] *Criminal Resolution Manual § 130 Hearing on Motion to Transfer*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-130-hearing-motion-transfer [https://perma.cc/9WPV-TJB3] (last visited Nov. 21, 2025).

already have received the consequence of transfer, losing the rehabilitative services and confidentiality protections of the juvenile court.

Prosecutorial discretion and direct file transfer schemes gives prosecutors the sole power to decide where to file charges, as both adult and juvenile courts have concurrent jurisdiction.[39] States may provide provisions when a youth has a complaint directly filed in an adult court to argue that they should be transferred back to the juvenile court.[40] As indicated above, direct file fails to require a hearing in the juvenile court first.[41] Direct file in criminal court means that the court may sever the youth's tether to rehabilitative services and confidentiality protections of the juvenile court.[42] Additionally, direct file fails to require any court to make a fulsome adversarial evaluation of the strength of the state's case prior to the youth being tried as an adult.[43]

Lastly, some states dictate that once a youth is tried as an adult, all subsequent charges filed against that youth must be heard in the adult court.[44] Colloquially referred to as "once an adult, always an adult," these charges include all charges, regardless of degree or nature, and include those charges that might not have otherwise originally been subject to adult criminal prosecution under the state transfer scheme.[45]

Some states have built "protections" into their transfer schemes, referred to as reverse waiver provisions, addressing how a youth might be returned to the juvenile court jurisdiction after a criminal court filing.[46] Some schema include that in the interest of justice, upon conviction for a nonwaivable offense and upon application or with the agreement of the prosecutor, that youth may return to juvenile court after transfer.[47] Jurisprudence is developing around motion practice prior to a decision on transfer, although even in states with such jurisprudence, the decision rests within the discretion of the judge addressing the transfer application.[48]

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[39] Darden, *supra* note 33, at 260.

[40] *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, Appendix*, OFF. JUV. JUST. & DELINQ. PREVENTION (Dec. 1998), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/tryingjuvasadult/appendix.html [https://perma.cc/QSX6-TJ9N] [hereinafter *Trying Juveniles as Adults*].

[41] *See supra* Section I.A.1.

[42] *Direct File: Unjust Process, Unjust Results*, ACLU FLA., https://www.aclufl.org/direct-file-unjust-process-unjust-results/ [https://perma.cc/X328-QF7D] (last visited Nov. 21, 2025).

[43] *Id.*

[44] Darden, *supra* note 33, at 261.

[45] GRIFFIN ET AL., *supra* note 4, at 2–3.

[46] *Id.* at 2.

[47] *Transfer Provisions*, OFF. JUV. JUST. & DELINQ. PREVENTION (Dec. 1998), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/tryingjuvasadult/transfer.html [https://perma.cc/S3WQ-U9NG] [hereinafter *Transfer Provisions*].

[48] *Id.*; GRIFFIN ET AL., *supra* note 4, at 2.

Fifteen states have a transfer scheme that contains a presumption in favor of transfer.[49] For a certain category of cases where a youth is charged with a certain offense, is of a certain age, or may meet adopted statutory criterion, transfer is a rebuttable presumption.[50] Fourteen states have a mandatory transfer provision in their transfer scheme.[51] In these situations, it is mandatory for a case to be transferred to an adult court once there are findings of a certain age, probable cause of a charged criminal offense, or prior record criteria by the juvenile court. States may have a blend of transfer provisions (e.g., discretionary for youth under fourteen, mandatory for youth over fourteen and charged with murder, and presumptive for youth between ages fourteen to seventeen charged with offenses other than murder).[52] Almost half of the states have no minimum age for transfer.[53] California has the highest minimum age of transfer at sixteen years old and is the only state with a minimum age for transfer at sixteen.[54] Only three other states have a minimum age of at least fifteen years old.[55]

Direct attacks on transfer frequently fail because it is not defined as a punishment, but rather a question of jurisdiction between two courts that have subject matter jurisdiction. Put differently, transfer, through a jurisdictional lens, is a question of "Is this a case that will be heard in the juvenile court or a matter heard by the criminal court?" However, as discussed below in the Section I.B.1, transfer is more transformative.[56] It is a mechanism to further punish a youth by preventing them from receiving the perceived more lenient treatment of a juvenile court.[57] The choice of jurisdiction is about the anticipated punishment, including the length of sentences and their severity, as well as collateral consequences.[58]

Scholars have written extensively on the history of the juvenile court.[59] This Article covers some of the timeline here in a truncated fashion as it is necessary to begin this discussion for two reasons: (1) it challenges the notion that transfer

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[49] GRIFFIN ET AL., *supra* note 4, at 4.

[50] *Id.*

[51] *Transfer Provisions*, *supra* note 48.

[52] *See* GRIFFIN ET AL., *supra* note 4, at 2.

[53] NAT'L GOVERNORS ASS'N, AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS 5 (2021).

[54] *Id.*

[55] *Id.*

[56] *See infra* Section I.B.1.

[57] CHARLES PUZZANCHERA, SARAH HOCKENBERRY & MELISSA SICKMUND, YOUTH AND THE JUVENILE JUSTICE SYSTEM: 2022 NATIONAL REPORT 78 (2022).

[58] *Id.*

[59] *See, e.g.*, Philip Reichel & Jay Albanese, *Comparing and Delivering Juvenile Justice Across the World*, *in* WOMEN AND CHILDREN AS VICTIMS AND OFFENDERS: BACKGROUND, PREVENTION, REINTEGRATION 783, 783 (Helmut Kury, Sławomir Redo & Evelyn Shea eds., 2016); *see also* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821 (1988) (tracing changes in the Juvenile Court purpose from the "best interests of the child", rehabilitative lens of the Progressive framers to the modernized focus on the "principle of the offense," including the role of due process and *Gault*).

theory is merely a line of demarcation between the juvenile court and its exclusion of some youth for criminal punishment, and (2) it supports the need for a moratorium for study of procedure and practice.

The concept of adolescence is a recent concept which began in the late 1800s.[60] Prior to that time, youth were largely valued for their contributions to agricultural life.[61] The role of child labor in industrialization and urbanization led to changes in the laws that protected children.[62] This led, in turn, to corresponding changes in criminal law and to how we as a nation viewed "criminal" offending behavior by youth.[63]

Prior to the creation of the juvenile court in 1899, which was part of the social welfare and child-saver movement calling for compulsory school attendance and child labor protections, criminal conduct by children was heard in an adult criminal court or not at all.[64] Through common law, we adopted protections on youth criminal responsibility.[65] Chronological age assisted in determining whether the child was too immature to have criminal capacity.[66] In the 1790s, Blackstone's Commentaries on the Laws of England contained guidance on how to consider youth and criminal activity.[67] Children under seven were unable to be held criminally responsible.[68] It was presumed that children under fourteen lacked the capacity to be deemed criminally responsible for their actions.[69] For children between the ages of seven and fourteen, there was a rebuttable presumption based on the specifics of the individual.[70] For this subset of children, a jury

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[60] *See* Reichel & Albanese, *supra* note 60, at 784 (discussing the evolution of the concept of adolescence).

[61] *See generally* Feld, *supra* note 60, at 821 (discussing the role of industry and urbanization on the concept of adolescence).

[62] Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 101, 107 (2014).

[63] Feld, *supra* note 60, at 824.

[64] Taylor-Thompson, *supra* note 63, at 106; *see, e.g.*, NAT'L CRIM. JUST. REFERENCE SERV., JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 85 (1999); *In re Gault*, 387 U.S. 1, 15 (1967) (noting that the reformers who led to the development of a separate juvenile court were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals").

[65] 4 WILLIAM BLACKSTONE, COMMENTARIES *20.

[66] NAT'L CRIM. JUST. REFERENCE SERV., *supra* note 65, at 86.

[67] *See* BLACKSTONE, *supra* note 66, at *22–23; Allen v. United States, 150 U.S. 551, 557–58 (1893); Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1584 (2018); Thompson v. Oklahoma, 487 U.S. 815, 864 (1988). The common law provided that any offender under the age of fourteen enjoyed a presumption of incapacity, which could only be overcome by compelling evidence of the defendant's capacity to discern the wrongness of his offense. Furthermore, as shown below, the harshness of the common law infancy defense was reserved for felonies; juvenile misdemeanants were provided a more generous defense than what prevails in the law today. Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 36–37 (2007).

[68] Kaban & Orlando, *supra* note 68, at 36.

[69] *Id.*

[70] *See In re* J.C.N.–V., 380 P.3d 248, 255 (Or. 2016).

was required to decide whether the child was "in possession and exercise of sufficient mentality to make an intelligent choice and possessed a knowledge of right and wrong and of the wrongfulness of the act charged."[71] In addition to these boundaries, Blackwell and Hale wrote that for misdemeanors, no criminal liability could arise until the offender was fourteen years old.[72] Even after that age, a defense was sometimes available all the way to the age of twenty-one years.[73]

The age of fourteen reflected what was understood as the age of physical maturity.[74] However, "maturity," particularly psycho-social maturity,[75] is a dynamic and developing concept. There are socio-cultural factors, contextual factors and, of course, individualistic factors.[76] Social science continues to learn about adolescent development and courts are admittedly slow to adopt evolving scientific standards.[77] Despite entering a developmental era of youth jurisprudence, most jurisdictions have failed to wrestle with categorical precommitment to considering adolescence before criminal responsibility including not only minimum ages of prosecution but expanded upper limits of jurisdictional boundaries for juvenile court and abolition or significant limits on transfer.[78]

2. The Role of Kent v. United States

Forty-six states incorporate a transfer scheme involving discretionary transfer of a youth for adult prosecution that borrows, in whole or in part, from the factors referenced in *Kent v. United States*.[79] Kent set the floor for due process protections for youth transfer, describing it as a "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.[80] The Warren Court, in the midst of the Civil Rights movement, mapped the floor for due process protections in a transfer decision.[81] The

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[71] *Id.* (citations omitted).

[72] BLACKSTONE, *supra* note 66, at *23; Kaban & Orlando, *supra* note 68, at 36.

[73] Lerner, *supra* note 68, at 1588.

[74] *See* Kaban & Orlando, *supra* note 68, at 36 (citing Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 429 (1939)).

[75] *See* LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 9 (2014).

[76] *See generally id.* (for a discussion on prevailing scientific thoughts on adolescent development, its connections to normative youth behavior and youth decision making.).

[77] Sarah Steimer, *Trauma-Informed Care for Juveniles, Not Punishment, Prevents Recidivism*, UNIV. CHI. DIV. SOC. SCIS. (Dec. 10, 2024), https://socialsciences.uchicago.edu/news/trauma-informed-care-juveniles-not-punishment-prevents-recidivism [https://perma.cc/V28N-XZQT].

[78] *See* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 558 (2017) (advocating for adolescent development-centered reform).

[79] SARAH HOCKENBERRY, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2020 (2023); Kent v. United States, 383 U.S. 541, 543 (1966).

[80] *Id.* at 556.

[81] *See* Eduardo R. Ferrer, *Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of* Parens Patriae, 54 LOY. L.J. 885, 917–19 (2023).

decision references certain axioms of the juvenile court and the role of transfer—specifically, that the juvenile court is "rooted in social welfare philosophy rather than in the corpus juris;" that the juvenile legal system is "theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct;" and that "[t]he objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[82] This allows the State to act as parens patriae rather than the prosecuting attorney and judge.[83]

As discussed below, the juvenile court experience envisioned in *Kent* stands in stark contrast to the reality of how some youth experience the juvenile and criminal court systems.[84] In the last few years alone, news stories have surfaced of children in Tennessee being illegally locked in their cells in a juvenile detention center,[85] a sheriff in Florida who announced he would release mug shots and "perp walk" children who were arrested,[86] and an Attorney General in Louisiana who is challenging *Roper*, and seeking the death penalty for an individual who was seventeen at the time of the crime.[87]

The importance of these vignettes for this Article is twofold. First, it acts as a counter to those that envision only the paternalistic, child-friendly court painted in *Kent* and cannot envision a juvenile court that is harsh and responsive, perhaps even overresponsive. The juvenile court is capable of handling youth who commit violent, even deadly, crimes. Second, if we recognize the punitive nature of transfer, we can think about global reform not only incorporating adolescent development but also novel models of culpability and punishment.

To make the point, this Article offers one, albeit rare, example in New Jersey on just how feasible transfer abolition might be.

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[82] *Kent*, 383 U.S. at 554–55.

[83] *Id.*

[84] *See* Ferrer, *supra* note 82, at 916 (providing for a deep exploration of *parens patriae* and its core connection to control and power); Robin Walker Sterling, *Fundamental Unfairness*: *In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 615 (2013) (discussing *Gault* and how the narrative of the parens patriae court fails to acknowledge and reinforces the disparate treatment of Black youth).

[85] Paige Pfleger, *This Youth Detention Center Superintendent Illegally Locks Kids Alone in Cells. No One Has Forced Him to Stop.*, PROPUBLICA (Nov. 16, 2023, at 05:00 EST), https://www.propublica.org/article/knoxville-detention-center-illegally-locks-kids-alone-in-cells [https://perma.cc/4JBC-H3MZ].

[86] Minyvonne Burke, *Florida Sheriff Releases Mug Shot and 'Perp Walk' Video of 11-Year-Old Charged with Making School Shooting Threat*, NBC (Sep. 17, 2024, at 08:33 PDT), https://www.nbcnews.com/news/us-news/florida-11-year-old-arrested-sheriff-release-mug-shot-rcna171437 [https://perma.cc/GR8U-W5SY].

[87] Greg LaRose, *Louisiana AG to Challenge Supreme Court Ruling Against Under-18 Executions*, LA. ILLUMINATOR (Sep. 4, 2025, at 05:00 PT) https://lailluminator.com/2025/09/04/louisiana-death-penalty-2/ [https://perma.cc/73HK-BPSX] (while this youth was tried as an adult, it is included as an example of the perilous nature of adolescent development reforms.); *see* Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

In 2016, the New Jersey legislature made several changes to the New Jersey transfer statute.[88] New Jersey narrowed the pool of youth eligible for transfer by raising the minimum age for transfer to fifteen and reducing the list of offenses for which transfer was possible.[89] Additionally, the legislature codified an examination of each individual youth, requiring prosecutors to consider certain factors, including history with the child welfare system and classification for special education services.[90] The statute was amended to include a requirement for data collection on motions for adult prosecution.[91] The data posted biennially, in a juvenile waiver report, tracks race of the youth, originally charged offense, transfer determination, and the final resolution of the charge.[92] The data demonstrates that a small number of youth receive sentences in excess of dispositions that could have been given in juvenile court.[93]

The Juvenile Waiver Practice in New Jersey report, issued in 2022, indicated a continued downward trend in the prosecution of youth as adults in New Jersey.[94] There were 111 motions to try a youth in adult court in 2019—an increase from 2018 and 2017 but a decrease from 2016.[95] During 2018–2019, 60 percent of waivers requested were granted, and 40 percent were withdrawn, dismissed, or denied.[96] Youth who received custodial sentences in an adult facility decreased from the 2016–2017 period.[97] And for the seventy-six youth tried as adults, which includes those who voluntary waived juvenile court jurisdiction, the average sentence for incarceration was 8.8 years, with a range of sentence between two to thirty-eight years.[98] Only 8 percent of seventy-six youth received sentences in excess of the juvenile court incarceration limits.[99]

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[88] N.J. STAT. ANN § 2A:4A-26.1 (2016).

[89] *See id.*

[90] *Id.*

[91] *Id.* § 2A:4A-26.1(g)(1) requires the Juvenile Justice Commission, in consultation with the Attorney General, "to collect, record, and analyze data regarding waiver of jurisdiction of a juvenile delinquency case" and the preparation of a biennial waiver report. The report includes the age, gender, race and ethnicity of the youth, degree of the original charge, conviction and final resolution of the case, and case processing times. These reports are sent to the Governor and the Legislature, along with "any recommendations the commission may have for legislation concerning waiver of jurisdiction of juvenile delinquency cases." *Id.* § 2A:4A-26.1(g)(3).

[92] N.J. OFF. ATT'Y GEN., JUVENILE WAIVER PRACTICE IN NEW JERSEY: AN ANALYSIS OF WAIVERS REQUESTED, WAIVERS GRANTED, AND WAIVER CASES RESOLVED IN CRIMINAL COURT IN 2018–2019 6 (2022).

[93] *Id.* at 30–31.

[94] *Id.* at 31–32.

[95] *Id.* at 8.

[96] *Id.* at 12.

[97] *Id.* at 28, 31.

[98] *Id.* at 31.

[99] *Id.*

It is possible that the number may be higher but not reflected in the manner the data was presented.[100] For example, if someone received a three-year sentence on an unlawful possession of a handgun charge in the adult court, that individual could have similarly received a three-year commission to the Juvenile Justice Commission.[101]

All those youth were also separated from the protections of confidentiality, collateral consequences, and rehabilitative services, before we knew whether or not they actually committed a crime.[102] And given the numbers, coupled with a decline in youth crime overall, it is possible that the juvenile court can already accommodate these youth in the juvenile legal system.[103]

New Jersey provides for a maximum twenty-year indeterminate sentence in juvenile court for murder and has no upper age limit of jurisdiction for juvenile court sentencing supervision.[104] This means that a seventeen-year-old, adjudicated of murder in juvenile court, could receive a twenty-year indeterminate sentence and remain under the supervision of the court for the length of the sentence, regardless of their age. Additionally, New Jersey provides that youth who are transferred to adult criminal prosecution are entitled to a resentencing hearing after twenty years in prison, at which a judge may reduce the parole bar to not

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[100] New Jersey provides that youth can receive twenty-year sentences in juvenile court for murder, ten years for felony murder, four years for first-degree charges and three years for second-degree charges, therefore, the maximum sentence exposure in juvenile court would be based on the charges. *See* N.J. STAT. ANN. § 2A:4A-44(d)(1)(a)–(d) (2025). These sentences are indeterminate sentences without mandatory periods of parole ineligibility. The data reflects the length of the sentences given in adult court with an average of 8.8 years, ranging from two years to thirty-eight years. Because the data does not indicate what charges the sentences were for, it is impossible to tell how many of the sentences could have been given in the juvenile court.

[101] There are additional considerations including fines, extended term, sentencing strikes, parole ineligibility, mandatory minimums of commitment and collateral consequences but there is not the often-perceived large gap between what "punishment" is available in the juvenile court and the adult criminal court. *See* NAT'L JUV. DEF. CTR., NEW JERSEY JUVENILE COLLATERAL CONSEQUENCES CHECKLIST 9–10 (2015) (regarding fines); *Juvenile Justice System Structure & Process: Jurisdictional Boundaries 2019*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2019 [https://perma.cc/43J6-U3PD] (last visited Nov. 24, 2025) (regarding extended terms); Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88. TEMP. L. REV. 675, 708–09 (2016) (regarding sentencing strikes); Joshua Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (Apr. 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/ [https://perma.cc/4LY5-LJLB] (regarding parole eligibility).

[102] *See, e.g.*, Scott et al., *supra* note 102, at 709.

[103] *See* N.J. OFF. ATT'Y GEN. JUV. JUST. COMM'N, NEW JERSEY JUVENILE DETENTION ALTERNATIVES INITIATIVE 2023 ANNUAL DATA REPORT 1, 3, 4 (2025) (data of overall decline of delinquency filings in New Jersey).

[104] N.J. STAT. ANN. § 2A:4A-44(d)(1)(a) (2025).

less than twenty years.[105] This marks a thinning of the veil between possible sentences in juvenile and criminal court.

B. Thinking Theoretically About Transfer as Punishment

This Article acknowledges some foundational normative assumptions and observations for this discussion. Even individuals that disagree with the Article's position that transfer operates as a punishment might be moved to consider the proposed reforms as they speak to their core beliefs on fundamental fairness. And an aspirational assumption that what a society deems as justice is grounded in societal and cultural context.[106] More specifically, where there is incongruence, we want reform, particularly where we have foundationally flawed axioms. First, there is a visceral reaction to abolition or significant restriction of transfer, that has not been quelled by adolescent development social science alone. We have always prosecuted some population of youth as adults.[107] This Article is not about lack of science, but rather a companion argument on how the practice of transfer fails to meet punishment theory or what we envision as just. Eliminating transfer would mean older youth and those charged with serious, and potentially deadly, charges would remain in the juvenile court. Second, the juvenile legal system is already quite capable of delivering some measure of punishment to children. One needs only to examine the images of juvenile prisons, euphemistically known as "training schools," for support.[108] The opaqueness of the juvenile court, training schools (youth prisons), potential penalties, and reform options which could address jurisdictional boundaries, encourage a mistaken belief that the juvenile legal system is unable to rehabilitate or punish, adequately, some children and for those children adult prosecution is necessary.[109] Third, the belief that children cannot be adequately held accountable for their offending behavior

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[105] State v. Comer, 266 A.3d 374, 380 (N.J. 2022) (holding that the "[New Jersey] Constitution and contemporary standards of decency" require a resentencing hearing for individuals convicted on crimes which occurred while they were children at which the court considers evidence including whether the juvenile appreciates risks and consequences of the crime, maturity or rehabilitation because, in part, "we cannot predict, at a juvenile's young age, whether a person can be rehabilitated and when an individual might be fit to reenter society").

[106] *See* Dana Zartner, *The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, 22 IND. INT'L & COMPAR. L. REV. 297, 297 (2012) (describing how justice is defined by culture).

[107] *See* JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell eds., 2001).

[108] *See generally* Richard Ross, *Juvenile in Justice*, https://www.juvenile-in-justice.com/the-book-juvenileinjustice [https://perma.cc/Q5QY-UBV4] (last visited Nov. 24, 2025) (images of youth in detention, training schools, and alternative to detention placements).

[109] While there are scholars that disagree, most seem to view the function of the adult criminal system as retribution. *See* MOORE, *supra* note 22, at 104–05. There are scholars who are wrestling with if this should be the sole function of the criminal legal system. *See* Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 359 (1998) (discussing how "crime equals punishment" fails to include the public's commitment to humanity).

or punished in a juvenile legal system is, in some ways, grounded in ignorance of its potential procedures and sentencing alternatives.[110]

Social scientists, who are more expressly concerned with adolescent behavior, make clear the complications between understanding maturity and the criminal prosecution of youth criminal offending behavior:

> A society that tries twelve-year-olds who commit serious crimes as adults because they are mature enough to 'know better,' but prohibits twenty-year-olds from buying alcohol because they are too immature to handle it, is deeply confused about how to treat people in this age range.[111]

1. Why Do We Punish Youth?

Criminal penalties are generally seen as a product of one of the five core theories of punishment: retribution (just deserts), deterrence (general to the population at large or specific to the individual to deter future violations of the law), incapacitation (to remove the individual from society to prevent future violations of the law), and/or restoration (making the victim whole) and rehabilitation (to address the needs of the individual who violated the law). [112] Punishments can meet more than one theory of punishment, meaning a fine can both be theoretically used to help make a victim whole and act as a deterrent to an offender. While individuals may support alternate theories of punishment, and theories fall in and out of favor, there is a general assumption that individuals do not support punishment purely for the sake of punishment.[113]

Much has been written about punishment theory and the ways in which these theories can be conceptualized or grouped. For purposes of this Article's discussion, we will borrow from scholars who have divided them into two camps:[114] (a) retributionists,[115] who ground the "good" of justice in the punishment of the

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[110] Allison Dempsey, *Transfer Law and Today's Youth: Rehabilitating or Creating Lifetime Criminals? A Comparative Analysis of Juvenile Transfer Law in Kentucky, Florida, and New York*, 59 U. LOUISVILLE L. REV. 519, 519–20 (2021).

[111] STEINBERG, *supra* note 76, at 1.

[112] Punishment, just for the sake of punishment, is not a good in and of itself. Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1215–17, 1229, 1232, 1248 (2004).

[113] *Id.* at 1215.

[114] There are also individuals who believe that rehabilitative services must occur outside the bounds of the courts and others that believe there should be no punishment for some behavior by youth which could be labeled as criminal offending behavior. *See* RICHARD A. MENDEL, PROTECT AND REDIRECT: BEST PRACTICES FOR JUVENILE DIVERSION 1 (2024) (regarding rehabilitation outside of the court system); *see also* RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 7 (2022) (regarding no punishment for juvenile criminal behavior). Given the purpose of offering a pragmatic bridge, the discussion is centered on those who support the need for court intervention.

[115] Retributivism is a theory, or justification, of punishment premised on the belief that an individual should be punished because they deserve it.. As one commentator observed:

> What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in

offender,[116] and (b) consequentialists,[117] or utilitarians, who believe the value of punishment rests in a "good" to society as a whole by reducing crime by rehabilitating the offender, incapacitating the offender, or deterring either the offender or others from future offending.[118]

As *Kent* or any subsequent jurisprudence has not held that youth have a constitutional right to access the juvenile court, courts assert that states are free to define their procedure as to the prosecution of youth.[119] States are free to define

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> proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955). Other commentators locate the common denominator of all retributivist accounts in retributivism's relation to a past wrong or offense. *See, e.g.*, R.A. DUFF, TRIALS AND PUNISHMENTS 4 (1986) ("[A]ll [retributivist theories] find the sense and justification of punishment in its relation to a past offence."); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 416–17 (1978) ("Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed."). Igor Primoratz notes that "[i]n its most complete form," retributivism contains five tenets:

> (1) The moral right to punish is based solely on the offense committed. (2) The moral duty to punish is also grounded exclusively on the offense committed. (3) Punishment ought to be proportionate to the offense (the lex talionis). (4) Punishment is the 'annulment' of the offense. (5) Punishment is a right of the offender.

IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 12 (1989) (original emphasis removed); *see also* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U.L. REV. 843, 876 (2002) (a deep scholarly exploration of the fundamentals of theories of punishment, and how retribution is fallible in the same ways critics question consequentialist theory).

[116] *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 129 (Allen W. Wood ed., H.B. Nisbet trans., 1991); *see generally* Christopher, *supra* note 116 (for explanation of retributivism).

[117] Christopher, *supra* note 116, at 867, n.126, 876–78 (internal citations omitted):

> Consequentialist theories justify punishment based on the attainment of actual or contingent consequences that may or may not occur. And whether or not they occur is subject to empirical verification. For example, the consequences of the offender being rehabilitated, the offender not committing crime while incapacitated, the offender being deterred not to commit future crimes, and members of the general public being deterred from committing future crimes, may or may not occur and are susceptible to empirical assessment. Conceptual or logical consequences, on the other hand, are those which are abstract or are claimed to necessarily follow as a result of punishment. Examples of the conceptual or logical consequences used to justify punishment by theories commonly perceived to be retributive include negation of the crime, avoidance of society's complicity with the crime, vindication of the victim of the crime and, reallocation of the wrongdoer's balance of society's benefits and burdens. All of these consequences are said to be abstract and necessarily follow from punishment.

[118] *See* United States v. Blarek, 7 F. Supp. 2d 192, 200–02 (1998). There are certainly more legal theories of punishment, including a subset of retribution explained later on, consequentialists, those that believe in restoration of the victim, and most interestingly, those that believe there is no good in punishment. Detailing them all here would swallow this piece, and I believe a discussion of the classic pillars will suffice for a conversation.

[119] *See, e.g.*, State v. Garrett, 867 S.E.2d 216, 226 (N.C. App. 2022) (finding "the prosecution of juveniles as adults does not involve the substance of what is made criminal, and instead involves the procedure taken regarding a criminal offense").

when young people are subject to adult prosecution, provided it is rationally related to a governmental interest.[120] The analysis routinely identifies the government interest as a variety of retributionist and consequentialist theories: "to punish violent juvenile offenders more harshly by denying them the prospect of more lenient treatment in the juvenile system;"[121] balancing it with the purposes of the juvenile court;[122] finding that the schema are "rationally related to the legitimate state interest of fighting rising juvenile crime because it allows the most serious juvenile offenders to be prosecuted in the general division, where harsher punishments are available;"[123] to "protect society and lower violent juvenile crime;" and "[t]he government's legitimate purpose is to punish violent juveniles more harshly and thereby deny them access to more lenient treatment in the juvenile system."[124] The courts also recognize that "harms suffered by victims are not dependent upon the age of the perpetrator,"[125] and the transfer scheme serves "to reduce the fiscal impact of violence."[126]

2. Eighth Amendment and Punitive Sanctions Comparison Supports Transfer as Punishment

Scholars have directly and more expansively addressed Eighth Amendment analysis and transfer, arguing that a statute may be considered punitive under the Eighth Amendment, even when it does not import a criminal sentence.[127]

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[120] *See, e.g.*, State v. Jones, 188 N.E.3d 280, 295 (Ohio Ct. App. 2022).

[121] *Id.*

[122] *Id.* ("The overriding purposes for juvenile dispositions under R.C. Chapter 2152 are to provide for the care, protection, and mental and physical development of children subject to R.C. Chapter 2152, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." (citation omitted)).

[123] *Id.*

[124] *Id.* at 296; *see* People v. Perea, 807 N.E.2d 26, 37 (Ill. App. Ct. 2004) ("the community's right to be protected" (citation omitted)).

[125] *In re* C.S., 874 N.E.2d 1177, 1186 (Ohio 2007); State v. Aalim, 83 N.E.3d 883, 896 (Ohio 2017); *see* Hunter v. Commonwealth, 587 S.W.3d 298, 303 (Ky. 2019) (citing Perkins v. Commonwealth, 511 S.W.3d 380, 388 (Ky. Ct. App. 2016) (holding no violation of state or federal equal protection violation, no suspect class for youth and that transfer is rationally related to the "obvious" "interest in curtailing violent crimes by juveniles and protecting the public from harm") and Caldwell v. Commonwealth, S.W.3d 445, 453 (Ky. 2004)). Four years later, Senate Bill 87 was enacted, which amended KY. REV. STAT. ANN. § 635.020 (West 2002), to remove automatic transfer of youth in certain cases. S. 87, 20 Gen. Assemb., Reg. Sess. (Ky. 2020).

[126] State v. Manro, 104 P.3d 708, 713 (Wash. Ct. App. 2005) (finding no equal protection violation on failure to return individual to juvenile court upon finding of not guilty on transferred offense in part due to the legitimate interest of the state in judicial economy and conservation of resources. However, legislative amendment of WASH. REV. CODE § 13.04.030 (2024) that same year now requires that a youth be subject to juvenile court jurisdiction if the youth is not convicted on the transferrable offense). *See* WASH. REV. CODE § 13.04.030(1)(e)(v)(C)(I)–(II) (2024); State v. Posey, 122 P.3d 914, 920 (Wash. Ct. App. 2005), *aff'd in part, rev'd in part en banc*, 167 P.3d 560, 561 (Wash. 2007).

[127] Katherine I. Puzone, *An Eighth Amendment Analysis of Statutes Allowing or Mandating Transfer of Juvenile Offenders to Adult Criminal Court in Light of the Supreme Court's Recent*

Katherine I. Puzone cites *Trop v. Dulles*, in support of her argument that transfer is punishment and violative of the Eighth Amendment prohibition against cruel and unusual punishment, noting that the determination of a statute's nature cannot be reduced to its label without further examination.[128] "The purpose of the Eighth Amendment is not solely to prohibit torture and extreme forms of punishment," or even actions we think of as "sentences."[129] Rather, it embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which courts must evaluate penal measures."[130]

If transfer is punitive, either constitutionally as Puzone has argued, or theoretically as discussed herein, those unpersuaded by adolescent development research alone might support reform which precludes a transfer determination prior to an adjudication or finding of guilt.

C. Well-Accepted Punishment Theory Fails to Justify the Current Transfer Regime

1. Transfer Is Inconsistent with Retributivist Theory

Retributive justice is dependent upon punishment which is inflicted because a person committed an offense.[131] Frequently, youth face adult prosecution upon no demonstration of proof, as in statutory exclusion schemes, or a probable cause determination.[132] Youth are transferred prior to a finding of guilt beyond a reasonable doubt; hence, retributive justice is not achieved.[133] Retributive justice is premised upon punishment for commission, and not mere accusation, of the crime.[134]

2. Transfer Is Inconsistent with Consequentialist Theory

Transfer, as it presently operates, lacks transparency and regularity that consequentialists value in their theory of punishment.[135] It is public transparency and regularity which precipitates general deterrence. For transfer cases that originate in juvenile court, there are, at the outset, confidentiality protections, which may

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Jurisprudence Recognizing Developmental Neuroscience, 3 VA. J. CRIM. L. 52, 82 (2015) (citing Trop v. Dulles, 356 U.S. 86, 94–95 (1958)).

[128] *Id.*

[129] *Id.* at 84–85.

[130] *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

[131] MOORE, *supra* note 22, at 28.

[132] Recent jurisprudence in New Jersey addresses if the transfer decision should be premised on evidence which is admissible and if the court should hear motions to suppress which might be dispositive of the case prior to making a transfer decision. The court failed to adopt a bright-line rule and deferred to the trial court to make the decision on a case-by-case basis. *See In re* E.S., 285 A.3d 294, 302–03 (N.J. 2022).

[133] MOORE, *supra* note 22, at 28.

[134] *Id.*

[135] Christopher, *supra* note 116, 975–76.

mask the details of transfer decisions.[136] For the adult prosecution of youth that require discretionary decisions, schemes rarely if ever require or adequately capture the nuances of judicial or prosecutorial exercises of discretion.[137] And while high profile transfer cases may make headlines, other filings in which the public may not support transfer are unlikely to garner media attention—meaning transfer decisions are often made outside of the public gaze and lack regularity in decision making.[138]

While guilt is not the primary focus of consequentialist theory, punishing those that might be factually innocent, certainly to incapacitate them, but potentially even to deter or rehabilitate, is cause for concern.[139]

A system which allows punishment of those who have not yet been found guilty can overburden the system, whose very design is to protect the public, thereby diluting its effectiveness.[140] Therefore, there is a consequentialist argument that reforming the current procedure for transfer, which decides transfer before guilt generally, would be better for the whole.[141] Following *Roper*, *Miller*, and *Montgomery*, more youth will have the opportunity to return to society.[142] Therefore, a consequentialist theory of justice demands that the public should be more concerned about the details of incapacitation given that youth are still developing and capable of change.[143] Retaining a youth in a juvenile court setting

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[136] Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN. ST. [DICK.] L. REV. 1071, 1080–81 (2005).

[137] *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 374 (1998) (discussing ramifications of increased prosecutorial discretion in transfer policies); *see also* Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN. ST. [DICK.] L. REV. 233, 243–49 (2005) (exploring the inherent conflict between a juvenile legal system premised on *parens patriae* and a state which vests the state representative, the prosecutor, with the power to try a youth as an adult); Streib, *supra* note 137, at 1085–86 (exploring cabining prosecutorial discretion on juvenile homicide cases); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311 (2002) (offering a historical overview of the role of the prosecutor and a nuanced focus on the relationship between the prosecutor and the public as a guide to modern reform discussions).

[138] *See* Jay D. Blitzman & Steven F. Kreager, *Transparency and Fairness: Open the Doors*, 102 MASS. L. REV. 38, 43 (2021) (exploring the role of public access in fundamental fairness).

[139] Although not explored in this Article, many will challenge the lack of attention to the role of the victim in my discussion of justice. *See* Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 182 (2022) (discussing the role of victim at common law and more recently).

[140] *Id.* at 185.

[141] *Id.*

[142] *See supra* Introduction.

[143] *See* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 85 (1995) (addressing the question: "[a]re there valid and reliable diagnostic tools with which a clinician or juvenile court can differentiate among youths' treatment potential or dangerousness to classify accurately any given individual offender?"); *see, e.g.*, Don M. Gottfredson & Stephen D. Gottfredson, *Stakes*

may be in the youth's, as well as the public's, best interests by returning a youth to society from a facility that has provided responsive interventions.[144] In 1989, a study by Forst, Fagan, and Vivona found that youth in juvenile specific facilities gave higher marks than youth in adult facilities to the available treatment.[145] Youth in juvenile centers described counseling as helpful in obtaining needed services, encouraging participation in programs, teaching the consequences of violating rules, and deepening their understanding of their personal challenges.[146] In 2007, "Kupchik [] found that youths in juvenile facilities reported far more positive, mentoring-style staff-inmate interactions than did the youths in adult facilities."[147] In 2000, Bishop and Frazier's study of Florida found that the juvenile correctional institutions were more treatment-oriented and adhered to therapeutic models of rehabilitation.[148] In the study, youth in juvenile facilities were more likely to report that they would not reoffend than youth in adult facilities.[149] Youth in adult facilities reported adopting negative offending behavior from others in the facility, responding to a need to show how tough they are, while also expressing fear of being victimized.[150]

3. Transfer Does Not Decrease Recidivism and Improve Public Safety

Over fifteen years ago, the Office of Juvenile Justice and Delinquency Prevention (OJJDP),[151] agreed that transfer of youth "does not engender community protection by reducing recidivism [and in fact] . . . substantially increases recidivism."[152] This conclusion by OJJDP came following their review of six large-scale studies on the specific deterrent effects of transfer, conducted by different researchers on five different state transfer schemes, which varied in transfer type: automatic, prosecutorial, or judicial discretion.[153] The studies involved large

and Risks in the Prediction of Violent Criminal Behavior, 3 VIOLENCE & VICTIMS 247, 258–59 (1988) (arguing that current offense seriousness and weighing "stakes" and "risks" can predict future criminal acts).

144 *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULLETIN, June 2010, at 7.

145 *Id.*

146 *Id.*

147 *Id.* However access to services may be more plentiful at adult facilities given the larger size.

148 *Id.*

149 *Id.*

150 *Id.*

151 The Office of Juvenile Justice and Delinquency Prevention (OJJDP) was created as part of federal legislation, The Juvenile Justice and Delinquency Prevention Act of 1974, and is part of the United States Department of Justice. *See About the Office*, OFF. JUV. JUST. & DELINQUENCY PREVENTION, https://ojjdp.ojp.gov/about [https://perma.cc/V69Y-WLX4] (last visited Nov. 25, 2025).

152 *See* Redding, *supra* note 145, at 6.

153 *Id.* at 6; *see, e.g.*, Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 409 (1996); Jeffrey Fagan, Aaron Kupchik & Akiva Liberman, *Be Careful What You Wish for:*

sample sizes (between 494 and 5,476 participants), different methodologies, multiple measures of recidivism, and were conducted in five different jurisdictions.[154] All six studies found higher recidivism rates among youth who had been transferred to criminal court for violent charges,[155] compared with those who were retained in the juvenile legal system. This was consistent regardless of the sentence received in criminal court and included youth receiving a probationary sentence.[156] The study additionally found that transfer policies and schemes likely have no deterrent effects on youth offending behavior.[157] Studies found that there was a deterrent effect on youth offending behavior only where the juvenile court and adult court sentencing schemes were vastly different and only once the youth reached the age of criminal court responsibility of eighteen-years-old.[158] It appears that the deterrent effect was more dependent on youth increasing in the sphere of psychosocial maturity rather than responding to "tough on crime" scare tactics.

The reasons why youth might recidivate at a higher rate following transfer, even when no custodial sentence was levied, seems consistent with what social scientists see in youth more generally: (1) conformist belief—when youth that are transferred and told they are more dangerous, conform their actions to meet

Legal Sanctions and Public Safety Among Adolescent Felony Offenders in Juvenile and Criminal Court, JUV. OFFENDERS IN ADULT CT. 1, 3, 15 (2007); Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57, 67 (2003); Jennifer L. Woolard et al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 7 (2005).

[154] Redding, *supra* note 145, at 6.

[155] *Id.* (citing research finding that "[f]or nonviolent property offenders, the effects of transfer remain unclear, with one study finding that transfer had no effect on recidivism and another finding that transfer decreased recidivism, but with two studies (conducted in the same jurisdiction as the first two studies) finding that it increased recidivism. In addition, with respect to drug offenders, two studies found decreased recidivism rates among those tried in the criminal court.").

[156] *Id.*

[157] *Id.*

[158] *Id.* at 3 ("Steiner and Wright examined the effects of prosecutorial transfer laws in the 14 States that had such laws as of 2003. These States enacted their laws at different times (between 1975 and 2000), thereby providing data over different historical time periods. Using time-series analyses, researchers compared monthly juvenile arrest rates for violent index crime (homicide, rape, robbery, and aggravated assault) for each month in the 5 years before and the 5 years after each State enacted its prosecutorial transfer law. In addition, 2 States were selected as controls for each of the 14 target States. The control States resembled the target States in size, location, and juvenile arrest rates, but implemented no transfer law during or near the relevant time period. The study found that transfer laws had no general deterrent effect. Only in Michigan did juvenile crime decrease after the State enacted its prosecutorial transfer law; in the other 13 States, juvenile crime either remained constant or increased after the enactment of the law."); *see also* Edwin A. Risler, Tim Sweatman & Larry Nackerud, *Evaluating the Georgia Legislative Waiver's Effectiveness in Deterring Juvenile Crime*, 8 RSCH. ON SOC. WORK PRAC. 657, 664, 666 (1998) (exploration of mean arrest data for youth before and after permissive change in Georgia's transfer statute in 1994, finding no deterrent effect consistent with similar studies in other states).

expectations;[159] and (2) perceived injustice—the perceived unfairness of transfer spurs criminal reactions in youth, who are somewhat "fairness fanatics."[160] And for reasons unique to youth in a carceral system, (3) transfer removes one of the positive rehabilitative aspects of juvenile court, confidentiality and access to services.[161] And (4) for youth, and those who are just emerging as adults, who begin their autonomous life being labeled as convicted felons, creates a lasting stigma and collateral consequences that impact employment and housing.[162]

4. The Original Sin of Transfer and Enter the Super Predator Myth

A study of the juvenile court in the 1940s found that Black youth were more likely to be tried as adults and denied entry into the houses of refuge.[163] Black children were more likely to be subject to adult prosecution or face harsher penalties.[164] Feld stated plainly that the discretion and social control of the juvenile court was a design to "enable [progressive reformers] to respond differently to other people's children than to their own."[165]

The Warren Court, between 1965 and 1975, during the decade of *Kent*, *In re Gault*, and the Juvenile Justice and Delinquency Prevention Act, ushered a wave of fundamental fairness, due process, and youth protective constitutional language.[166] In contrast, youth in the 1990s met a nation gripped by the racist tropes

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[159] Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128, 136–37 (2003).

[160] Raymond R. Corrado et al., *Serious and Violent Young Offenders' Decisions to Recidivate: An Assessment of Five Sentencing Models*, 49 CRIME & DELINQ. 179, 183 (2003).

[161] Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 2–3 (1989).

[162] Fagan, Kupchik & Liberman, *supra* note 154, at 11.

[163] Houses of refuge were early institutions, some which predated the creation of the juvenile court, used to house youth in crisis as an alternative to the adult prisons. *See generally America's Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., https://www.cjcj.org/our-bold-vision/juvenile-justice-history [https://perma.cc/QYQ4-Z64V] (last visited Mar. 8, 2026). The super-predator myth and its role on the juvenile court and transfer in particular is extensively explored by experts in books, like Dorothy Roberts in TORN APART (2022), and Jane Spinack in THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES (2023). This Article surfaces pieces of the narrative here as support for the need for moratorium to extricate myth from the support for transfer. For discussion on the progressive child saver movement, see RICHARD LAWERENCE & CRAIG HEMMENS, JUVENILE JUSTICE (2008)*; see also* Sterling, *supra* note 85, at 623–24 (exploring houses of refuge, noting that some were built during the period of legalized slavery and excluded Black children and some houses even after admitting Black youth still excluded them from rehabilitative treatment).

[164] *See, e.g.*, SUSAN TIFFIN, IN WHOSE BEST INTEREST?: CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 32–33 (1982); Feld, *supra* note 60, at 884–85.

[165] BARRY FELD, BAD KIDS: RACE & THE TRANSFORMATION OF JUVENILE COURTS 7 (1999).

[166] *Id.* at 10–11; *see, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 73 (1997) (arguing that the Supreme Court decisions mandating the juvenile court's adoption of procedural safeguards "unintentionally, but inevitably, transformed the juvenile court system from its original Progressive conception as a social welfare agency into a wholly-owned subsidiary of the

of the super-predator crime predictions.[167] Largely prompted by a few isolated, but highly public, instances of youth violence, media hysteria around a purported juvenile crime wave surged. First coined in 1995, John Dilulio described a youth for which classic forms of deterrence would be unsuccessful.[168] The criminal forecast was flawed and failed to include and account for factors like a growing recession and crack cocaine substance abuse crisis.[169] It was fanned by dehumanizing and animalistic language to describe youth.[170] Stories about five youths charged with the brutal rape and beating of a Central Park jogger, now known as the Exonerated Five, were described in the New York Post as "wilding" and in "packs."[171] In response, states rushed to reform their transfer statutes to make it easier for children to face adult prosecution.[172]

In 1978, Willie Bosket, a youth with extensive, troubling and documented social history, was found guilty of two murders and the shooting of a third individual and received a five-year sentence in a juvenile facility, which was the maximum penalty under the law at the time.[173] Willie had been abused by his mother and father, spent time in juvenile facilities which did not focus on rehabilitation, including one where his father had been previously housed.[174] The story made headlines, nicknaming him the "Baby-Faced Butcher."[175] Governor Hugh Carey read the story while on an airline flight, and by the time he landed,

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criminal justice system"). For discussion of *In re Gault*'s misstep in grounding its decision in fundamental fairness as opposed to fundamental rights, see Sterling, *supra* note 85, at 614–15.

[167] Gregory A. Loken & David Rosettenstein, Symposium Introduction, *The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals*, 18 QUINNIPIAC L. REV. 351, 351–52 (1999); *see* Audrey Dupont, *The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U.L. REV. 255, 255–56, n.7 (2000).

[168] *See, e.g.*, Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/2XHT-4DJB] (last visited Nov. 25, 2025).

[169] *See* John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 27, 1995, at 05:00 PT), https://www.washingtonexaminer.com/magazine/1558817/the-coming-of-the-super-predators/ [https://perma.cc/XK4C-75J4]; Stevie Leahy, *The Battle of the Narrative in* Jones v. Mississippi*: Consideration of Youth "In Name Only"*, 74 MERCER L. REV. 1129, 1138–42 (2023) (discussing the role of the media and the super-predator myth).

[170] Leahy, *supra* note 170, at 1133; *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/7YK8-2NUU] [hereinafter *The Superpredator Myth*].

[171] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1348 (2004).

[172] GRIFFIN ET AL., *supra* note 4, at 3.

[173] *See* FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE xii (1995); Travis Johnson, *All Children Are Created Equal Too: The Disparate Treatment of Youth Rights in America*, 15 CUNY L. REV. 173, 182 (2011).

[174] BUTTERFIELD, *supra* note 174, at 102–03; Johnson, *supra* note 174, at 182.

[175] Eli Hager, *The Willie Bosket Case*, MARSHALL PROJECT (Dec. 29, 2014, at 07:15 EST), https://www.themarshallproject.org/2014/12/29/the-willie-bosket-case [https://perma.cc/R9HA-KRJZ].

he had decided that the legislature of New York must respond.[176] Governor Carey called the legislature to return from summer recess back to Albany and in two weeks' time, the Juvenile Offender Act of 1978, known as the Willie Bosket law, passed.[177] It eased protections and procedures that allowed youth to be prosecuted as adults in New York.[178] States such as Florida, Illinois, and Texas quickly followed suit. By 1997, all fifty states had passed legislation creating or expanding transfer schema or requiring certain youth to be tried as adults.[179]

Between 1992 and 1997, twenty-seven states eased judicial transfer, lowering the minimum age of eligibility or expanding the category of youth that were eligible.[180] By 1999, sixteen states adopted presumptions in favor of transfer of youth for adult prosecution, fifteen had mandatory transfer in their schema, twenty-nine had statutory exclusion laws, and fifteen had concurrent jurisdiction allowing for direct file.[181] The total cases judicially transferred to adult court prosecution in 1985 was 5,951 and peaked at 13,000 in 1994,[182] more than doubling in nine years. There is a recurring narrative about the exploding rate of dangerous youth behavior, which data has not supported.[183]

The Department of Justice (DOJ) declared the Super-predator myth to be false. The curve which demonstrates the rate of juvenile crime began to decline the same year that John Dilulio made his claim and has largely declined or remained constant since his prediction.[184] Dilulio himself rejected the Super-predator myth, and joined an amicus brief in *Miller*.[185] However, despite its rejection from the courts, the DOJ, and the author himself, most jurisdictions have not removed the stain of the Superpredator myth from their transfer mechanisms. California has made recognized steps towards redress.[186] In addressing the

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] HOCKENBERRY, *supra* note 80, at 2.

[181] *Id.*

[182] *Id.*

[183] *See* Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?*, 26 TEX. TECH L. REV. 813, 816–17 (1995) (citing Troy L. Armstrong & David M. Altschuler, *Conflicting Trends in Juvenile Justice Sanctioning: Divergent Strategies in the Handling of the Serious Juvenile Offender*, 33 JUV. & FAM. CT. J. 15, 15–16 (1982) (stating that the problem of serious juvenile crime and disenchantment with the perceived shortcomings of the rehabilitative juvenile court model has led to advocation of harsher procedures and sanctions for juveniles)); Ralph A. Weisheit & Diane M. Alexander, *Juvenile Justice Philosophy and the Demise of* Parens Patriae, 52 FED. PROB. 56, 57 (1988) (asserting that concerns over increases in crime have led to a shift from rehabilitation to a "just deserts" viewpoint, and waiver is a creation and is more perception than reality).

[184] Increases following the COVID-19 Pandemic need additional study to identify the pandemic as a contributing factor. Additionally, a more extensive review of the data indicates that the increase is related to nonviolent offenses and offenses for which transfer is not generally sought. *The Superpredator Myth*, *supra* note 171.

[185] *Id.*; *see* Miller v. Alabama, 567 U.S. 460, 511–12 (2012).

[186] S. 1391, 2017 Gen Assemb., Reg. Sess. (Cal. 2018).

constitutionality of California Senate Bill 1391, which raised the minimum age of adult transfer to sixteen, the California Supreme Court described it as a measure which "undid a policy enacted at 'a time in California history where the state was getting 'tough on crime,' but not smart on crime.'"[187]

OJJDP has captured and published reports on state transfer schema.[188] The report found that the number of youth transferred under a judicial transfer scheme declined from 6,943 in 2005 to 2,980 in 2020;[189] however, rates of racial disparities, which were already staggering, increased. In 2005, Black youth accounted for 39 percent of judicial transfer cases. In 2020, they accounted for 53 percent of the youth transfer population.[190]

Consistently, over the last forty years, racial disparities in the juvenile court have been studied.[191] However, studies do not mean that states have acted in response to documented issues.[192] Disparities have either been ignored, or interventions have resulted in consistent or increasing disparities.[193] When they have acted, interventions are met with lax oversite or sanctions.[194] The issue is much more a product of majoritarian "process defects" worthy of correction through intervention and deep theoretical embryonic reform.[195] The issue is not new or

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[187] *See id.*; O.G. v. Superior Ct., 481 P.3d 648, 660 (Cal. 2021) (citation omitted).

[188] *Miller*, 567 U.S. at 511–12.

> By 2019 (the latest information available), the state transfer landscape had changed: 27 states had statutory exclusion laws, 14 had concurrent jurisdiction provisions, 12 had mandatory waiver laws, and 12 had presumptive waiver laws. In addition, between 1999 and 2019, 4 states added reverse waiver provisions to send cases initiated in criminal court to juvenile court (increasing from 24 states to 28), and 7 states opted to add blended sentencing provisions that allow criminal courts to impose juvenile dispositions (increasing from 16 states to 23).

Id.

[189] HOCKENBERRY, *supra* note 80, at 3.

[190] *Id.*

[191] EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME 1, 18 (2000); *see, e.g.*, Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 7, 11–14, 40 (2002) (finding that thirty-two of forty-six studies conducted by forty different states reported "[r]ace effect," defined as "the presence of a statistically significant race relationship with a case outcome that remains once controls for legal factors have been considered"); CARL E. POPE, RICK LOVELL & HEIDI M. HSIA, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 2–5 (2002) (finding that twenty-five of thirty-four studies reviewed reported "race effects" in the processing of youth).

[192] *See, e.g.*, Leiber, *supra* note 192, at 16; HEIDI M. HSIA, GEORGE S. BRIDGES & ROSALIE MCHALE, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE 10–11 (2004) (confirming that, as of 2002, several states had not complied with even the most basic requirements of the Mandate) [hereinafter DMC 2002]; ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS 2 (2003) (discussing Massachusetts's continued failure to comply with the DMC Mandate).

[193] HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 163, 169 (1999).

[194] Pfleger, *supra* note 86.

[195] Ely argues that the Free Speech, Due Process, and Equal Protection Clauses "should be read most aggressively when legislative majorities lock out minorities from political power or adopt policies reflecting social prejudice." William N. Eskridge, Jr., *Pluralism and Distrust:*

isolated to the period of the super-predator myth era, with lasting potential impact.

According to OJJDP, individual states report that racial stereotyping has impacts on decision-making in their juvenile justice systems.[196] In its 2002 update on states' compliance with the DMC Mandate, OJJDP reported that "[e]ighteen states identified racial stereotyping and cultural insensitivity—both intentional and unintentional—on the part of the police and others in the juvenile justice system . . . as important factors contributing to higher arrest rates, higher charging rates, and higher rates of detention and confinement of minority youth."[197]

Studies opine that this is the result not merely of societal factors, but that implicit racial bias and the selection of policies, procedures, and criteria, which contribute to racial disparities.[198] Sociologists George Bridges and Sara Steen conducted a comprehensive analysis of narrative-based reports authored by county probation officers.[199] The researchers controlled for factors such as age, gender, and offense history, and observed that the officers' written rationales for sentencing recommendations indicated that they were more likely to attribute the criminal behavior of minority youth, like with Ed, to "internal forces," such as personal failure, inadequate moral character, and personality, while attributing the criminal behavior of white youth, like Lou, to "external forces," such as poor home life, lack of appropriate role models, and environment, even when the objective risk factors associated with the youth were similar.[200] For example:

> This robbery was very dangerous as Ed confronted the victim with a loaded shotgun. He pointed it at the victim and demanded that he place the money in a paper bag . . . There is an adult quality to this referral. In talking with Ed, what was evident was the relaxed and open way he discussed his life style. There didn't seem to be any desire to change. There was no expression of remorse from the young man. There was no moral content to his comment . . . . Lou is the victim of a broken home. He is trying to be his own man, but . . . is seemingly easily misled and

How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 YALE L.J. 1279, 1284 (2005) (discussing the application and limitations of Ely's representation reinforcement theory on Constitutional activism as process, rather than values, driven); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (For explanation of the representation reinforcement theory).

196 The Office of Juvenile Justice and Delinquency Prevention is an office of the Department of Justice. *See generally* DMC 2002, *supra* note 193 ("Eighteen states identified racial stereotyping and cultural insensitivity—both intentional and unintentional—on the part of the police and others in the juvenile justice system (e.g., juvenile court workers and judges) as important factors contributing to higher arrest rates, higher charging rates, and higher rates of detention and confinement of minority youth." Identifying the belief that the "demeanor" of the youth may contribute as well as the belief that the youth would not respond to treatment as factors in more harsh treatment).

197 *Id.* at 12.

198 *Id.* at 4.

199 George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, 554 (1998).

200 *Id.* at 558, 561.

> follows other delinquents against his better judgment. Lou is a tall emaciated little boy who is terrified by his present predicament. It appears that he is in need of drug/alcohol evaluation and treatment.[201]

Probation officers have a unique role in transfer decisions, often completing reports, social histories, relied upon by the court in considering appropriate sanctions.[202] Some states even play an active role in recommending whether a youth should be transferred.[203]

Racial disparities in the juvenile court and the transfer of youth are impacted by a complicated history. It is unlikely that pulling at one thread will unravel the issue. Progress would be better achieved with a fulsome study of how we consider adolescence and criminal behavior as a whole, with a precommitment to consider adolescence as a concept separate from criminal behavior.

D. Adolescent Development Research and Reconsideration of Youth Offending Behavior

1. The Science of Roper and Its Progeny

"The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences."[204]

Following the Court's decision in *Thompson* in the late 1990s, advances in brain imaging, specifically functional MRI (fMRI),[205] allowed science to

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[201] *Id.* at 564; *see* Bishop & Frazier, *supra* note 154, at 409–10 (Highlighting how race influences youth sentencing decisions; "Inadequate family correlates with race and ethnicity. It makes sense to put delinquent kids from these circumstances in residential facilities."); *see generally* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004) (study which explored responses from juvenile probation officers and police officers when primed with either racially neutral and subliminal references to Black youth. Officers responded to vignettes of youth offending behavior when racially primed by assigning higher negative traits to the youth, anticipating higher likelihood of recidivism and recommending more harsh treatment.).

[202] "At the request of the juvenile court, either or both of these divisions may complete evaluations of the personal or psychological characteristics of the offender, family background, education, and delinquency background." Podkopacz & Feld, *supra* note 144, at 137–38.

[203] *See* Redding, *supra* note 145, at 2.

[204] Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae in Support of Respondent at 2, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004.

[205] *See id.* at 2–3; Scott & Steinberg, *supra* note 4, at 816; Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 1012, 1019 (2001) (assessing MRI studies of brain development in childhood and adolescence); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8175 (2004); V.S. Caviness, Jr. et al., *The Human Brain Age 7–11 Years: A Volumetric Analysis*

document what they already garnered through behavior studies. This testing confirmed that how youth make decisions is different than how adults make decisions.[206] For the first time, these scans allowed social scientists to see in real time, as opposed to exams postmortem, how young people make decisions, tracing the areas of the brain recruited when responding to peers, calculating risk, and future planning.[207] The fMRI scans backed decades of research and the common-sense deductions that youth often fail to think through the ramifications of their actions and fail to appreciate risk, relying more frequently on the sensation area of the brain as opposed to the prefrontal cortex.[208] Decisions made by youth which are violent, serious, and deadly are not necessarily more well-reasoned and frequently contain the hallmarks of adolescent behavior-sensation seeking, peer influence, lack of future orientation.[209] Youth engage their amygdala, located in the limbic area of the brain, when making decisions.[210] The amygdala is connected to fear, anger, and aggression.[211] Adults engage the prefrontal cortex, the area related to process, reason, and foresight.[212] This is not a conscious choice.[213] The prefrontal cortex does not fully mature until late adolescence for the average youth.[214]

Influenced by the social science of the American Psychological Association, amicus brief to *Roper*, the Court cited three reasons why youth should not be deemed to be among the "worst" of offenders.[215] First, there is their lack of

Based on Magnetic Resonance Images, 6 CEREBRAL CORTEX 726, 734 (1996); Catherine Chiron et al., *Changes in Regional Cerebral Blood Flow During Brain Maturation in Children and Adolescents*, 33 J. NUCLEAR MED. 696, 701 (1992); Jay N. Giedd et al., *Quantitative Magnetic Resonance Imaging of Human Brain Development: Ages 4–18*, 6 CEREBRAL CORTEX 551, 551 (1996); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–63 (1999); Kaban & Orlando, *supra* note 68, at 64; Thompson v. Oklahoma, 487 U.S. 815, 816 (1998).

[206] Scott & Steinberg, *supra* note 4, at 814–15.

[207] *Id.* at 816; Kaban & Orlando, *supra* note 68, at 64.

[208] Scott & Steinberg, *supra* note 4, at 816; Catherine Chiron et al., *supra* note 206, at 696.

[209] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1013 (2003) [hereinafter Steinberg & Scott, *Less Guilty*].

[210] Caviness et al., *supra* note 206, at 732.

[211] *Amygdala*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/body/24894-amygdala [https://perma.cc/T4S9-8SSH] (last visited Nov. 26, 2025).

[212] Kaban & Orlando, *supra* note 68, at 48.

[213] Lori Dajose, *New Insights into the Neuroscience Behind Conscious Awareness of Choice*, CALTECH (Apr. 6, 2022), https://www.caltech.edu/about/news/new-insights-into-the-neuroscience-behind-conscious-awareness-of-choice [https://perma.cc/WXZ2-T4T3].

[214] *See* STEINBERG, *supra* note 76, at 78.

[215] Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae in Support of Respondent at 3, 7–8, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

maturity and sense of responsibility.[216] Second, youth are both more sensitive to peer influence and have less control over their environments.[217] Third, the character traits of a youth are less fixed and therefore more capable of change.[218]

2. Social Science, Adolescent Development Research, and Jurisprudence: Limitations and Critiques

A precommitment to recognizing youth immaturity categorically draws concern from scholars who write on youth rights and privileges.[219] If we draw a brightline age determination of criminal responsibility at eighteen or higher, how do we protect youth affirmative rights? The nexus of this requires a more nuanced focus on psychosocial immaturity and its relation to cognitive capacity.[220] Youth around sixteen begin to mirror adults in their cognitive capacity, however, they may still be impulsive in high stress situations, more sensitive to peer influence, and move towards risk as opposed to withdraw from it.[221] The American Psychological Association specifically addressed this perceived "flip-flop" between their position on youth rights for reproductive autonomy and immaturity in terms of criminal culpability:

> [W]hereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities that were referred to in the *Hodgson* brief—abilities that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities listed by Justice Kennedy in the majority opinion in *Roper*—capacities such as impulse control and resistance to peer influence. Not only were the legal issues different in the two cases, but so are the circumstances surrounding abortion decisions and criminal behavior, and therefore, the relevant dimensions along which adolescents and adults should be compared differ as well. Unlike adolescents' decisions to commit crimes, which are usually rash and made in

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[216] *Id.* at 7; *Roper*, 543 U.S. at 569; *see generally* Jeffrey Arnett, *The Young and the Reckless: Adolescent Reckless Behavior*, 4 CURRENT DIRECTIONS PSYCH. SCI. 67, 69 (1995).

[217] *Roper*, 543 U.S. at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *See* Steinberg & Scott, *Less Guilty*, *supra* note 210, at 1013–14.

[218] *Roper*, 543 U.S. at 569; *see generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) (cited by the Court in *Roper* for the premise that youth, as compared to adults, have less fixed identities).

[219] Scott & Steinberg, *supra* note 4, at 839.

[220] *See* Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCH. 583, 590 (2009) (youth mature cognitively before they mature emotionally and socially); Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 593 n.17 (2015) (while they have the cognitive capacity, they may lack the capability to execute adult like decision making).

[221] Steinberg et al., *Alleged APA*, *supra* note 200, at 590–91.

> the presence of peers, adolescents' decisions about terminating a pregnancy can be made in an unhurried fashion and in consultation with adults.[222]

In short, youth's capacity to make well-reasoned decisions, and hence, be protected in their autonomy and personhood, may, but need not necessarily, be seen as incongruent with revising criminal culpability.[223] However, changes in upper-age jurisdiction for a juvenile legal system could negatively impact other legally defined brightline age demarcations.[224] The reforms discussed below are influenced by and are never incongruent with these scholars.[225] Indeed, different chronological ages have frequently marked various rights, privileges, and lines of demarcation, including marriage, driving, military enlistment, contracts, etc.[226]

II. SCHOLARLY DISCUSSION OF TRANSFER AND PROPOSED REFORMS

A. Scholars Have Acknowledged the Flaws of Transfer Schemes and Have Focused Largely on Reform Grounded Primarily in Adolescent Development Research and Constitutional Rights Deprivations

Scholars hoping to expand transfer reform have either pushed for a stricter standard of review or enhanced procedural due process protections.[227] Many scholars in recent years have explored how to weave adolescent development research into the *Kent* factors.[228] Scholars have called for increased due process protections to address youth capacity for change,[229] enhanced substantive due process,[230] Eighth Amendment protections,[231] congressional guidance on judicial

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[222] *Id.* at 586.

[223] *Id.*

[224] *See* Jonathan Todres, Charlene Choi & Joseph Wright, *A Rights-Based Assessment of Youth Participation in the United States*, 95 TEMP. L. REV. 411, 414 (2023) (noting the importance of protecting youth personhood).

[225] *See infra* Part II.

[226] *See* Todres, Choi & Wright, supra note 224, at 414 (for a discussion of how the United States has limited civic engagement for youth).

[227] *See* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 303, 326 (1999) (discussion of amenability to treatment in light of adolescent developmental research).

[228] *See generally* Amanda NeMoyer, Kent *Revisited: Aligning Judicial Waiver Criteria with More than Fifty Years of Social Science Research*, 42 VT. L. REV. 441 (2018) (examining the *Kent* factors in light of the research, including the memorandum of *Kent*, a fifty-state overview of transfer factors and proposed updated *Kent* factors that incorporate adolescent development research).

[229] Rachel Jacobs, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 992 (2013) ("[F]ailure to take account of juveniles' capacity for rehabilitation, decreased culpability, and individual life circumstances, thereby violating the due process rights of juveniles.").

[230] Darden, *supra* note 33, at 258.

[231] Puzone, *supra* note 128, at 55 ("Given that the result of an adult charge could be the equivalent of life in prison—and in light of the developmental neuroscience recognized by the

discretion,[232] and a focus on constitutional protections, as opposed to public opinion in transfer determinations.[233] Specifically, scholars have examined the *Kent* factors in light of *Miller*,[234] the role of *Graham* in litigation strategy,[235] and the importance of *Miller* on youth conditions of confinement, transfer laws, and lengthy sentencing structures.[236]

Scholars have looked at the inconsistency between *Kent*, which splits focus between the youth and the charged offense, and *Miller*, which is more squarely focused on the developmental framework of adolescent development.[237] Scholarship has drawn on international reform campaigns which have braided the adolescent development framework with a human rights focus.[238] In sum, scholars

Supreme Court—procedures used to transfer youth to adult criminal courts must comport with the Eighth Amendment.").

[232] Juan Alberto Arteaga, *Juvenile (In)justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1056 (2002) ("Congress should provide stricter guidelines for the judiciary to follow when making such decisions.").

[233] *See* Tiffani N. Darden, *Known Unknowns: Legislating for A Juvenile's Reformative Uncertainty*, 97 NEB. L. REV. 334, 355 (2018) (discussing the role that *Roper*, *Graham*, and *Miller* established play in ushering in a constitutional prioritization, dethroning public opinion, in transfer determinations).

[234] NeMoyer, *supra* note 229, at 442 n.5, 457 n.81, 460 nn.92–95, 461 n.99, 462, 463 n.108, 466 n.121; *see* Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 PSYCH., PUB. POL'Y & L. 235, 235 (2016) (examining how developmental and clinical psychological evidence might be relevant to courts considering *Miller* jurisprudence).

[235] Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 99–100 (2010).

[236] Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1789, 1803 n.102 (2016) (citing William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 345 (2014) as evidence that others have "argu[ed] for extension of *Miller* rule to all cases where defendant faces death-in-custody sentence"); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 4–7 (2013) (positing that *Miller* undermines the legitimacy of mandatory sex offender registries for juveniles); Hoeffel, *supra* note 4, at 51–54 (arguing that *Miller* calls into question current juvenile transfer laws); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 298 (2012) (arguing pre-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 101–03 (2008) (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether); Sarah A. Kellogg, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After* Miller v. Alabama, 55 B.C. L. REV. 265, 266–68 (2014) (discussing how *Miller* calls into question general legislation designed to address gang crime as it applies to juveniles); Mariko K. Shitama, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 845–53 (2013) (arguing post-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses); Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1488–89 (2012) (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether).

[237] *See* NeMoyer, *supra* note 229, at 442–43.

[238] *See* Roger-Claude Liwanga & Patrick Ibe, *Transfer of Child Offenders to Adult Criminal Courts in the USA: An Unnecessary Exercise, Unconstitutional Practice, International Law*

have extensively examined the importance of adolescent development science and what it should mean for transfer reform.

B. Given the Wide Variations in State Transfer Schema, Scholars and Practitioners Have Struggled to Concretize a Plan for Fulsome Reform

Uniform national reform is difficult due to variations state by state in minimum age for transfer, burden, presumptions, and process.[239] Scholars have examined existing schema and voiced preference for one type of mechanism over another.[240] Attention is given to most, if not all, existing state schemas and perceived positives and negatives of individual structure.[241] This Article contributes to the existing landscape by offering a framework which could be employed, in whole or in part, in each jurisdiction regardless of its existing scheme. Further, the advanced reforms are dynamic and able to expand with changing and evolving social science and long-term juvenile court age jurisdictional boundaries.

C. Scholars Have Cited to the Similarities Between Transfer and Death Penalty Theory, Without Exploring the Herein Proposed Reforms

Professor Hoeffel noted that while "'death is different,' children are different too"[242] in her article The Jurisprudence of Death and Youth: Now the Twain Should Meet. Scholars that consider transfer abolition and reform echo aspects of the death penalty movement, even without naming it, by focusing on reforms that narrow the population of youth eligible for transfer, or calling for reform to process and procedure—both of which were precedents in studied death penalty abolition movements.[243] Additionally, both the death penalty and transfer are critiqued for racial disparities in application.[244] Scholars have specifically chronicled the role of the super-predator myth, in the juvenile legal system.[245]

Scholars have grounded the abolition of transfer punishment theory, while also identifying the incapacity and potentially rehabilitative impact of raising the upper limit of juvenile court jurisdiction to twenty-five, thereby addressing the

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Violation, or All of the Above?, 49 GA. J. INT'L & COMP. L. 99, 118–24 (2021); *see* Elizabeth E. Clarke, *Disrupting Injustice: Fifty Years Post* Miranda *and* Gault*: A Call to Action to Re-Examine the Rights of Children in Conflict with the Law*, 62 S.D. L. REV. 608, 610–11 (2017); *see generally* Kim Hai Pearson, *Children Are Human*, 8 TEX. A&M L. REV. 495, 496, 500 (2021) (encouraging child advocates to look to the principles of UN Convention on the rights of the child in promoting that children in the US be seen as full human rights holders).

[239] *See* Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 S.D. L. REV. 783, 793–804, 807, 809 (2000).

[240] *See, e.g.*, Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595, 601 (1998).

[241] *See, e.g.*, *id.*

[242] Hoeffel, *supra* note 4, at 29–30 (citing Miller v. Alabama, 567 U.S. 460, 481 (2012)).

[243] *Id.* at 30.

[244] *See id.* at 37 n.47.

[245] Darden, *supra* note 234, at 364–65, 367.

age-crime curve of youthful offenders.[246] Scholar and Practitioner, Jenny Carroll, examined litigation strategy rooted in *Apprendi* arguments to attack the punitive nature of transfer.[247]

This Article fits within the scholarly landscape by exploring new and previously unexplored reforms grounded in both policy and practice, inspired by classical punishment theory, social science, and death penalty moratorium movements.

III. MORATORIUM TO STUDY THE PROCEDURE, INTERMEDIATE REFORM AND CONSIDERATIONS OF ABOLITION

A. As Transfer Is a Practice of Punishment, Transfer Reform should Borrow from Punishment Reform

1. Potential Reform Grounded in Criminal Theory of Responsibility

The defense of "infancy" was a question on if the youth was a proper subject for criminal responsibility.[248] These defenses were directed at the general capacity of the individual to be a responsible person.[249] While there were different standards based on the degree of the alleged criminal act, the details of the act did not influence the question of if the youth was sufficiently adult-like in the same manner in which we think about transfer.

Criminal responsibility theory defines infancy with "true excuses" under the law, as opposed to moral excuses, which might be more situationally dependent, like self-defense.[250] Rather, these "true excuses" are directed at the general capacity of the individual to be a responsible person, independent of the crime charged.[251]

Scholars have called for resurgence of the defense of infancy as a response to arguments grounded in retribution.[252] Youth around sixteen begin to mirror

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[246] Slobogin, *supra* note 228, at 328; David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1585 (2004).

[247] Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings:* Apprendi*, Adult Punishment, and Adult Process*, 61 HASTINGS L.J. 175, 198–212 (2009).

[248] Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1236 (1966).

[249] MOORE, *supra* note 22, at 61.

[250] *Id.* at 59.

[251] *Id.* at 60.

[252] *See* Laura Cohen, *The Anti-Racist Imperative of Infancy*, 19 NW. J.L. & SOC. POL'Y 177, 220–22 (2024) (for a discussion of a reimagined, developmental-centered categorical infancy defense); *see* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 KAN. L. REV. 687, 702–07 (2006) (for a discussion of due process protections and the defense of infancy); *see* Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 190–98 (2000)

adults in their cognitive[253] capacity.[254] However, as discussed above cognitive capacity is different than psychosocial maturity, which more closely mirrors "moral understanding" and criminal intentions, and the ways in which we thought of adult responsibility under a defense of infancy.[255]

2. *Reform Following Jurisprudence of Theory of Responsibility for Individuals with Intellectual Disabilities,* Moore v. Texas

Transfer determinations are heavily or exclusively focused on questions of a youth's charged offense.[256] It creates a "franken jurisdiction" where a youth's adult-like nature is inextricably connected to the crime for which they are charged.[257] In *Thompson*, when addressing the retributive purpose of the death penalty, the Court spoke of "society's fiduciary obligations to its children," given their diminished culpability and capacity to change.[258] And in other contexts, criminal behavior is not a sufficient demonstration of adult-like behavior such to sever the responsibility of a parental figure. Emancipation from parental fiduciary obligations has repeatedly held that a commission of a crime by a youth is not sufficient indicia of adult-like behavior.[259]

Roper found an Eighth Amendment categorical ban on punishment for children, which leaned heavily on jurisprudence that addressed appropriate punishment for those individuals with intellectual disabilities in *Atkins*.[260] In *Atkins*, the Court directed trial courts to adopt schemes which were rooted in scientific and clinical framework for their determination of which individuals were intellectually disabled and ineligible for the death penalty.[261] In *Moore v. Texas*, the Court held that states are not free to adopt a legal definition of "intellectually disabled" for consideration for the death penalty, which fails to conform with prevailing clinical approaches to address the classification.[262]

In *Moore*, Texas relied on the outdated *Briseno* factors for consideration of adaptive functioning as opposed to prevailing medical standards which focused on deficient.[263] *Moore* held that deference to state court schemes was not so

(for a discussion of reformulated Infancy defense); *see* Kaban & Orlando, *supra* note 68, at 50–65 (for a discussion of revitalizing the defense of Infancy in juvenile courts).

253 *See supra* Section I.D.2.

254 Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 112 (2013).

255 *See* Steinberg et al., *supra* note 221, at 586.

256 *See* Redding, *Transfer Laws*, *supra* note 145, at 4.

257 *See id.*

258 Thompson v. Oklahoma, 487 U.S. 815, 872–73 (1988).

259 *Id.* at 823–25, 838.

260 Roper v. Simmons, 543 U.S. 551, 567–69 (2005); Atkins v. Virginia, 536 U.S. 304, 313 (2002).

261 *Id.* at 312–13.

262 Moore v. Texas, 581 U.S. 1, 20–21 (2017).

263 *Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), *abrogated by*, Moore v. Texas, 581 U.S. 1 (2017); *Moore*, 581 U.S. at 5–6, 8–12, 21 (Roberts, C.J., dissenting).

broad as to allow states to adopt tests that failed to conform to prevailing notions of science.[264] To allow such would result in a risk of making an erroneous decision in failing to identify defendants who possess an intellectual disability. Just as the Court in *Roper* used the framework of *Atkins* and intellectual disability to find youth offending behavior ineligible for the death penalty, *Moore* should require states to conform their transfer schemes to prevailing science on adolescent development.

Further, in *Moore*, the Court reversed the decision of the Texas Court of Criminal Appeals for adopting and following a legal standard which was not rooted in the prevailing science related to intellectual deficiency and because the determination invited non experts to assess intellectual functioning.[265] Rooting decisions in the *Briseno* factors, as opposed to the prevailing clinical factors "creat[es] an unacceptable risk that persons with intellectual disability will be executed."[266] While the Court left to States "the task of developing appropriate ways to enforce" that individuals deemed mentally incompetent be spared a death sentence, their discretion is not "unfettered," and must be "informed by the medical community's diagnostic framework."[267] Similarly, an argument would be that transfer schemes that are not rooted in prevailing science on adolescent development and youth offending behavior creates an unacceptable risk that youth will be tried as adults, lose the protections of a rehabilitative court, face lengthy prison sentences, or be sentenced to life in prison without the opportunity of parole. A *Moore* type inquiry challenges the constitutionality of transfer schemes that ignore prevailing notions, just as the Court invalidated Texas's test of mental incapacity based in *Briseno* factors.[268]

Moore-influenced transfer reforms could be forced in two different ways. First, *Moore* inspired litigation practice around an individual state's transfer schema. And second, through legislative recognition of the failure of a state's transfer schema to conform to prevailing notions of science. The attraction of a *Moore*-influenced reform is that it is more expansive than the science adopted in post-transfer jurisprudence by the Supreme Court and better able to respond to the rapidly advancing adolescent development science research. This moves the United States towards jurisprudence like that of Canada, discussed below, which

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[264] *Moore*, 581 U.S. at 20.

[265] *Id.* at 20–21.

[266] *Moore*, 581 U.S. at 6 (quoting Hall v. Florida, 572 U.S. 701, 704 (2014)).

[267] *Id.* at 12–13 (quoting *Hall*, 572 U.S. at 719, 721).

[268] Moore v. Texas, 586 U.S. 133, 137–38 (2019) (per curiam) (quoting *Moore*, 581 U.S. at 13, 17–18):

> We criticized the use of these factors both because they had no grounding in prevailing medical practice, and because they invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability. Emphasizing the *Briseno* factors over clinical factors, we said, 'creat[es] an unacceptable risk that persons with intellectual disability will be executed.' While our decisions in '*Atkins* and *Hall* left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled,' a court's intellectual disability determination 'must be "informed" by the medical community's diagnostic framework.'

admonishes the consideration of the severity of the crime prior to a consideration of adolescent development as opposed to jurisprudence, which allows transfer purely on the severity of the charge alone.[269]

B. Delaying a Decision on Adult Punishment Until After a Determination of Guilt

1. Canada as a Model

If transfer is either conceptually, theoretically, or actually a form of punishment, discussions should focus on delaying a decision on adult prosecution until after there has been a finding of guilt. Such a reform could be advanced in each jurisdiction with local decisions made about the jurisdiction, either juvenile or adult criminal court, that would be responsible for the adjudication hearing or trial. Such a reform would, by necessity, spirit reforms for due process and pretrial protections for youth who face transfer, including right to discovery, motion practice, and interlocutory appeals.[270]

This concept is not without precedent and currently exists in Canada. Canada's Youth Justice Act (CYJA) requires that Canadian youth are all tried in juvenile court.[271] The court may only after a finding of guilt impose adult sanctions.[272] Much like our practice of prosecutorial discretion transfer motions, the Crown may seek an adult sentence for certain convictions or for youth fourteen or older, but the decision is reserved until after a finding of guilt.[273] Support for the reform was grounded in two concerns: first, that transfer to adult prosecution separates youth from rehabilitative services in the youth court, and second, that it was unfair to make a transfer decision prior to the finding of guilt.[274]

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[269] Youth Criminal Justice Act, S.C. 2002, c. 1, § 72(1)(a) (Can.).

[270] It would raise additional procedural questions as well which are not explored here. As explored in the following section, a moratorium would allow all interested and impacted parties, including advocates for youth, complaining parties and courts to explore the logistics,including what factors and standard would be addressed prior to levying an adult sentence and if the hearing might be bifurcated on the issue of guilt and sentence jurisdiction.

[271] Youth Criminal Justice Act, S.C. 2002, c. 1, § 3(1)(b) (Can.).

[272] Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 16–17 (2017); R. v. D.B., [2008] 2 S.C.R. 3, para. 68 (Can. Ont.); R. v. S.J.L.-G, [2009] 1 S.C.R. 426, para. 21 (Can. Que.).

[273] Youth Criminal Justice Act, S.C. 2002, c. 1, § 64(1) (Can.); *see generally* Anthony N. Doob & Jane B. Sprott, *Youth Justice in Canada*, 31 CRIME & JUST. 185 (2004) (tracing the history of Canada's youth justice system from 1908 to 2003 including the changes of the Youth Criminal Justice Act).

[274] *See* Doob, *supra* note 274, at 224–26 (discussing the history of Canada's youth justice system and foundation for the YCJA including a preamble that notes Canada as a party to the CRC, reserving serious interventions for only the most serious cases and reframing "protection of the public" to not specifically refer to deterrence or incapacitation); G.A. Res. 44/25, at 44, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

CYJA is part of a larger commitment by Canada to the Convention on the Rights of the Child (CRC).[275] One significant divergence between the United States and other members of the United Nations, is its delay in signing the CRC and our continuing decline to ratify and agree to be bound by its requirements.[276] The CRC has been widely ratified and is the most universally accepted convention related to justice,[277] as well as the most universally approved treaty in the world, lacking ratification from the United States as the outlier.[278] Signing onto a Convention represents a country's commitment to the promulgated rules and agreement to face sanctions for violations of the rules.[279] The Convention defines a child as a human under the age of eighteen, unless the country has an earlier age of majority, and provides that a country shall establish a minimum age of prosecution.[280] In 2018, the CRC recommended a minimum age of responsibility of at least fourteen, which is higher than any state in the United States.[281]

CYJA represents a categorical precommitment to focus on adolescence first, even when youth are charged with violent and deadly offenses.[282] Indeed, in Canada the court may only order an adult sentence if two elements are met:

> (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.[283]

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[275] *See* Youth Criminal Justice Act, S.C. 2002, c. 1 (Can.).

[276] *See* Pearson, *supra* note 239, at 509 (discussing the role of the United States and the UN Convention and the Rights of the Child and perceived reasons for its failure to ratify); *United States Treaty Collection: Convention on the Rights of the Child*, U.N., https://treaties.un.org/pages/showDetails.aspx?objid=08000002800007fe&clang=_en [https://perma.cc/W97K-NLM8] (last visited Nov. 28, 2025) [hereinafter U.N.].

[277] *See* U.N., *supra* note 277.

[278] *See* CRC, *supra* note 275, at 44; Pearson, *supra* note 239, at 496, 509–10 (opining that the United States has refused to ratify the Convention due to a fear that youth rights would be elevated above parental rights).

[279] *See generally* CRC, *supra* note 275 (nations that ratify the CRC agree to be bound by its provisions under international law. CRC has a committee which reports on implementation and compliance); *see* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 166–70 (1998) (discussing ratification, compliance monitoring and judicial interpretation of early case law including limitations of the CRC).

[280] *See* CRC, *supra* note 275, at, art. 42–43.

[281] *Id.* at art. 1, 41; *Brief Charting U.S. Minimum Ages of Jurisdiction, Detention, and Commitment*, NAT'L JUV. JUST. NETWORK (July 2023), https://nyjn.org/wp-content/uploads/UPDATED-February-2024_Minimum-Age-Laws-for-Juvenile-Court-Jurisdiction-and-Confinement.pdf [https://perma.cc/XB5X-4EDR].

[282] *See generally* CRC, *supra* note 275.

[283] Youth Criminal Justice Act, S.C. 2002, c. 1, § 72 (Can.).

At the sentencing phase, the judge may consider the evidence in deciding whether to give an adult sentence, including colonial trauma to an indigenous youth.[284]

In July of 2025, the Supreme Court of Canada heard the matter of *R. v. I.M.* and reversed the imposition of an adult sentence on a youth who had participated in a premeditated group robbery of another teen.[285] During the robbery, the youth, along with others, attacked and stabbed the teen who died from the injuries.[286] The group then entered the victim's home, pistol-whipped the victim's mother, and searched the home for firearms.[287] In its decision, the Court found that the Crown had failed to prove beyond a reasonable doubt that the appellant had the maturity or capacity for moral judgment of an adult at the time of the offence and that the Court had erred by considering the severity of the offense in its decision on if the Crown had met its burden.[288] In its decision, the court held that the sentencing court "should consider factors that properly fix on the young offender's developmental age and capacity for moral judgment" alone and that its standard of proof is beyond a reasonable doubt.[289]

Delaying the decision of "transfer" until after a determination of guilt and on the underlying facts that support guilt would protect youth who are factually and legally not guilty and confront situations in which continued investigation impacts the perceived seriousness or substance of the youth's involvement. It would also allow youth to remain tethered to rehabilitative services and allow a court and prosecutor to consider amenability to treatment prior to the final decision on the appropriateness of an adult criminal sentence and the collateral consequences of the same. This would be more in line with theories of punishment. The punishment would be commensurate with the offending behavior, it would punish only those found guilty of the offending behavior, and it would be more responsive to the need for rehabilitation.

Such a reform may align transfer with classical punishment theories, but without additional considerations of transfer, which would best be explored by a moratorium, transfer might be susceptible to the critiques of sentencing enhancements.[290] Without a more global discussion about transfer and the impact and relevance of adolescent development, transfer could continue to be used as a sword to exact more guilty pleas to avoid a more harsh adult sentence, ultimately widening the net of youth who receive adult criminal sentences. If, as in Canada,

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[284] Chinta Puxley, *A Look at How Canadian Courts Handle Young People Charged with Murder*, GLOB. NEWS (Jan. 26, 2016), https://globalnews.ca/news/2476202/a-look-at-how-courts-handle-youth-murder-suspects/ [https://perma.cc/5CTM-JZPY].

[285] R. v. I.M. [2025] S.C.C. 23 (Can. Ont.).

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *See* Wes Reber Porter, *Threaten Sentencing Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea*, 3 TEX. A&M L. REV. 261, 266 (2015) (providing an overview of history, impact and operation of sentencing enhancements).

adult prosecutions are available only for certain convictions, it should further reduce the population of youth that receive adult sentences.

C. Inspiration for Moratorium from the Death Penalty Movement

"High-profile cases of violent juvenile crimes, along with regular news reports of gang violence and violence in schools, have spurred the public's belief that juvenile crime is out of control."[291] In turn, legislatures and lawmakers are influenced by this misconception, or at a minimum are influenced by the public's misperception of increasing violent juvenile crime.[292] One avenue to address the concerns explored in this Article, including categorical precommitment to adolescence, incorporation of adolescent development research, and excising the taint of the Super-predator myth, is to halt the practice of transfer and study and evaluate its continued need. One similar space for inspiration is the call for moratoria from campaigns focused on the death penalty.

In a symposium on the death penalty in 2002, then President of the American Bar Association (ABA), Marsha Barnett addressed the role of the ABA and the legal profession generally to step into the breach on the death penalty, calling capital punishment a civil rights issue.[293] Barnett referenced the 1997 resolution by the ABA calling for a moratorium on the death penalty:

> 'Today the administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.' Because of that, and because of the anecdotal and empirical data that we now have regarding the problems in the administration of the death penalty, American lawyers adopted a call for a moratorium.[294]

Professor Anthony Amsterdam identified racial disparities, the indigency of individuals criminally charged, the deficiency of their court appointed representation, system failures, and deprivation of constitutional rights.[295] He called for a moratorium in all jurisdictions which were still allowing capital punishment as an "indispensable condition of proceeding with appropriate deliberation to review and repair a death-penalty machine that has run amok in this country and unleashed a train of injustices that will cause our children's children to look back in horror at the record of what we have done."[296] He also called for a moratorium as opposed to reform of the practice while it continued for two reasons; the first

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[291] Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 710 (1997).

[292] *See* Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 739 (2001) (discussing the role of moratoria on public discourse on the death penalty).

[293] Martha Barnett & Anthony G. Amsterdam, *Call to Action: A Moratorium on Executions Presented by the American Bar Association on October 12, 2000 at the Carter Center*, 4 N.Y. CITY L. REV. 117, 117 (2002).

[294] *Id.* at 118.

[295] *Id.* at 120–24.

[296] *Id.* at 126.

is the finality of the death penalty, but the second is reminiscent of the preceding portions of this Article. "[T]he death penalty has become symbolically entrenched not simply as a legal institution but as a competition sport that pits prosecutors and police investigators against defense lawyers, and pits aspiring politicians against weepy, wimpy ivory-tower academics."[297] He believed that with time, reflection. and space from the "steeplechase," that some prosecutors may come to support reform.[298]

The ABA took no position on the death penalty, per se, only the way in which it was administered.[299] The ABA's interest in a moratorium followed the state's failure to adopt the ABA's proposed policies, including a policy to examine racial discrimination in administration of the death penalty either in the defendant's or victim's race.[300] The 1990s, much like in transfer, saw states instead doubling down on "tough on crime" provisions in the death penalty arena.[301]

Calling for a moratorium may sound like a sidestep to an abolitionist and too far a step for those who believe that the concerns raised in this Article could be addressed through reform. Here's a list of potential lessons for transfer taken from the ABA call for a moratorium on the death penalty: First, even with well accepted adolescent development science, the taint of the super-predator myth and racial disparities in transfer documented as far back as the creation of a juvenile court in 1899, have not engendered fulsome reform. There is no less invasive step to fully remove the taint of this history. Second, those that do not support abolition of transfer at this juncture can still support a moratorium to study the practice and potential juvenile court jurisdictional boundary reform. On the other hand, for abolitionists, moratoria have been the first step that led to abolition.[302] Lastly, there is a good in the call for a moratorium. The call for a moratorium on the death penalty by the ABA engendered increased attention, conversation and examination of the practice, including educating the public on the operation of the death penalty.[303] The increased understanding of the practice then in turn increased public support of a moratorium[304].

A moratorium on transfer could borrow heavily from the ABA's Death without Justice: A Guide for Examining the Administration of the Death Penalty in

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[297] *Id.* at 127.

[298] *Id.* at 128. Some prosecutors already embrace transfer reform. *See Redefinition of Redefinition of Child Amendment Act: Hearing on C.B. Before the Council on Judiciary and Public Safety*, 24th Council (D.C. 2021) (statement of Miriam Krinsky, Exec. Dir. of Fair & Just Prosecution).

[299] *See About Us*, ABA, https://www.americanbar.org/groups/crsj/about/initiatives/death-penalty/about/ [https://perma.cc/UU9V-6THU] (last visited Nov. 28, 2025) [hereinafter *About Us*].

[300] *Id.*

[301] *Id.*

[302] *See, e.g.*, Raffaele Marchetti, *Advocacy Strategies for Human Rights: The Campaign for the Moratorium on the Death Penalty*, 46 ITALIAN POL. SCI. REV. 355, 365 (2016).

[303] *About Us*, *supra* note 300.

[304] *Id.*

the United States and State Assessments on Individual State Practices on the Death Penalty.[305] This resource was released in 2001 as a guide to aid jurisdictions in reviewing their death penalty practice.[306] In the guide, the ABA suggests areas for discussion which have equal applicability to transfer.[307] The following offers a non-exhaustive model for transfer state assessment and the corresponding language from the ABA State Assessment Guide on the death penalty:[308]

1. Youth tried as adult demographics, including data which contains original charge, final charge, and sentence for youth tried as adults, evolution of the state transfer scheme with particular attention to changes in the 1990s and the location of the information;[309]
2. Collection and preservation of DNA and other types of forensic evidence including if expedited testing is available prior to a determination of transfer;
3. Law enforcement tools and techniques, including how adolescent development science has or has not prompted changes in practices;
4. Prosecutors, and if prosecutors specialize in juvenile prosecution divisions and the extent to which they receive adolescent development training;
5. Defense services during trial, appeal, and state post-conviction proceedings; defense services during transfer, and if youth receive specialized youth defense counsel,[310] the right to an interlocutory appeal of transfer determinations, and state post-transfer proceedings if a youth is found guilty of a charge which would otherwise not be a transferable offense;
6. Direct appeal and the unitary appeal process;
7. ;

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[305] *State Death Penalty Assessments*, ABA, https://www.americanbar.org/groups/crsj/about/initiatives/death-penalty/state-assessments/ [https://perma.cc/6AG2-W4KA] (last visited Nov. 29, 2025) [hereinafter *State Assessments*]; *see* Barnett, *supra* note 273, at 127.

[306] *State Assessments*, supra note 306.

[307] *Id. See generally* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485 (1995) (discussing administration failures in death penalty cases, such as ineffective assistance of counsel).

[308] *State Assessments*, *supra* note 306.

[309] Although simplistic and not reflective of the larger socio-political landscape of the 1980s and 1990s, it is worth considering what transfer schemes looked like in 1977, before the Superpredator myth. In 1977, sixteen states and the federal government had a minimum age for transfer at sixteen. Now only one state, California, does. *See* Joseph N. Sorrentino & Gary K. Olsen, *Certification of Juveniles to Adult Court*, 4 PEPP. L. REV. 497, 504–07 (1977). During this period, most states lowered the age at which youth can be tried as adults, and legislative waiver (mandating automatic adjudication in criminal court above the jurisdictional age for some offenses) became more common. Elizabeth Scott, *Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 584–85 (2000).

[310] Statement of Interest of the United States at 1–2, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cnty. 2015). *See generally* THE GAULT CTR., NATIONAL YOUTH DEFENSE SYSTEM STANDARDS 1 n.4 (2024) (arguing that state youth defense delivery systems must provide defenders which are educated in developmental science and the specifics of youth defense to meet constitutional mandates of due process and equal protection.).

8. Clemency for transferred youth;[311]
9. Jury instructions; standard of proof for transfer finding, transfer presumptions, criteria and factors and guidance on application; including pretextual factors and developmental application of the factors;[312]
10. Judicial independence; judicial, prosecutor discretion and geographic disparities in transfer;
11. Disproportionate racial and ethnic minority contact; and
12. Identification and process of transfer on intellectually disabled and mentally ill youth offenders.

Additional considerations, modeled on the New Jersey Death Penalty Study Commission established in 2006:[313]

1. Whether the transfer scheme "rationally serves a legitimate penological intent such as deterrence;"[314]
2. Whether transfer is consistent with "evolving standards of decency," including understanding of adolescent development science, youth offending behavior and international law;[315]
3. Whether the selection of youth for adult prosecution "is arbitrary, unfair, or discriminatory in any way and there is unfair, arbitrary, or discriminatory variability at any stage of the process;"[316]
4. Whether alternatives to transfer exist "that would sufficiently ensure public safety and address other legitimate social and penological interests," including potential reforms to the jurisdictional boundaries of the juvenile court such that previously criminally tried youth could be addressed in the juvenile court.[317]

CONCLUSION

By viewing transfer as punishment, each jurisdiction can engage in a discussion of reform from their unique vantage point. Using punishment theory to

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[311] While not discussed herein, forthcoming scholarship explores the potential role of clemency on transfer as most state executive clemency provisions include reference to "reprieves." *See* Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2654–64, 2668, 2684–86, 2690 (2011).

[312] *See generally* NeMoyer, *supra* note 229 (discussing the *Kent* factors in light of developmental research).

[313] *See* S.709, 2005 Gen. Assemb., Reg. Sess. (N.J. 2006).

[314] *Id.* § 2(b)(1).

[315] *Id.* § 2(b)(3). One significant divergence between the United States and other members of the United Nations, is the United States's decision not to ratify the UN Convention on the Child (CRC). *See generally* G.A. Res. 44/25 (Nov. 20, 1989); Thompson, *supra* note 312, at 2641, 2654–64, 2668, 2684–86, 2690; LUISA BLANCHFIELD, CONG. RSCH. SERV., R4048, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 4–17 (2015); CRC, *supra* note 275, at 44.

[316] *Id.* § 2(b)(4).

[317] *Id.* § 2(b)(7); *see* Lisa A. Cintron, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1275–1282 (1996).

scaffold adolescent development arguments elucidates novel and previously unexplored reforms in national transfer procedure and process. These reforms are dynamic and responsive to ever-changing adolescent development science.

Adolescent development should be enough to change our sense of justice in response to youth charged with violent and serious offending behavior, but it fails to ignite enough moral skepticism for fulsome reform. A recognition of our flawed assumptions of the juvenile legal system, when paired with adolescent development science jurisprudence and a socio-cultural shift towards extended adolescence, spurs a renewed conversation around the transfer of youth for adult prosecution. Youth transfer reformists can borrow from the death penalty abolition movement to explore moratoria to study the policy and procedure of transfer. Even a moratorium which fails to prompt abolition may provide the large-scale reform of the juvenile legal system and ignite litigation and policy efforts to eventually abolish youth transfer.

We have allowed myths to drown out science. When societal and culture changes demand, we must revisit our theories of punishment to ensure that they match what we believe about justice for the next generation of young people.

Youth truly are not like us. They are, hopefully, better.