

**Let Them Be Little:**  
*Keeping Juveniles Out of The Adult Criminal Justice System*

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Class of 2021

*Let them be little cause they're only that way for a while. Give them hope, give them praise, give them love every day. Let them cry, let them giggle, let them sleep in the middle. Oh, just let them be little.*

~ Billy Dean~

## I. INTRODUCTION

In a monumental trilogy of cases, the United States Supreme Court joined the rest of the world in recognizing that juveniles are fundamentally different than adults.<sup>1</sup> Through the Court's recognition of the abundance of research, reports, and testimony by medical experts, and international practices, it is now unconstitutional to sentence juveniles to the death penalty<sup>2</sup> or to life without the possibility of parole for nonhomicide crimes.<sup>3</sup> Most recently, the Court held that it is unconstitutional to have a sentencing scheme that denotes *mandatory* life without parole for juvenile homicide offenders, emphasizing that "children are constitutionally different from adults for sentencing purposes."<sup>4</sup> However, despite this resounding acknowledgement, every single state and the District of Columbia have at least one mechanism to transfer individuals under the age of 18 from juvenile court to adult court.<sup>5</sup>

## II. JUVENILE COURTS ARE THE APPROPRIATE VENUE FOR JUVENILE OFFENDERS

The United States Supreme Court has stated that "children cannot be viewed simply as miniature adults."<sup>6</sup> This premise is the reason why we have juvenile courts; adult courts are not equipped to work with juveniles.<sup>7</sup> Juvenile courts were originally created with the intent to educate and support juveniles, understanding that was at the heart of combating juvenile

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<sup>1</sup> Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (explaining "[a]s to the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes. Their 'lack of maturity' and 'underdeveloped sense of responsibility' lead to recklessness, impulsivity, and heedless risk-taking. They 'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And because a child's character is not as 'well formed' as an adult's, his traits are 'less fixed' and his actions are less likely to be 'evidence of irremediabl[e] deprav[ity].'<sup>7</sup> *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.") (citations omitted).

<sup>2</sup> See *Roper v. Simons*, 543 U.S. 551 (2005).

<sup>3</sup> See *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>4</sup> See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>5</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, CAMPAIGN FOR YOUTH JUSTICE (2019), [http://cfyj.org/images/Raising\\_the\\_Floor\\_Final.pdf](http://cfyj.org/images/Raising_the_Floor_Final.pdf).

<sup>6</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) (citations omitted).

<sup>7</sup> *The Impact of Prosecuting Youth in the Criminal Justice System: A Review of the Literature*, UCLA SCHOOL OF LAW'S JUVENILE JUSTICE PROJECT (2010), [http://www.antonioacasella.eu/restorative/UCLA\\_july2010.pdf](http://www.antonioacasella.eu/restorative/UCLA_july2010.pdf).

delinquency.<sup>8</sup> These courts were created under the State's belief of its role as *parens patriae*, or quasi-parent, to a juvenile.<sup>9</sup>

Since their origins in 1899, juvenile courts have been specifically “designed to provide not only rehabilitative functions but also protective supervision for youth.”<sup>10</sup> Unlike the punitive philosophy of criminal courts at the time, juvenile courts “sought to investigate, diagnose, and treat the problems, instead of assigning guilt or blame.”<sup>11</sup> In fact, juvenile courts are not even considered criminal courts, and therefore refuse to use traditional terminology from criminal courts such as being found “guilty” or going to “trial.”<sup>12</sup> Instead, a juvenile is either found “delinquent” or “not delinquent” in an “adjudication” proceeding, thus recognizing that adults and juveniles have different levels of responsibility.<sup>13</sup>

The need for these philosophies has been emphasized in recent years with the development of science and the increased understanding of human brain development.<sup>14</sup> One of the most compelling reasons the United States Supreme Court has declared that “children are constitutionally different from adults for the purpose of sentencing” is the acknowledgment of the neurological studies illustrating brain development.<sup>15</sup> In fact, the American Psychiatric Association shares that juveniles’ brains are not fully developed until they are in their twenties.<sup>16</sup> Specifically, neuropsychiatrists find that “[i]t is well established that the brain undergoes a ‘rewriting’ process that is not complete until approximately 25 years of age.”<sup>17</sup> The age 25 is particularly important to explain juvenile criminology because the age 25 “refers specifically to the development of the *prefrontal cortex*,” the part of the brain that “offers an individual the capacity to exercise good judgement when presented with difficult life situations.”<sup>18</sup> Juvenile offenders need to be in a court that was designed to recognize this lack of cognitive development and lower level of culpability.

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<sup>8</sup> Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, AMERICAN BAR ASSOCIATION (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/>.

<sup>9</sup> Jesse Knowlden, *State of Ohio v. Aalim: Due Process and the Mandatory Transfer of Juveniles to Adult Court*, 87 U. CIN. L. REV. 251 (2018) (defining *parens patriae* as “the policy that the government should intervene and act as the parent of a child who cannot care for itself”).

<sup>10</sup> Scialabba, *supra* note 8.

<sup>11</sup> 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, 722 (2016).

<sup>12</sup> JUVENILE COURT TERMINOLOGY, NATIONAL JUVENILE DEFENDER CENTER, <https://njdc.info/juvenile-court-terminology/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).

<sup>15</sup> *Id.*

<sup>16</sup> Beatriz Luna & Catherine Write, *Adolescent Brain Development: Implications of the Juvenile Criminal Justice System*, in APA HANDBOOK OF PSYCHOLOGY AND JUVENILE JUSTICE (pp. 91, 87, and 108), Washington, DC, US (2016).

<sup>17</sup> Mariam Arian, et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT 449, 451 (2013).

<sup>18</sup> *Id.* at 453.

Furthermore, juvenile courts are the appropriate venue because the courts appropriately recognize the statistics that show “[t]here is a 50 percent decline in criminal behavior by the time juvenile delinquents who have engaged in criminal behavior reach the age of 22. By the time they reach the age of 28, there is a decline of 85 percent.”<sup>19</sup> This is true regardless of the severity of the original crime.<sup>20</sup> This phenomenon has been appropriately called “aging-out” of criminal behavior.<sup>21</sup> Therefore, most juvenile offenders, by the time they are out of the juvenile justice system, are not at risk to reoffend. Juvenile courts believe in this innate ability to rehabilitate, and tend to provide juveniles the age-specific resources to accomplish it.

For all of these reasons, juvenile courts are the *best* chance that juveniles have to be rehabilitated. Consequently, transferring juvenile offenders away from these courts’ age-appropriate protections and into the more punitive adult court has significant negative impacts on juveniles.<sup>22</sup>

### III. THE MECHANISMS USED TO TRANSFER JUVENILES TO ADULT COURT

Despite acknowledgement that juvenile courts are the most appropriate venue for juveniles, every state and the District of Columbia have at least one mechanism to transfer juvenile offenders into the adult criminal courts.<sup>23</sup> As a result, “[e]ach year, at least 76,000 *youth* will come into contact with the *adult* criminal justice system.”<sup>24</sup> A state’s mechanism to transfer from juvenile to adult court generally occurs in 1 of 3 ways: **(1)** judicial waiver laws; **(2)** prosecutorial discretion or concurrent jurisdiction laws; or **(3)** statutory exclusion laws.<sup>25</sup>

**First**, in states where there are *judicial waiver laws*, “the juvenile court judge has the responsibility of waiving jurisdiction, thereby sending the case to adult court.”<sup>26</sup> When making the decision, the juvenile judge generally conducts a formal hearing to determine whether or not to transfer a specific juvenile to adult court.<sup>27</sup> At these hearings, a state’s statute may provide factors that help the judge decide how to rule when presented with reports from court

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<sup>19</sup> NV Assembly Judiciary Minutes, March 27, 2015, P. 11, <https://www.leg.state.nv.us/Session/78th2015/Minutes/Assembly/JUD/Final/566.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Aging-Out Phenomenon, Aging-Out Process*, THE AMERICAN DICTIONARY OF CRIMINAL JUSTICE (3rd Ed. 2005) (defining the “aging-out phenomenon” as “[t]he notion that criminals either diminish or discontinue their criminal conduct as they grow older through maturation . . . [researchers] have argued than an aging-out process is responsible for the decline of crime among persons as they grow older.”).

<sup>22</sup> *See generally* CHILDREN AND ADOLESCENTS IN THE UNITED STATES’ ADULT CRIMINAL JUSTICE SYSTEM: THE SITUATION OF CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1 (2018), <https://www.oas.org/en/iachr/reports/pdfs/Children-USA.asp>.

<sup>23</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5.

<sup>24</sup> THE IMPACT OF MANDATORY TRANSFER & STATUTORY EXCLUSION STATUTES, CAMPAIGN FOR YOUTH JUSTICE (2018), [http://www.campaignforyouthjustice.org/images/factsheets/Mandatory\\_Transfer\\_FINAL\\_1.pdf](http://www.campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_FINAL_1.pdf) (emphasis added).

<sup>25</sup> Scialabba, *supra* note 8.

<sup>26</sup> *Id.*

<sup>27</sup> Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP’T OF JUSTICE (Sept. 2011), [http://www.ncjj.org/pdf/Transfer\\_232434.pdf](http://www.ncjj.org/pdf/Transfer_232434.pdf).

investigators, the state, or the juvenile’s attorney; this is the typical “*discretionary* waiver.”<sup>28</sup> However, some states with judicial waiver have “*mandatory* waiver” where the juvenile judge’s waiver is mandated by the legislature in certain situations, typically involving more serious offenses.<sup>29</sup> As of 2019, 16 states had this type of sentencing scheme.<sup>30</sup>

**Second**, under *prosecutorial discretion or concurrent jurisdiction laws*, “there is a class of cases that could be brought before either a juvenile or adult court. It is typically within the prosecutor’s discretion to determine which court will initiate the criminal charges.”<sup>31</sup> In these cases, there is typically no formal hearing or any factors to consider; it is within the *total* discretion of the prosecutor and is described as “comparable with the charging discretion.”<sup>32</sup> As of 2019, 14 states and the District of Columbia used this type of transfer system.<sup>33</sup>

**Finally**, *statutory exclusion laws* are where the “legislature has [] granted the adult criminal court exclusive jurisdiction over certain types of cases involving juvenile offenders.”<sup>34</sup> Although the types of cases included in these statutes vary from state to state, it typically involves a more serious offense, such as first-degree murder, or a repeat-offender.<sup>35</sup> “When a case falls under one of the statutory exclusion laws, it is *mandated* that the case be filed in adult court rather than in juvenile court.”<sup>36</sup> Additionally, unlike mandatory judicial waiver where juvenile courts retain *some* power to make orders, this total statutory exclusion takes every single stage out of the juvenile court’s jurisdiction.<sup>37</sup> As of 2019, 20 states use this method.<sup>38</sup>

In addition to these 3 categories of laws that transfer juveniles to adult courts, many states have implemented additional laws that dictate when a juvenile should be transferred to adult court.<sup>39</sup> For example, in 33 states and the District of Columbia there are *Once an Adult, Always an Adult laws*, which “are a special kind of exclusion requiring criminal prosecution [in the adult

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<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.* (explaining that “[f]unctionally, a mandatory waiver law resembles a statutory exclusion, removing a designated category of cases from juvenile court jurisdiction.”) (emphasis added).

<sup>30</sup> Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2019), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> (HI, ND, TX, NE, KS, MO, TN, KY, WV, NC, OH, NH, ME, RI, CT, NJ).

<sup>31</sup> Scialabba, *supra* note 8.

<sup>32</sup> *Id.*

<sup>33</sup> Teigen, *supra* note 30 (Prosecutorial Discretion only: WY, CO, MI, VA, NY, DC; Prosecutorial Discretion + Statutory Exclusion: CA, AZ, MT, OK, AR, LA, GA, FL VT).

<sup>34</sup> Scialabba, *supra* note 8.

<sup>35</sup> STATUTORY EXCLUSION, US DEPT’ OF JUSTICE: OJJDP, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/tryingjuvasadult/transfer3.html>.

<sup>36</sup> Scialabba, *supra* note 8 (emphasis added).

<sup>37</sup> Griffin, *supra* note 27.

<sup>38</sup> Teigen, *supra* note 30 (AK, WA, OR, ID, NV, UT, NM, SD, MN, IA, WI, IL, IN, MS, AL, SC, MD, DE, MA, PA).

<sup>39</sup> Griffin, *supra* note 27.

system] of any juvenile who has been criminally prosecuted [as an adult] in the past – usually without regard to the seriousness of the current offense.”<sup>40</sup>

Despite the legislative goals to *deter* juveniles from crime, research shows that these transfer laws have a profoundly negative affect on juveniles.<sup>41</sup> This is because, as stated previously, the adult criminal justice system was not created to serve or rehabilitate juveniles; that is the reason the juvenile court system was enacted in the first place.<sup>42</sup>

#### **IV. THE NEGATIVE IMPACTS OF TRANSFERRING JUVENILES INTO THE ADULT CRIMINAL JUSTICE SYSTEM**

Though there are innumerable problems with transferring juveniles into the adult criminal justice system, four major problems will be addressed in this paper: **(1)** the failure to ensure due process guarantees and protections for juveniles; **(2)** the extreme racial disparities in juveniles transferred; **(3)** the increased likelihood of spending time in an adult facility; and **(4)** the increased recidivism rates of juveniles transferred into the adult system.

##### ***a. The Failure to Ensure Due Process Guarantees and Protections for Juveniles***

The Inter-American Commission on Human Rights’ 2018 Report on *The Situation of Children in the Adult Criminal Justice System in the United States* explains that it all starts with a failure to ensure due process guarantees and protections for juveniles.<sup>43</sup> While the juvenile court system is tailored to protect juvenile rights at each stage, the adult court simply treats juveniles as adults.<sup>44</sup> Therefore, parents do not participate in the proceedings at all as they would in the juvenile system, leaving the juvenile to navigate the system alone.<sup>45</sup> These are confusing proceedings for juveniles, and oftentimes juveniles do not comprehend what is happening.<sup>46</sup> As an added hardship, juveniles often lack counsel at the crucial stages of the process when they are still in the juvenile system and charged with crimes.<sup>47</sup> Without

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<sup>40</sup> *Id.* (AL, AZ, CA, DE, DC, FL, HI, ID, IL, IN, IA, KS, ME, MD, MI, MN, MS, MO, NV, NH, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, UT, VA, WA, WI).

<sup>41</sup> *The Impact of Prosecuting Youth in in the Criminal Justice System: A Review of the Literature*, *supra* note 7 (stating that these laws: (1) disproportionately affect youth of color; (2) convict and incarcerate juveniles at a higher rate than the juvenile system; (3) confer harsher sentences than the juvenile system; (4) force pretrial detention at a higher rate; (5) deprive juveniles of resources vital to their development; (6) place youth at an unacceptably high risk for assault and abuse; and (7) cause sharp increases in recidivism across several jurisdictions).

<sup>42</sup> *Id.*; *see also* discussion *supra*, Section II: Juvenile Courts Are The Appropriate Venue For Juvenile Offenders.

<sup>43</sup> CHILDREN AND ADOLESCENTS IN THE UNITED STATES’ ADULT CRIMINAL JUSTICE SYSTEM: THE SITUATION OF CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES, *supra* note 22, at 62.

<sup>44</sup> *Id.* at 63 (explaining that “adult criminal proceedings . . . do not respect or acknowledge their status as children.”).

<sup>45</sup> *Id.* at 69 (stating that the reason for this is “because the children are treated as adults and are therefore considered to be independent and mature individuals not in need of parental guidance and assistance during the proceedings.”).

<sup>46</sup> *Id.* at 64 (revealing that the adult system “is geared toward persons who have reached the age of majority and from whom corresponding level of maturity is therefore expected, children and adolescents very often do not comprehend the proceedings that involve them.”).

<sup>47</sup> *Id.* at 67.

specialized defense counsel to guide them through the complexities of the transfer mechanisms or its effects, juveniles cannot adequately protect themselves.<sup>48</sup>

The report concludes that juveniles “are not duly protected at each stage of the proceedings, which in turn, has further negative consequences for those who are transferred and sentenced in the adult system.”<sup>49</sup> Some examples of these consequences of these vulnerabilities are: “the absence of quality legal counsel; the possibility that youth undergo long periods of time awaiting the disposition of their cases; and the possibility that many youth end up in the adult system as a result of plea agreement, without fully comprehending the consequences of such agreements.”<sup>50</sup>

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<sup>48</sup> *Id.* at 66 (discussing how “many defense attorneys appointed to represent children accused of crimes are not sufficiently specialized, or often do not employ necessary diligence with respect to their more vulnerable clients, due to lack of training or resources specific to this field. As a result, some attorneys . . . frequently and wrongly advise their clients to accept plea bargains that allow the children to be transferred to the adult system.”).

<sup>49</sup> *Id.* at 62.

<sup>50</sup> *Id.*

### ***b. The Extreme Racial Disparities in Juveniles Transferred to Adult Court***

Many studies show that there are severe racial and ethnic disparities at almost every stage of the juvenile justice system.<sup>51</sup> Black youth, in general, are more likely to be involved in the juvenile court system.<sup>52</sup> In a 2016 study, the number of juvenile delinquency cases for black youth were *triple* that of white, Hispanic, or American Indian youth, and *more than 12 times* that of Asian youth.<sup>53</sup>

In addition to being overrepresented in the number of cases in juvenile court, black youth are also disproportionately transferred into the adult system from the juvenile court. In 2017, black youth made 35% of the total cases in juvenile court, yet 54% of the judicial transfers.<sup>54</sup> Meanwhile, white youth made up 44% of the total cases in juvenile court, but only 31% of juvenile transfers.<sup>55</sup>

The statistics show that, despite the fact that the number of juvenile transfers has gone *down* as a whole, “the racial disproportionality among these transfers has actually *increased* over time.”<sup>56</sup> Unfortunately, the explanation for this phenomenon is almost impossible to determine because researchers have a difficult time studying the “intricacies of racial disparities in the juvenile justice system.”<sup>57</sup> The culprit is the “close relationship between crime and many

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<sup>51</sup> Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47 J. AM. ACAD. PSYCHIATRY LAW 1, 3 (2019) (explaining that “[i]n a review of 72 studies that examined the processing of youth [in the juvenile justice system] at nine different decision points, there was a positive race effect toward the differential treatment of minority youth in 82 percent of the studies”).

<sup>52</sup> LET’S GET CHILDREN OUT OF ADULT COURTS, JAILS, AND PRISONS, CAMPAIGN FOR YOUTH JUSTICE (2018), [http://www.campaignforyouthjustice.org/images/factsheets/Basic\\_Facts\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/factsheets/Basic_Facts_FINAL.pdf).

<sup>53</sup> Sarah Hockenberry & Charles Puzanchera, *Juvenile Court Statistics 2016: Briefing Book*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 1, 20 (2016), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwil5cqkwrboAhVXgnIEHcEjAO8QFjAKegQIBRAB&url=https%3A%2F%2Fwww.ojjdp.gov%2Fojstatbb%2Fnjcda%2Fpdf%2Fjcs2016.pdf&usg=AOvVaw0Pr6apw6z6DZ15BjXJTZ\\_1](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwil5cqkwrboAhVXgnIEHcEjAO8QFjAKegQIBRAB&url=https%3A%2F%2Fwww.ojjdp.gov%2Fojstatbb%2Fnjcda%2Fpdf%2Fjcs2016.pdf&usg=AOvVaw0Pr6apw6z6DZ15BjXJTZ_1).

<sup>54</sup> Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POLICY INITIATIVE (2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (emphasis added); see e.g. Yolanda Jones, *Records Show Increase, Racial Disparity in Juvenile Transfers to Adult Court*, DAILY MEMPHIAN (Jan. 13, 2020), <https://dailymemphian.com/article/9914/transfer-of-juveniles-to-adult-court-increases> (explaining that in 2019 Memphis transferred 90 juveniles to the adult system; and, of the 90 juveniles, 86 were black); Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens are Overly Tried as Adults*, ST. LOUIS PUBLIC RADIO (March 12, 2019), <https://news.stlpublicradio.org/post/despite-law-racial-disparities-black-teens-are-overly-tried-adults#stream/0> (stating that “[r]acial disparity has increased as juvenile crime and the overall number of youth tried as adults each year has fallen considerably from a statewide peak in the mid-1990s”); Elizabeth Weill-Greenberg, *Despite Flat Crime Rates, More Cleveland-Area Young People are Being Tried as Adults*, THE APPEAL (Oct. 22, 2019), <https://theappeal.org/despite-flat-crime-rates-more-cleveland-area-young-people-are-being-tried-as-adults/> (explaining that, despite the national decline in the amount of juveniles committing crime and in the juvenile system, Cuyahoga County, Ohio, transfers more juveniles to adult court than any other county. Additionally, “[t]he vast majority of those transferred to adult court in Cuyahoga County and throughout Ohio are Black, according to the department’s report. In the fiscal year 2018, 82 percent of youth transferred to adult court statewide were Black; in Cuyahoga County, more than 94 percent were Black”).

<sup>57</sup> Robles-Ramamurthy & Watson, *supra* note 51, at 4.



of the *social factors* affecting communities in which minority youth are likely raised.”<sup>58</sup> However, it is possible that this increase in disparities is correlated with social factors:

Black and Hispanic populations have higher rates of poverty than whites. Black students are more likely to attend schools with zero-tolerance policies and law enforcement presence on campus, and this increases a student’s chance of being arrested at a young age, expelled, or suspended. Minorities are more likely to have lower income than whites; therefore, minority children are more likely to live in low-income households. Given the racial disparities within the justice system [generally], minority children are often faced with parental incarceration and family separation.<sup>59</sup>

Local judges in St. Louis, Missouri, weighed in on what they believed the reasons for the disparity were based on the statistics collected in their jurisdictions.<sup>60</sup> The answers ranged from the fact that black juveniles are charged with more serious crimes, thus triggering a higher likelihood of being transferred, to the “relative social, economic and educational opportunities for racial groups” and class differentials.<sup>61</sup> Though it is sometimes suggested as a reason, the judges did not believe that the disparity was due to prosecutorial prejudice; this is based on the number of black prosecutors in the area and their numbers of transfers.<sup>62</sup>

***c. The Increased Likelihood of Juveniles Spending Time in Adult Facilities***

Juveniles transferred into the adult system are more likely to go to adult prison, which places juveniles in a dangerous position. *One out of every 10 juveniles is held in an adult facility.*<sup>63</sup> The physical and psychological harms of detaining juveniles in adult prison are evidenced in extensive research. Juveniles have a much “higher likelihood of physical and sexual abuse throughout their stay in prison, a significantly increased risk of suicide, inability to access appropriate education, and [are] subjected to harmful isolation.”<sup>64</sup> For example, as of 2018, “[y]outh in adult jails are 9 times more likely to die from suicide than their peers” in either the general population or juvenile facilities.<sup>65</sup> Juveniles in adult facilities are “5 times more likely to experience abuse than [if they were] in juvenile facilities.”<sup>66</sup> These studies have

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<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens are Overly Tried as Adults*, ST. LOUIS PUBLIC RADIO (March 12, 2019), <https://news.stlpublicradio.org/post/despite-law-racial-disparities-black-teens-are-overly-tried-adults#stream/0>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Sawyer, *supra* note 54.

<sup>64</sup> YOUTH IN ADULT COURT, SUPREME COURT OF OHIO (2018), <https://www.supremecourt.ohio.gov/JCS/CFC/resources/juvenileBenchCards/8youthAdultCourt.pdf>.

<sup>65</sup> JEREE THOMAS, YOUTH TRANSFER: THE IMPORTANCE OF INDIVIDUALIZED FACTOR REVIEW, CAMPAIGN FOR YOUTH JUSTICE (2018), [http://www.campaignforyouthjustice.org/images/20180314\\_CFYJ\\_Youth\\_Transfer\\_Brief.pdf](http://www.campaignforyouthjustice.org/images/20180314_CFYJ_Youth_Transfer_Brief.pdf).

<sup>66</sup> *Id.*

led some to argue that confining juveniles with adults is unconstitutional as it is cruel and unusual punishment.<sup>67</sup>

*d. The Increased Recidivism Rates of Juveniles Transferred into the Adult System*

As a result of all of these indiscretions in the transfer system, research actually shows that “juveniles transferred to the adult system reoffend more often than their counterparts in the juvenile system,” a conclusion that seems inexplicably counterintuitive to the theoretical “goals” of the criminal justice system.<sup>68</sup> In a report by the Centers for Disease Control, the task force found that juveniles who are transferred to the adult system are 34% more likely to recidivate (re-offend) than juveniles who stay in juvenile court.<sup>69</sup> This statistic, coupled with the fact that 95% of juveniles will be released into their communities before the age of 25, illustrates that transferring juveniles into the adult system may actually be less safe for the general public.<sup>70</sup>

These life altering negative impacts that juveniles face when transferred from juvenile court into adult court are the reason that almost all other countries forbid this practice.<sup>71</sup> “The American criminal justice system is unique in the world in that it allows for hundreds of thousands of children (under 18) to be tried, sentenced and incarcerated as adults and leads the world in incarcerating children.”<sup>72</sup> These practices have placed the United States in violation of major provisions of international human rights conventions.<sup>73</sup> As a result, there have been efforts nationwide to try and prevent this practice and keep juveniles out of adult courts and facilities.<sup>74</sup>

## V. THE PROPOSED SOLUTIONS

The national and international community are generally in agreement that there needs to be some sort of reform in this area. The key question that states are trying to answer is *how*. How can juvenile transfers be reduced or eliminated? There are a variety of different proposed

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<sup>67</sup> Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L. J. 1445 (2012) (emphasizing the significantly higher rates of physical assault, sexual abuse, and suicide of juveniles confined with adults than those in juvenile facilities).

<sup>68</sup> 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, 323 (2014) (emphasis added).

<sup>69</sup> Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 MORBIDITY AND MORTALITY WEEKLY REPORT NO. RR-9 1, 6 (2007), <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.

<sup>70</sup> JEREE THOMAS, YOUTH TRANSFER: THE IMPORTANCE OF INDIVIDUALIZED FACTOR REVIEW, *supra* note 65.

<sup>71</sup> Liz Ryan, *Youth in the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUSTICE (2012), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwiS69jevbn0AhWUknIEHV-BACgQFjARegQIARAB&url=http%3A%2F%2Fwww.campaignforyouthjustice.org%2Fimages%2Fpolicybriefs%2Fpolicyreform%2FFR\\_YACJS\\_2012.pdf&usg=AOvVaw0hDxBwXL5GeOqi\\_of7qYUD](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwiS69jevbn0AhWUknIEHV-BACgQFjARegQIARAB&url=http%3A%2F%2Fwww.campaignforyouthjustice.org%2Fimages%2Fpolicybriefs%2Fpolicyreform%2FFR_YACJS_2012.pdf&usg=AOvVaw0hDxBwXL5GeOqi_of7qYUD).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5 (explaining how “[o]ver the past decade, a number of state legislatures have passed bills to ‘raise the floor’ by raising the minimum age of prosecution as an adult for all or some offenses, thereby narrowing the number of youth who could enter the adult criminal justice system in their state . . . [or] eliminates one of their state’s transfer mechanisms all together”).

solutions. In this paper, 3 major changes are suggested: (1) Eliminate any form of mandatory transfers of juveniles into adult court; (2) Implement internal prosecutorial and judicial policies to ensure prosecutors and judges properly use their discretion; and (3) Raise the minimum age for juveniles to be tried as adults. Though it is unlikely that judicial transfer will be completely abolished in the near future, these changes could exponentially decrease the number of juveniles being transferred to adult court.

***a. Eliminate any form of Mandatory Transfers of Juveniles into Adult Court***

It has been recommended that juvenile transfer should be a “safety valve, used *only* for those juveniles who cannot be treated in the juvenile justice system or who pose too great a threat to public safety to evade long-term confinement.”<sup>75</sup> In order to do this, *only the juvenile waiver system is appropriate*; statutory exclusion and prosecutorial discretion inappropriately transfers juveniles by transferring them without any opportunity for a hearing and therefore should be abolished.<sup>76</sup> Essentially, by eliminating any automatic transfers, this “safety valve” approach creates a strong presumption for juvenile court, therefore returning juvenile offenders to the appropriate venue.<sup>77</sup> As one author argues: “[J]uvenile transfer to adult court should be onerous for the state and rare.”<sup>78</sup>

Today, mandatory transfer laws have made it far too easy to transfer juveniles into the adult system without hearings or due process protections. In opposition to the “safety valve” approach suggested, these mandatory transfer laws are thought to be a “vacuum” approach, “sucking children into the adult system.”<sup>79</sup> As the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention explained, in recent years

[t]he movement of adolescents to adult court was no longer the product of a juvenile court judge exercising his or her discretion; it was instead largely the product of who fell into the statutorily defined net of eligibility and was not waived back to juvenile court. Rather than relying on a judgment of individual appropriateness regarding transfer, the emphasis was instead on the act, not the actor, and on retribution, not rehabilitation.<sup>80</sup>

Not surprisingly, the expansion of these vacuum-like mandatory transfer laws *increased* the rate of juveniles transferred into the adult criminal justice system.<sup>81</sup>

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<sup>75</sup> Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995) (emphasis added).

<sup>76</sup> *Id.* at 510.

<sup>77</sup> See discussion *supra* Section II: Juvenile Courts Are The Appropriate Venue For Juvenile Offenders (discussing further the reasons why juvenile court is the proper venue for juveniles).

<sup>78</sup> CHRIS W. SURPRENANT, *RETHINKING PUNISHMENT IN THE ERA OF MASS INCARCERATION* 195 (1st ed. 2019).

<sup>79</sup> Guttman, *supra* note 75, at 510.

<sup>80</sup> Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, US DEPT’ OF JUSTICE: OJJDP 1, 2–3 (Dec. 2012), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&ved=2ahUKEwjop3HlbvoAhUGmHIEHWapBV8QFjANegQIARAB&url=https%3A%2F%2Fwww.pathwaysstudy.pitt.edu%2Fdocuments%2FTranferOfJuvenilesToAdultCourt.pdf&usg=AOvVaw0IM1hEUMb8mpCH8ZgKpgQS>.

<sup>81</sup> *Id.* at 3.

One of the most problematic factors of mandatory transfer laws is the “one size fits all” treatment of juveniles, something that the United States Supreme Court has specifically criticized.<sup>82</sup> Juvenile offenders should have the unfettered right to *individualized assessments*, something that any type of mandatory transfer law takes away.<sup>83</sup> Many times, these juveniles themselves have been victims of crimes.<sup>84</sup> There is *always more* to the juvenile offender than the crime they committed and “[o]nly by listening to their stories can we discern how best to treat them.”<sup>85</sup> Juveniles are very receptive to treatment and rehabilitation, making juvenile court their best opportunity to turn their lives around.<sup>86</sup>

This is precisely why only discretionary judicial waiver laws are acceptable. Instead of casting a juvenile into the adult system based on a single act with no context, a juvenile waiver system presumes juvenile court to be appropriate, placing the burden on the court to show that the juvenile is a rare and dangerous individual who needs to be transferred to adult court. And, most importantly, within that decision-making process, the juveniles receive an individualized assessment through a proper hearing and have the opportunity to demonstrate their capacity to be rehabilitated and any mitigating factors that should be considered.

Though this seems to be the most plausible solution, as of 2018, only 14 states have attempted to follow this advice by eliminating mandatory transfer and statutory exclusion statutes.<sup>87</sup> Ohio originally became the fifteenth state in 2016 with *State v. Aalim*.<sup>88</sup> In that would-have-been landmark case, the Ohio Supreme Court held mandatory transfer statutes to be unconstitutional, reasoning that every juvenile has the right to an amenability hearing before being transferred to the adult court.<sup>89</sup> This hearing was held to be a protection of the juvenile’s constitutional due process right because it permitted juveniles an opportunity to demonstrate their capacity to change.<sup>90</sup>

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<sup>82</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2474–75 (2012) (holding in the *Graham, Roper, Miller* that “individualized sentencing decisions” are required to ensure that “a judge or jury “have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles;” therefore, the Supreme Court is consequently criticizing mandatory transfer system as conflicting to this principle because “[a] juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court.”).

<sup>83</sup> Guttman, *supra* note 75, at 523.

<sup>84</sup> JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW, THE SENTENCING PROJECT (July 2019), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> (explaining that 79% witnessed violence in their homes regularly; 32% grew up in public housing; 40% had been enrolled in special education classes; fewer than half were attending school at the time of their offense; 47% were physically abused; 80% of the girls reported histories of physical abuse and 77% of the girls reported histories of sexual abuse).

<sup>85</sup> Guttman, *supra* note 75, at 510.

<sup>86</sup> *Id.*

<sup>87</sup> THE IMPACT OF MANDATORY TRANSFER & STATUTORY EXCLUSION STATUTES, CAMPAIGN FOR YOUTH JUSTICE (2018), *supra* note 24 (CA, TX, CO, WY, NE, KS, HI, MO, AK, MI, TN, RI, NH, ME).

<sup>88</sup> Knowlden, *supra* note 9, at 252; *see also* *State v. Aalim*, 83 N.E.3d 862 (Ohio 2016).

<sup>89</sup> *State v. Aalim*, 83 N.E.3d 862, 870 (Ohio 2016).

<sup>90</sup> *Id.* at 868.

However, only 6 short months later, the Ohio Supreme Court reversed its own decision.<sup>91</sup> On reconsideration, the Ohio Supreme Court concluded that the mandatory transfer statute was constitutional because the legislature, which created the mandatory transfer statute, has “*exclusive* constitutional authority to define the jurisdiction of the courts of common pleas,” something that it had not considered when reviewing the case in 2016.<sup>92</sup> It is notable that this new decision came almost directly after an election year for the judges<sup>93</sup> when there was a switch in two justices.<sup>94</sup> One of the justices replaced was the justice who wrote the majority opinion in the original *Aalim* case.<sup>95</sup> Additionally, both new justices voted to vacate the original decision and declare mandatory transfers constitutional.<sup>96</sup> In the dissenting opinion, Justice O’Neill matter-of-factly declared:

Today’s decision is a mistake, and it should be treated that way. *Aalim I* was issued on December 22, 2016. From that day until today, it has been the law of Ohio that [the mandatory transfer statutes] are incompatible with the Fourteenth Amendment of the United States . . . Nothing has changed since that date other than the makeup of this court.<sup>97</sup>

Despite this loss in Ohio, there are still 14 states who have already eliminated mandatory transfer statutes, and many others are following the trend and at least limiting the scope of mandatory transfers. The ultimate goal is to eliminate every automatic placement of a juvenile in adult court without any opportunity to review the mitigating factors of youth and circumstances. By providing a strong presumption of juvenile court, it would seem to follow that less juveniles would be transferred into the adult courts.

However, in order for this judicial-waiver-only system to work properly, the judicial waiver system needs to be appropriately designed to focus on the individual juvenile and have an emphasis on rehabilitation.<sup>98</sup> As recommended by this paper, this could be accomplished

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<sup>91</sup> Knowlden, *supra* note 9, at 252; *see also* State v. Aalim, 83 N.E.3d 883 (Ohio 2017).

<sup>92</sup> *Id.* at 502 (emphasis added); *But see* Brief for Juvenile Law Center and National Juvenile Defender Center, State v. Aalim, 150 Ohio St.3d 489 (2017) (expressing strong disapproval of mandatory transfer legislation, stating that it is still unconstitutional because it does “not allow for individualized determination regarding the propriety of prosecuting certain minors in adult court rather than juvenile court”).

<sup>93</sup> *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEORGETOWN J. OF LEGAL ETHICS 1259 (2008) (providing a further discussion of the debate over whether judges should be appointed or elected).

<sup>94</sup> 2016 OHIO ELECTION RECAP, OHIO ACEP (Nov. 23, 2016), [https://associationdatabase.com/aws/OACEP/page\\_template/show\\_detail/130922?layout\\_name=layout\\_details&model\\_name=news\\_article](https://associationdatabase.com/aws/OACEP/page_template/show_detail/130922?layout_name=layout_details&model_name=news_article) (stating that both Justice Judith Ann Lanzinger and Justice Paul Pfeifer aged out of the position and were going to be replaced by Judge Fischer and Judge DeWine respectively).

<sup>95</sup> State v. Aalim, 83 N.E.3d 862, 864 (Ohio 2016) (showing that Justice Lanzinger wrote the majority opinion).

<sup>96</sup> *See* State v. Aalim, 83 N.E.3d 883, 897 (Ohio 2017) (displaying that Justice DeWine in his concurrence stated that he “join[ed] fully in the court’s decision [to vacate the 2016 decision]”); *See also* State v. Aalim 83 N.E.3d 883, 899 (confirming that Justice Fischer declared that he also “join[ed] the majority’s opinion on the merits in this case”).

<sup>97</sup> State v. Aalim, 83 N.E.3d 883, 916 (2017).

<sup>98</sup> *Id.*

through implementing internal policies to hold prosecutors and juvenile judges accountable for properly using their discretion.<sup>99</sup>

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<sup>99</sup> See discussion *infra* Section V(b): Implement Internal Prosecutorial and Judicial Policies to Ensure Prosecutors and Judges Properly Use Their Discretion (explaining further the need for prosecutors to have internal procedures to hold them accountable).

***b. Implement Internal Prosecutorial and Judicial Policies to Ensure Prosecutors and Judges Properly Use Their Discretion***

In response to the well-documented negative impacts on juveniles, in 2012, the Attorney General’s National Task Force on Children Exposed to Violence recommended to prosecutors “[w]henver possible, prosecute young offenders in the juvenile justice system instead of transferring their cases to adult courts.”<sup>100</sup> This directive is targeted at prosecutors and juvenile judges because of the immense “power and discretion” that those parties hold “to shape the course of a young person’s life and promote the safety of their community.”<sup>101</sup> For example, prosecutors can overcharge juveniles in a way that triggers a “mandatory” waiver instead of a “discretionary” waiver.<sup>102</sup> Juvenile judges can recommend the transfer of a specific juvenile into adult court if they “deem[] that the resources available to the court were insufficient to rehabilitate [the] adolescent.”<sup>103</sup> This is enormous power without any type of review, which means it can easily be abused.<sup>104</sup>

In order to hold these individuals accountable for trying to keep juveniles in the juvenile justice system, The Campaign for Youth Justice has additional recommendations for prosecutors and juvenile judges.<sup>105</sup> Under these *prosecutors* are to (1) consider individual factors; (2) consider systemic factors; (3) document these factors in every case and, (4) ideally, recruit research assistance.<sup>106</sup> *Juvenile court judges* are encouraged to (1) prioritize and weigh equally individual factors; (2) appoint mitigation specialists or forensic social workers to review and report on the needs of youth using evidence; (3) consider a continuum of less restrictive options; (4) hold not only youth, but programs and placements, accountable for providing the

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<sup>100</sup> Robert L. Listenbee et al., *Report of the Attorney General’s Taks Force on Children Exposed to Violence*, Office of Juvenile Justice and Delinquency Prevention 1, 23 (Dec. 12, 2012), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=2ahUKEwilnPCjzrnoAhVKmXIEHUJNA7gQFjAJegQIAxAB&url=https%3A%2F%2Fwww.justice.gov%2Fdefendingchildhood%2Fcevr-rpt-full.pdf&usg=AOvVaw3bQpW6WOboB2TZNuk\\_nKbq](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=2ahUKEwilnPCjzrnoAhVKmXIEHUJNA7gQFjAJegQIAxAB&url=https%3A%2F%2Fwww.justice.gov%2Fdefendingchildhood%2Fcevr-rpt-full.pdf&usg=AOvVaw3bQpW6WOboB2TZNuk_nKbq).

<sup>101</sup> JEREE THOMAS, YOUTH TRANSFER: THE IMPORTANCE OF INDIVIDUALIZED FACTOR REVIEW, *supra* note 65.

<sup>102</sup> Jarvis DeBerry, *Charging Juveniles as Juveniles is Better for Them – And Us*, CLEVELAND.COM, <https://www.cleveland.com/opinion/2020/01/charging-juveniles-as-juveniles-is-better-for-them-and-us.html> (illustrating how this discretion is being abused in Cuyahoga County, Ohio).

<sup>103</sup> Mulvey & Schubert, *supra* note 80, at 2.

<sup>104</sup> See FACTSHEET 2019: CUYAHOGA COUNTY’S TREATMENT OF CHILDREN, ACLU OHIO (2019), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiUxMmulLvoAhUvI1XIEHbsIA8sQFjAAegQIARAB&url=https%3A%2F%2Fwww.acluohio.org%2Fwp-content%2Fuploads%2F2019%2F10%2FACLUofOhioChildrensLawCenter-JuvenileJusticeCoalition%25E2%2580%2593Factsheet2019-CuyahogaCountysTreatmentOfChildren\\_2019-1022.pdf&usg=AOvVaw2\\_PN3v8TUyqzHP30huOwUg](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiUxMmulLvoAhUvI1XIEHbsIA8sQFjAAegQIARAB&url=https%3A%2F%2Fwww.acluohio.org%2Fwp-content%2Fuploads%2F2019%2F10%2FACLUofOhioChildrensLawCenter-JuvenileJusticeCoalition%25E2%2580%2593Factsheet2019-CuyahogaCountysTreatmentOfChildren_2019-1022.pdf&usg=AOvVaw2_PN3v8TUyqzHP30huOwUg) (explaining the prosecutors’ role in transferring juveniles to adult court and how it is easily abused); see also Jodi K. Olson, *Waiver of Juveniles to Criminal Court: Judicial Discretion and Racial Disparity*, 2 JUSTICE POLICY JOURNAL (2005), [http://www.cjcj.org/uploads/cjcj/documents/waiver\\_of.pdf](http://www.cjcj.org/uploads/cjcj/documents/waiver_of.pdf) (discussing the juvenile judges’ role in transferring juveniles to the adult court and how it can easily be abused).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

necessary treatment and support to juveniles.<sup>107</sup> These policies would produce a true individualized assessment.

Although prosecutors and judges don't typically like to have restrictions on their power, the research has shown that prosecutors and judges who are properly educated on the evidence and effects of transferring juveniles to the adult system are less likely to transfer.<sup>108</sup> In fact, when put in effect in Miami, Florida, there was a 350% increase in the number of juveniles that received juvenile sanctions instead of adult sanctions.<sup>109</sup> Adopting these internal policies is an effective way to make the necessary parties aware of the weight of their decisions and hopefully decrease the number of transfers.

Prosecutors and judges who adopt these policies at their local office or courthouse will help ensure accountability amongst each other to check their own power, therefore protecting the juvenile from an abuse of discretion. Though limited in scope because it is not legally binding like a legislative change or a court decision, it is something that could be implemented right away without all the barriers that come with legislation and court adjudication.

***c. Raise the Minimum Age for Juveniles to be tried as Adults***

Finally, there have been sweeping movements to “raise the floor.” This campaign’s main focus and goal is to raise the minimum age for children to be tried as adult, which ideally, will reduce the number of juveniles who will subsequently be transferred into the adult system.<sup>110</sup> The 10 states that have adopted this method have seen a decline in juvenile crime and have had great success with their programs.<sup>111</sup>

As of 2019, in a review of 45 states and the District of Columbia’s statutory minimum age for a judicial waiver transfer, almost 50% of the states permit the transfer of juveniles ages 12 or under into an adult court.<sup>112</sup> These are juveniles who have not even reached their teenage years. Seventeen states set no minimum age to transfer juveniles, theoretically permitting extremely young children – ages 5, 6, or 7 – to be transferred to the adult criminal justice

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<sup>107</sup> *Id.*

<sup>108</sup> Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. DEPT. OF JUSTICE: OJJDP 1, 8 (2010), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=2ahUKEwjop3HlbvoAhUGmHIEHWapBV8QFjAMegQIAxAB&url=https%3A%2F%2Fwww.ncjrs.gov%2Fpdffiles1%2Fojjdp%2F220595.pdf&usq=AOvVaw3Nj8gbc2FD0jrKRPsA8WOc> (finding that “educating judges, prosecutors, court personnel and legislators about the research on transfer may reduce the number of cases transferred to criminal court or the number of transferred cases that result in criminal sanctions).

<sup>109</sup> *Id.*

<sup>110</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5 (explaining how “[o]ver the past decade, a number of state legislatures have passed bills to ‘raise the floor’ by raising the minimum age of prosecution as an adult for all or some offenses, thereby narrowing the number of youth who could enter the adult criminal justice system in their state . . . [or] eliminates one of their state’s transfer mechanisms all together.”).

<sup>111</sup> THE IMPACT OF “RAISE THE AGE” LAWS, CAMPAIGN FOR YOUTH JUSTICE (2018), [http://campaignforyouthjustice.org/images/factsheets/Impact\\_of\\_Raise\\_the\\_Age\\_FINAL.pdf](http://campaignforyouthjustice.org/images/factsheets/Impact_of_Raise_the_Age_FINAL.pdf) (MS, CT, MA, IL, NH, LA, SC, NY, NC, MO).

<sup>112</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5.



system.<sup>113</sup> The highest minimum age of transfer is the age of 16, and only 1 state has a minimum age this old.<sup>114</sup>

These low minimum age requirements remain despite the overwhelming scientific evidence that the human brain is not fully developed until the age of 25.<sup>115</sup> Therefore, if legislatures were to follow the science, the minimum age to be tried as an adult could technically be 25. Despite the fact that no state has set a minimum transfer age quite that high, numerous state legislatures are attempting to “raise the floor.”<sup>116</sup>

For example, in 2016 Kansas passed SB 367 which raised the minimum age of transfer from 12 to 14 years of age and “joined a growing number of states setting their minimum age of transfer at 14 years or older.”<sup>117</sup> In 2018 Tennessee passed campaign bills SB 2261 and HB 2271 to amend their juvenile justice code and raise the minimum age of transfer for 13 offenses and attempted offenses.<sup>118</sup> Most recently, in January 2020, California made the news when SB 889 was proposed to lawmakers in an attempt to expand the reach of the state’s juvenile justice system so that those under the age of 21 were automatically tried as minors in juvenile court.<sup>119</sup> This would effectively raise the floor in California to the age of 21, which would be much closer to what the scientific evidence suggests.

Furthermore, raising the minimum age of transfer to the adult court “has proven to be good fiscal and public safety policy. Concerns about large numbers of older juveniles and their associated costs straining juvenile justice systems have not come to pass, and juvenile crime has continued to decline.”<sup>120</sup> The public safety and decline in juvenile crime logically makes sense considering the negative impacts that come with transferring juveniles to the adult system.<sup>121</sup> However, additionally, Texas, a state that raised its minimum age of transfer, did a study and found that “raising the age of juvenile jurisdiction would have a net benefit of \$88.9 million for every cohort of seventeen-year-olds moved into the juvenile system in Texas.”<sup>122</sup> Similarly, a

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<sup>113</sup> See e.g. CHILDREN IN ADULT PRISON, EQUAL JUSTICE INITIATIVE, <https://eji.org/issues/children-in-prison/> (showing that the youngest person transferred into adult court was 8 years old).

<sup>114</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5 (explaining that these ages are so low because of the nation’s mistaken concern over “juvenile super predators” in the “tough on crime” age; that theory has since been debunked based on research and data).

<sup>115</sup> Arian, *supra* note 17, at 451; see also discussion *supra* Section II: Juvenile Courts Are The Appropriate Venue For Juvenile Offenders (discussing further the importance of the science behind human brain development).

<sup>116</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Anita Chabria, *Offenders Under 21 Would be Automatically Tried as Juveniles Under New California Bill*, LOS ANGELES TIMES (Jan 28, 2020), [https://www.latimes.com/california/story/2020-01-28/california-considers-charging-all-teens-as-juveniles?fbclid=IwAR2sLqw6lSluecExun9DYU9\\_zvvq9\\_jtmLC7wHRZxytGY8j8DQPqtj1utBo](https://www.latimes.com/california/story/2020-01-28/california-considers-charging-all-teens-as-juveniles?fbclid=IwAR2sLqw6lSluecExun9DYU9_zvvq9_jtmLC7wHRZxytGY8j8DQPqtj1utBo).

<sup>120</sup> THE IMPACT OF “RAISE THE AGE” LAWS, *supra* note 111.

<sup>121</sup> See discussion *supra* Section IV: The Negative Impacts of Transferring Juveniles Into The Adult Criminal Justice System (discussing further the increased recidivism of juveniles transferred to the adult system among other negative impacts).

<sup>122</sup> THE IMPACT OF “RAISE THE AGE” LAWS, *supra* note 111.

study in North Carolina, another state that raised its age, found that it would bring \$52.3 million in net benefits annually.<sup>123</sup>

## VI. CONCLUSION

Raising the minimum age for a juvenile to be tried as an adult narrows the number of juveniles that could potentially enter the adult criminal justice system in their state.<sup>124</sup> Some states have done this in a way that “eliminates their state’s transfer mechanisms all together.”<sup>125</sup> This solution, combined with straightforward efforts to eliminate mandatory transfers as a whole and implement internal prosecutorial and judicial policies to hold the necessary parties accountable, would protect many juveniles from the negative effects that come with being transferred from the juvenile courts and having their status as a juvenile stolen from them. And most importantly, it keeps juvenile offenders in the most appropriate venue for them: the juvenile court system. If the nation were to move in this direction it would be one step closer to fulfilling the Supreme Court’s mandate that “children are constitutionally different than adults.”<sup>126</sup> We should let them be little.

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<sup>123</sup> *Id.*

<sup>124</sup> JEREE THOMAS ET AL., RAISING THE FLOOR: INCREASING THE MINIMUM AGE OF PROSECUTION AS AN ADULT, *supra* note 5.

<sup>125</sup> *Id.*

<sup>126</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).