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Our state, home of the country's first juvenile court and once a leader in juvenile justice reform, should not be a place where we boast of locking up juveniles and throwing away the key. Illinois should be a place where youth matters . . . .

– Justice Mary J. Theis[1]

INTRODUCTION

In 1899—well over a century ago—Illinois laid a cornerstone for juvenile justice reform by creating the first juvenile court in the nation.[2] Rather than adopting the punitive principles of its adult counterpart, the juvenile court based its philosophy upon rehabilitating and protecting youth.[3] A perceived spike in juvenile crime in the 1980s, however, prompted policymakers to embrace a "tough on crime" approach that lasted until the turn of the century.[4] This period was marked by the reduction of juvenile court jurisdiction and the enactment of harsh transfer laws across the country, despite declining rates of juvenile crime in the mid-1990s.[5] During this time span, Illinois, like most states, employed three mechanisms for trying youth in adult court: mandatory transfers, presumptive transfers, and discretionary transfers.[6] As a result, the number of youth prosecuted in both juvenile and adult court increased dramatically.[7]

Illinois has implemented progressive reform over the past two decades in an effort to realign its juvenile justice system with its original goals. The legislature, for example, has raised the age of juvenile court jurisdiction, abolished mandatory transfers, and limited eligibility criteria for presumptive transfers.[8] Given these substantial improvements, the

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[1] People v. Patterson, 2014 IL 115102, ¶ 177 (Theis, J., dissenting).

[2] LINDSAY BOSTWICK, ILL. CRIM. JUST. INFO. AUTH., POLICIES AND PROCEDURES OF THE ILLINOIS JUVENILE JUSTICE SYSTEM 1 (2010), http://www.icjia.state.il.us/assets/pdf/ResearchReports/IL_Juvenile_Justice_System_Walkthrough_0810.pdf.

[3] *Id.*

[4] *See* KANAKO ISHIDA ET AL., JUV. JUST. INITIATIVE, AUTOMATIC ADULT PROSECUTION OF CHILDREN IN COOK COUNTY, ILLINOIS. 2010-2012, at 5 (2014), http://www.modelsforchange.net/publications/532.

[5] Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS & VICTIMS: NAT'L REP. SERIES BULL., Sept. 2011, at 1, 8-9, https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf.

[6] *Id.* at 3.

[7] Roger Przybylski, *With Higher Numbers of Children Entering Their Crime-Prone Years, More Needs to Be Done to Address Increasing Rates of Juvenile Violence*, COMPILER, Summer 1996, at 4, 5.

[8] Pub. Act 95-1031, 2008 Ill. Laws 3971 (raising the age of original juvenile court jurisdiction from seventeen to eighteen for misdemeanor offenses); Pub. Act 98-61, 2013 Ill. Laws 1709 (raising the age of

state's discretionary transfer provision often goes overlooked. This article examines the problems posed by the language of the discretionary transfer mechanism in light of constitutional standards and emerging research. It argues that the provision is fundamentally incompatible with contemporary concepts of juvenile culpability.

Part I outlines the development of Illinois' statutory transfer scheme within the context of broader national trends. While the state has shifted its policy on mandatory and presumptive transfers in recent years, its discretionary transfer provision remains untouched. Part II evaluates the provision's arbitrary determination that youth as young as thirteen years old are capable of forming the identical requisite *mens rea* as adults. Part III discusses the implications of the broad discretion afforded to juvenile court judges and analyzes the inherently subjective nature of transfer determinations. Part IV demonstrates how adult courts subject transferred juveniles to harsh punishment under the state criminal code, with few constitutional protections shielding them from unduly long sentences. Lastly, Part V urges Illinois to implement certain restrictions to conform its discretionary transfer with contemporary understandings of juvenile criminal responsibility. In particular, the state should consider increasing the minimum age for transfer, categorically excluding certain types of crimes from eligibility, altering the balancing test employed in transfer hearings, and adopting a reverse waiver provision. In the absence of these or comparable safeguards, Illinois youth will continue to face unnecessary criminalization.

I. BACKGROUND

Illinois invoked the doctrine of *parens patriae*, the inherent authority of a state to assume guardian power over its youth, to establish the nation's first juvenile court in Cook County through the Juvenile Court Act of 1899.[9] In creating a new realm of judicial jurisdiction solely for minors under the age of sixteen, Illinois became the first state to formally recognize that children are fundamentally different from adults.[10] Other states followed suit shortly thereafter, with all but two instituting their own juvenile court systems by 1925.[11]

Judge Julian W. Mack, one of the first judges to preside over the Cook County Juvenile Court in the early twentieth century, articulated the goals of juvenile court as follows:

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original juvenile court jurisdiction from seventeen to eighteen for felony offenses); Pub. Act 99-258, 2015 Ill. Laws 4718 (eliminating mandatory transfers and removing enumerated list of offenses qualifying for presumptive transfer).

[9] *See* Illinois Juvenile Court Act, 1899 Ill. Laws 131; Howard N. Snyder & Melissa Sickmund, *Juvenile Justice: A Century of Change*, JUV. JUST. BULL., Dec. 1999, at 1, 2, https://www.ojp.gov/pdffiles1/ojjdp/178995.pdf.

[10] Illinois Juvenile Court Act, 1899 Ill. Laws 131; *see* HOWARD N. SNYDER & MELISSA SICKMUND, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 94 (2006), https://www.ojjdp.gov/ojstatbb/nr2006/.

[11] SUZANNE CAVANAGH & DAVID TEASLEY, CONG. RSCH. SERV., 92-633 GOV, JUVENILE JUSTICE AND DELINQUENCY PREVENTION: BACKGROUND AND CURRENT ISSUES 2 (1992), https://www.ncjrs.gov/pdffiles1/Digitization/139229NCJRS.pdf.

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, *be made to feel that he is the object of its care and solicitude*. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.[12]

This notion—that youth should be the object of the state's care and solicitude—encapsulates the fundamental difference between juvenile and adult courts. Children ought to be protected and rehabilitated, not punished. Although the state created the juvenile court to defend youth from the clutches of the adult penal system, it nonetheless transferred its first juvenile to face adult criminal prosecution a mere four years after the court's founding.[13] As discussed in greater detail below, subsequent legislation further eroded its protections as well.

States remained free to legislate transfer schemes as they deemed fit until the mid-1960s, when the U.S. Supreme Court established a constitutional floor for all transfer hearings in *Kent v. United States*.[14] In *Kent*, the Court invalidated the transfer of a sixteen-year-old juvenile to adult court on the ground that the juvenile court failed to hold a formal hearing to determine whether transfer was appropriate.[15] While the "objectives [of the juvenile court] are to provide measures of guidance and rehabilitation for the child and to protect society, not to fix criminal responsibility, guilt, and punishment," the state's position as *parens patriae* is "not an invitation to procedural arbitrariness."[16] The Court held that youth, like adults, are entitled to due process and fairness.[17] To satisfy the demands of due process, a juvenile court judge must conduct a hearing during which the juvenile is represented by counsel who has access to his social records, and a judge may only enter an order waiving jurisdiction on the basis of a "full investigation."[18] In the event

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[12] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) (emphasis added).
[13] ELIZABETH KOOY, ILL. JUV. JUST. INITIATIVE, CHANGING COURSE: A REVIEW OF THE FIRST TWO YEARS OF DRUG TRANSFER REFORM IN ILLINOIS 7 (2008) [hereinafter KOOY, CHANGING COURSE], http://www.modelsforchange.net/publications/111 (noting that the first discretionary transfer occurred in 1903); *see also* L. Mara Dodge, *"Our Juvenile Court Has Become More Like a Criminal Court": A Century of Reform at the Cook County (Chicago) Juvenile Court*, 26 MICH. HIST. REV. 51, 57 (2000), https://www.jstor.org/stable/20173859?seq=1 (noting that the court's "first judge, Richard S. Tuthill, transferred ten to twelve juveniles a year to adult criminal court").
[14] *See* Kent v. United States, 383 U.S. 541, 562 (1966).
[15] *Id.*
[16] *Id.* at 554-55.
[17] *Id.* at 562.
[18] *Id.* at 561.

the juvenile court determines transfer is appropriate, it must state on the record the reasons for its conclusion so as to allow for meaningful appellate review.[19]

Although the Court declined to announce a binding test of what constitutes a "full investigation," it identified a list of factors that a juvenile court may consider in making a transfer determination, as enumerated below:

> 1. The *seriousness* of the alleged offense to the community and whether the *protection of the community* requires waiver.
> 2. Whether the alleged offense was committed in an *aggressive, violent, premeditated or willful manner.*
> 3. Whether the alleged offense was *against persons or against property*, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The *prosecutive merit* of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
> 5. The *desirability of trial and disposition of the entire offense in one court* when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
> 6. The *sophistication and maturity* of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The *record and previous history* of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
> 8. The prospects for *adequate protection of the public* and the *likelihood of reasonable rehabilitation* of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.[20]

In the wake of *Kent*, states began amending their transfer statutes to adhere to the new formal hearing requirements and to reflect incorporation of these eight factors, albeit loosely.[21]

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[19] *Id.*

[20] *Id.* at 566-67 (emphasis added).

[21] WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 9.6(d) (3d ed. 2020) (explaining that "a great majority of states have adopted, either by statute or case law, some or all of the [*Kent* criteria]."); *see also* KOOY, CHANGING COURSE, *supra* note 13 (noting that the Illinois legislature amended its transfer scheme to comply with the due process requirements under *Kent* in 1973).

One year later, in the seminal case *In re Gault*, the Court extended the due process protections afforded to juveniles to include the right to counsel, to confront witnesses, to protect against self-incrimination, and to timely notification of the allegations pending against them.[22] It thereafter determined in *In re Winship* and *Breed v. Jones* that the standard of reasonable doubt and protections against double jeopardy also apply to juvenile adjudications.[23] While these cases collectively gave juvenile proceedings the semblance of adult court prosecutions, the Supreme Court has consistently reaffirmed the principle that juveniles are entitled to different treatment.[24] In a series of decisions, for example, it ruled that distinctions between juvenile and adult court proceedings justified the inapplicability of the Sixth Amendment right to a jury and the imposition of special confidentiality requirements.[25]

By the early 1980s, however, states began to reverse course.[26] Juvenile crime appeared to be escalating at an alarming rate; the number of juvenile arrests for violent offenses between 1980 and 1994 increased by 64%.[27] In response, states nationwide lowered the age for exclusive jurisdiction, increased the number of eligible offenses for transfer, and filed more delinquency petitions.[28] Illinois enacted its first mandatory transfer statute in 1982, which allowed juveniles age fifteen and older to be automatically prosecuted in adult court for murder, criminal sexual assault, and robbery with a firearm.[29] The legislature continued to broaden the mandatory transfer statute over the years, expanding its applicability to nonviolent drug and weapon offenses, as well as to certain serious crimes committed by thirteen and fourteen-year-olds.[30]

As the perceived spike in juvenile crime continued into the 1990s, so did calls for a "tough on crime" approach. However, the decade was fraught with inaccurate projections of national crime trends and inflammatory rhetoric that proved to be effective forms of propaganda. Between 1983 and 1995, the number of delinquency petitions filed in Illinois

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[22] *In re* Gault, 387 U.S. 1, 33-34, 41, 55, 57 (1967).
[23] *In re* Winship, 397 U.S. 358, 364 (1970); Breed v. Jones, 421 U.S. 519, 541 (1975).
[24] Snyder & Sickmund, *supra* note 9, at 3, 7-8.
[25] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that the right to trial by jury does not apply to juvenile proceedings); *see* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105 (1979) (recognizing that "all 50 states have statutes that provide in some way for confidentiality"); *see also* People v. Patterson, 2014 IL 115102, ¶ 106 (explaining that access to juvenile courts is not a constitutional right because the juvenile justice system is a "creature of legislation").
[26] ISHIDA ET AL., *supra* note 4.
[27] JEFFREY BUTTS & JEREMY TRAVIS, URBAN INST. JUST. POL'Y CTR, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2 (2002), https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF.
[28] Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, at 1, 1, https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf; JEFFREY A. BUTTS ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE COURT STATISTICS 1994, at 5 (1996), https://www.ojp.gov/pdffiles/163709.pdf (noting that "[f]rom 1985 to 1994, the number of delinquency cases processed by U.S. juvenile courts increased 41%").
[29] *Automatic Transfer History*, JUV. JUST. INITIATIVE, https://jjustice.org/resources/juvenile-transfer-to-adult-court/automatic-transfer-history/ (last visited Mar. 22, 2021).
[30] ISHIDA ET AL., *supra* note 4, at 5-6, 9 (noting that mandatory transfer also applies to juveniles as young as thirteen for the crime of first degree murder committed during the course of aggravated sexual assault, criminal sexual assault, or aggravated kidnapping).

rose by 59%, while the number of adult court transfers increased by over 1,424% from 1985 to 1994.[31] Despite declining crime rates beginning in 1994, John J. Dilulio Jr., an influential criminologist, warned the following year of an impending influx of violent juvenile crime.[32] He coined the term "superpredator" to describe the new type of juvenile offender on the rise: youth who have "no respect for human life and no sense of the future," and who "kill and maim on impulse."[33] These "fatherless, Godless, and jobless" juveniles, he contended, were the product of "moral poverty."[34] By weaving pejorative terminology into the national discourse, false characterizations were weaponized against marginalized communities, particularly Black men and boys.[35] After years of postulations that Black males are morally bankrupt, it is unsurprising that Black youth, who were once labeled incorrigible superpredators, comprise the majority of commitments to the Illinois Department of Justice (IDJJ) and adult court transfers.[36]

Similar-minded academics echoed Dilulio's prediction, opining that "[t]he overall drop in crime hides the grim truth" and that the country will "likely face a future wave of youth violence that will be even worse than that of the past ten years."[37] Dilulio, who once proclaimed that "[n]o one in academia is a bigger fan of incarceration"[38] than he, projected that 6% of youth—or approximately 270,000 juveniles—would become superpredators by 2010.[39] According to his estimates, the country would "probably need to incarcerate at least 150,000 juvenile criminals in the years just ahead."[40] Media outlets and politicians widely

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[31] Przybylski, *supra* note 7, at 5.
[32] *See* Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT (Nov. 11, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth.
[33] John Dilulio, *The Coming of the Super – Predators*, WASH. EXAM'R (Nov. 27, 1995) [hereinafter Dilulio, *Super – Predators*], https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators.
[34] John Dilulio, *Fill Churches, Not Jails: Youth Crime and "Superpredators,"* BROOKINGS (Feb. 28, 1996), https://www.brookings.edu/testimonies/fill-churches-not-jails-youth-crime-and-superpredators/ (republishing Dilulio's statement submitted to the Senate Judiciary Committee); *see also* John Dilulio, *Moral Poverty*, CHI. TRIB. (Dec. 15, 1995) [hereinafter Dilulio, *Moral Poverty*] ("Moral poverty is the poverty of being without loving, capable, responsible adults who teach you right from wrong. It is the poverty of being without parents and other authorities who habituate you to feel joy at others' joy, pain at others' pain, happiness when you do right, remorse when you do wrong. It is the poverty of growing up in the virtual absence of people who teach morality by their own everyday example and who insist that you follow suit.").
[35] *See* Bogert & Hancock, *supra* note 32 (describing the "superpredator" theory as a "racist trope" that "began a process of allowing us to suspend our feelings of empathy towards young people of color").
[36] *See infra* Part III.
[37] JAMES ALAN FOX, TRENDS IN JUVENILE JUSTICE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 1 (1996), https://www.bjs.gov/content/pub/pdf/tjvfox.pdf; *see also* Philip Yam, *Profile: James Alan Fox*, SCI. AM., Jun. 1996, at 40, 41.
[38] Dilulio, *Super – Predators*, *supra* note 33.
[39] JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 4 (2d ed. 2013).
[40] Dilulio, *Moral Poverty*, *supra* note 34.

popularized Dilulio's commentary, prompting states to pass more legislation that allowed for increased prosecution of juvenile crimes.[41]

Consistent with national trends, Illinois created presumptive transfer as a third avenue to adult court.[42] Under presumptive transfer, a transfer hearing must be held in accordance with *Kent*, but unlike discretionary transfers, a finding of probable cause creates a rebuttable presumption that the juvenile justice system is an improper forum.[43] The provision presumes that juvenile services are unsuitable for repeat juvenile offenders who commit certain serious crimes.[44] Once the burden shifts, a juvenile may rebut this presumption, but only by clear and convincing evidence—a demanding standard to meet.[45] The juvenile bears the burden of proving amenability "to the care, treatment, and training programs available" through the juvenile court by reference to a specified list of factors.[46]

As the turn of the century neared and national juvenile crime rates continued to steadily decline, Dilulio's earlier forecasts faced mounting skepticism. His predictions of a "demographic time bomb" never materialized.[47] Not only did the overall juvenile crime rate decline between 1994 and 2000, but juvenile arrests for murder and burglary dropped by 68% and 51%, respectively.[48] In fact, the rate of violent juvenile crime by 2000 reached its lowest rate since 1980.[49]

Juvenile justice organizations began reevaluating the efficacy of Illinois' punitive policies in the mid to late 1990s, advocating for structural reform.[50] Illinois policymakers acknowledged the growing demands for reform by passing the Illinois Juvenile Justice Reform Act of 1998.[51] It amended the purpose and policy statement of the Juvenile Court Act to incorporate the principles of restorative justice, emphasizing the importance of accountability, community safety, and competency development.[52] Eight years later, the legislature created the IDJJ as an independent agency charged with overseeing the treatment and services of adjudicated youth.[53] Prior to this, the Illinois Department of Corrections managed all juvenile detention facilities.[54] In more recent years, the state not only increased the age of juvenile court jurisdiction to seventeen years for misdemeanors

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[41] Bogert & Hancock, *supra* note 32.
[42] Safe Neighborhood Law, Pub. Act 88-680, 1995 Ill. Laws 107 (amending the Juvenile Court Act of 1987 to include presumptive transfers).
[43] 705 ILL. COMP. STAT. ANN. 405/5-805(2) (West, Westlaw through P.A. 101-653).
[44] *Id.* § 5-805(2).
[45] *Id.* § 5-805(2)(b).
[46] *Id.* § 5-805(2)(b).
[47] Dilulio, *Super – Predators*, *supra* note 33; *see* Bogert & Hancock, *supra* note 32.
[48] BUTTS & TRAVIS, *supra* note 27, at 4.
[49] *Id.* at 3.
[50] James R. Coldren Jr., *Juvenile Justice Reform Takes Hold in Illinois*, JUST. RES. & STAT. ASS'N (2006) https://www.jrsa.org/pubs/forum/full-articles/juvenile-justice-reform.pdf.
[51] BOSTWICK, *supra* note 2.
[52] *Id.* at 1-2.
[53] 730 ILL. COMP. STAT. ANN. 5/3-2.5-5 (West, Westlaw current through P.A. 101-673) (indicating an effective date of June 1, 2006).
[54] Child. & Fam. Just. Ctr., *Restoring the State Legacy of Rehabilitation and Reform*, 1 CMTY. SAFETY & FUTURE ILL.' YOUTH PRISONS, Jan. 2018, at 1, 3, https://www.law.northwestern.edu/legalclinic/cfjc/documents/CFJC%20Youth%20Prison%20Brief%20Vol%201%20FINAL.pdf.

and felonies, but also reduced the population of youth in juvenile detention centers by 87% since 1999.[55]

The state's transfer scheme, however, has withstood numerous constitutional attacks waged against it over the years.[56] It remained unmarred until 2016, when the legislature passed a bipartisan bill abolishing all mandatory transfers and limiting the scope of presumptive transfers.[57] To prevail on a presumptive transfer petition under the revised statute, the state must allege that: (1) the juvenile committed a forcible felony,[58] (2) the juvenile was previously adjudicated or found guilty of a forcible felony, and (3) the instant offense was "committed in furtherance of criminal activity by an organized gang."[59] Although it was the first bill of its kind to comprehensively reform the state's juvenile transfer laws, it left the discretionary transfer provision fully intact.[60] Under this provision, a juvenile court possesses the authority to transfer a juvenile as young as thirteen years old to adult court for *any* offense, provided a *Kent* hearing is held.[61]

While adjudication in juvenile court "is not a matter of constitutional right,"[62] the very creation of the juvenile justice system evinces Illinois' intent to provide unique protection for its most vulnerable youth. Consequently, "[i]f something about children compels the existence of juvenile courts, the lack of symmetry between the irrebuttable presumption of majority and the rebuttable presumption of minority should be disturbing."[63] The state's discretionary transfer mechanism, in particular, confronts this position.

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[55] Pub. Act 95-1031, 2008 Ill. Laws 3971; Pub. Act 98-61, 2013 Ill. Laws 1709; ILL. DEP'T OF JUV. JUST., 2019 ANNUAL REPORT 1, https://www2.illinois.gov/idjj/Documents/IDJJ%20Annual%20Report%202019.pdf (noting that 2,174 juveniles were held in detention centers in 1999, while 286 juveniles were detained in 2019).

[56] *See* People v. M.A., 529 N.E.2d 492, 497 (Ill. 1988) (finding that the mandatory transfer of juveniles charged with weapon offenses on school grounds does not violate due process guarantees); *see* People v. R.L., 634 N.E.2d 733, 735 (Ill. 1994) (holding that expansion of the mandatory transfer statute to minors charged with committing drug offenses near public housing property does not violate equal protection); *see* People v. Beltran, 327 765 N.E.2d 1071, 1076 (Ill. App. Ct. 2002) (concluding that *Apprendi* is not implicated in presumptive transfers because such hearings are dispositional, not adjudicatory); *see* People v. Patterson, 2014 IL 115102, ¶¶ 97, 106, 127 (rejecting due process and Eighth Amendment challenges to the mandatory transfer statute).

[57] Pub. Act 99-258, 2015 Ill. Laws 4718 (amending 705 ILL. COMP. STAT. 405/5-130(1)(a), 5-805).

[58] The following offenses constitute forcible felonies under Illinois law: "treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILL. COMP. STAT. ANN. 5/2-8 (West, Westlaw through P.A. 101-653).

[59] 705 ILL. COMP. STAT. ANN. 405/5-805(2)(a) (West, Westlaw through P.A. 101-653).

[60] *Id.* § 5-805(3).

[61] *Id.* § 5-805(3)(a).

[62] People v. Fiveash, 2015 IL 117669, ¶ 21; *see also* People v. Jiles, 251 N.E.2d 529, 530-31 (Ill. 1969) (noting that "while it may be highly desirable to commit to the judge of a specialized juvenile court the determination of whether or not a particular juvenile is to be prosecuted criminally, we are aware of no constitutional requirement that a State must do so").

[63] ABA & INST. OF JUD. ADMIN., JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO TRANSFER BETWEEN COURTS 3 (1980), https://www.ncjrs.gov/pdffiles1/ojjdp/82487.pdf.

II. AGE OF CRIMINAL RESPONSIBILITY

Criminal responsibility refers to the extent to which a person may be deemed "answerable" for a criminal act.[64] With the exception of strict liability offenses, criminal responsibility is a requisite for the imposition of criminal liability.[65] It is widely recognized as being contingent upon the wrongdoer's ability to understand right from wrong.[66] While the existence of such an ability may be easy to discern in mature adults, the same does not hold true for children and adolescents.

Current discrepancies among states are illustrative; there is no consensus on the precise age at which a juvenile is presumed to acquire this understanding. At present, twenty-eight states—including Illinois—do not prescribe a minimum age for adjudication in juvenile court.[67] Among the twenty-two states that do, thirteen set the minimum age at

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[64] *Responsibility*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[65] Orvill C. Snyder, *Criminal Responsibility*, 1962 DUKE L.J. 204, 204 (1962).
[66] *Id.* at 208, 210.
[67] ALA. CODE § 12-15-102 (Westlaw through Act 2021-238); ALASKA STAT. ANN. § 47.12.022 (West, Westlaw through 2021 Sess. Ch. 1); DEL. CODE. ANN. tit. 10, § 901 (West, Westlaw through 2021-2022 Sess. Ch. 18); FLA. STAT. ANN. § 985.03 (West, Westlaw through 2021 Sess. Ch. 6); GA. CODE. ANN. § 15-11-2(10) (West, Westlaw through Laws 2021, Act 10); HAW. REV. STAT. ANN. § 571-11 (West, Westlaw through 2021 Sess., Act 7); 705 ILL. COMP. STAT. ANN. 405/5-105 (West, Westlaw through P.A. 102-3 of 2021 Sess.); IDAHO CODE ANN. § 20-502 (West, Westlaw through 2021 Sess. Ch.1-223, 225); IND. CODE. ANN. § 31-37-1-1 (West, Westlaw through 2021 First Sess.); IOWA CODE ANN. § 232.3 (West, Westlaw through Apr. 12, 2021 legis.); KY. REV. STAT. ANN. § 610.010 (West, Westlaw through Apr. 12, 2021 legis.); ME. REV. STAT. ANN. tit 15, § 3003 (Westlaw through 2021 First Sess. Ch. 31); MICH. COMP. LAWS ANN. § 712A.2 (West, Westlaw through P.A. 2021, No. 8 of 2021 Sess.); MO. ANN. STAT. § 211.031 (West, Westlaw through 2021 First Sess.); MONT. CODE ANN. § 41-5-103 (West, Westlaw through 2021 Sess. Chs. effective Apr. 11, 2021); N.H. REV. STAT. ANN. § 169-B:2 (Westlaw through 2020 Sess.); N.J. STAT. ANN. § 2A:4A-22 (West, Westlaw through 2021 legis. Ch. 47, J.R. No. 1); N.M. STAT. ANN. § 32A-1-4 (West, Westlaw through 2021 First Sess. Ch. 140 & 2021 First Special Sess. Ch. 4); OHIO REV. CODE ANN. § 2151.011 (West, Westlaw through Files 1-4, 6-8 of 2021-2022 Sess.); OKLA. STAT. ANN. tit. 10A, § 1-1-105 (Westlaw through 2021 First Sess. Ch. 197); OR. REV. STAT. ANN. § 419C.005 (West, Westlaw through 2020 Sess.); 14 R.I. GEN. LAWS ANN. § 14-1-3 (West, Westlaw through 2021 Sess. Ch. 4); S.C. CODE ANN. § 63-19-20 (Westlaw through 2021 Act No. 18); TENN. CODE ANN. § 37-1-102 (West, Westlaw through 2021 First Sess. Mar. 23, 2021); UTAH CODE ANN. § 78A-6-105 (West, Westlaw through 2021 Sess. Apr. 30, 2021); VA. CODE. ANN. § 16.1-228 (West, Westlaw through 2021 Sess.); W. VA CODE ANN. § 49-4-701 (West, Westlaw through 2021 Sess. Mar. 25, 2021); WYO. STAT. ANN. § 14-6-201 (West, Westlaw through 2021 Sess. Apr. 21, 2021); *see also In re* Greene, 390 N.E.2d 884, 887 (Ill. 1979) ("We hold that age is not an element which must be proved beyond a reasonable doubt in order to support an adjudication of delinquency. Delinquency is not a crime codified under our criminal laws. Rather, it is the commission of an otherwise unlawful act by one under 17 that triggers the application of the Juvenile Court Act. Age therefore is merely the factor which authorizes the application of the juvenile system." (internal citations omitted)).

ten years old,[68] while the lowest in the country—North Carolina—is set at six years old.[69] Although the lack of uniformity and extraordinarily low bounds for adjudication have raised concerns on an international level, state legislatures have rebuffed calls for reform.[70]

Similar variability is apparent in laws governing adult prosecution of youth. All fifty states have mechanisms in place for adult court transfer, with some allowing prosecution of children as young as ten years old.[71] While the majority has retreated from mandatory or presumptive transfers, forty-four states continue to rely upon discretionary transfer provisions.[72] Of these, thirteen states provide no minimum age for discretionary

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[68] ARIZ. REV. STAT. ANN. § 8-307 (Westlaw through 2021 First Sess. Apr. 20, 2021); ARK. CODE. ANN. § 9-27-303(15) (West, Westlaw through 2021 Sess. Act 564); COLO. REV. STAT. ANN. § 19-2-104 (West, Westlaw through 2021 First Sess. Apr. 26, 2021); KAN. STAT. ANN. § 38-2302(n) (West, Westlaw through 2021 Sess. Apr. 22, 2021 legis.); LA. CHILD. CODE ANN. art. 804(3) (Westlaw through 2020 Second Extraordinary Sess.); MINN. STAT. ANN. § 611.14 (West, Westlaw through 2021 Sess. Apr. 27, 2021); MISS. CODE ANN. § 43-21-105 (West, Westlaw through 2021 Sess. Apr. 20, 2021); N.D. CENT. CODE ANN. § 12.1-04-01 (West, Westlaw through 2021 Sess. Apr. 22, 2021); 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West, Westlaw through 2021 Sess. Act 9); S.D. CODIFIED LAWS § 26-8C-2 (Westlaw through 2021 Sess. Mar. 25, 2021); TEX. FAM. CODE ANN. § 51.02(2) (West, Westlaw through 2019 Sess.); VT. STAT. ANN. tit. 33, § 5102(2)(C) (West, Westlaw through 2021-2022 Sess. Acts 1-9, M-1) (but allowing for adjudication of a minor regardless of age for the crime of murder); WIS. STAT. ANN. § 938.12 (West, Westlaw through 2021 Act 7).

[69] N.C. GEN. STAT. ANN. § 7B-1501(7)(a) (West, Westlaw through 2020 Sess.).

[70] Committee on the Rights of the Child, United Nations Convention on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, U.N. Doc CRC/C/GC/24, at 6 (Sept. 18, 2019) ("States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances . . . .").

[71] Griffin et al., *supra* note 5, at 2-4; *e.g.*, IOWA CODE ANN. § 232.45(7)(a)(1) (West, Westlaw through 2021 Sess.); *e.g.*, WIS. STAT. ANN. § 938.183(1)(am) (West, Westlaw through 2019 Act 186).

[72] ALA. CODE § 12-15-203 (Westlaw through Act 2021-118); ALASKA STAT. ANN. § 47.12.100 (West, Westlaw through 2020 Second Sess.); ARIZ. REV. STAT. ANN. § 8-327 (Westlaw through 2021 First Sess.); ARK. CODE. ANN. § 9-27-318 (West, Westlaw through 2021 Sess. Act 151); CAL. WELF. & INST. CODE § 707 (West, Westlaw through 2021 Sess. Ch. 9); COLO. REV. STAT. ANN. § 19-2-518 (West, Westlaw through 2021 First Sess. Ch. 7); CONN. GEN. STAT. ANN. § 46b-127(a)(3) (West, Westlaw through 2020 Sess.); DEL. CODE. ANN. tit. 10, § 921 (West, Westlaw through 2020-2021 Sess. Ch. 3); FLA. STAT. ANN. § 985.556 (West, Westlaw through 2020 Sess.); GA. CODE. ANN. § 15-11-561 (West, Westlaw through 2020 Legis. Sess.); HAW. REV. STAT. ANN. § 571-22 (West, Westlaw through 2020 Sess.); IDAHO CODE ANN. § 20-508 (West, Westlaw through 2021 First Sess. Ch. 13); 705 ILL. COMP. STAT. ANN. 405/5-805(3); IND. CODE. ANN. § 31-30-3-6 (West, Westlaw through 2020 Second Sess.); IOWA CODE ANN. § 232.45 (West, Westlaw through 2021 Sess. Feb. 23, 2021 legis.); KAN. STAT. ANN. § 38-2347 (West, Westlaw through 2021 Sess. Jan. 25, 2021 legis.); KY. REV. STAT. ANN. § 635.020 (West, Westlaw through 2021 Sess. Ch. 8); LA. CHILD. CODE ANN. art. 857 (Westlaw through 2020 Sess.); ME. REV. STAT. ANN. tit. 15, § 3101 (Westlaw through 2021 First Sess. Ch. 20); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06 (West, Westlaw through 2021 Sess. Feb. 15, 2021 legis.); MICH. COMP. LAWS ANN. § 712A.4 (West, Westlaw through P.A. 2020, No. 402); MINN. STAT. ANN. § 260B.125 (West, Westlaw through 2021 Sess. Feb. 13, 2021 legis.); MISS. CODE ANN. § 43-21-157 (West, Westlaw through 2021 Feb. 8, 2021 legis.); MO. ANN. STAT. § 211.071 (West, Westlaw through 2020 Sess.); MONT. CODE ANN. § 41-5-203 (West, Westlaw through 2021

transfer, opting instead to leave the criminal responsibility determination up to the court or the prosecution.[73] Among those specifying an age, nineteen states fixed the minimum age at fourteen years old,[74] while the lowest are set at twelve years old.[75] Illinois falls in the middle; a child must be at least thirteen years of age to be eligible for transfer.[76] This pattern of inconsistent line drawing across the country invites skepticism as to the rationale behind these age determinations.

Unlike modern approaches to juvenile criminal responsibility, the common law infancy defense epitomized the understanding that youthfulness may reduce, if not completely absolve, a juvenile's culpability. By using age as a proxy for responsibility, the infancy defense operated on the assumption that some youth, by virtue of their age, are unable to "grasp the moral ramifications of their behavior."[77] This defense created a presumption that children under seven years old are *doli incapax*, or "incapable of

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Sess. Chs. effective Feb. 18, 2021); NEV. REV. STAT. ANN. § 62B.390 (West, Westlaw through 2020 Special Sess.); N.H. REV. STAT. ANN. § 169-B:24 (Westlaw through 2020 Sess.); N.J. STAT. ANN. § 2A:4A-26.1 (West, Westlaw through 2020 Legis. Sess., Ch. 146, J.R. No. 6); N.C. GEN. STAT. ANN. § 7B-2200 (West, Westlaw through 2020 Sess.); N.D. CENT. CODE ANN. § 27-20-34 (West, Westlaw through 2021 Sess. Mar. 18, 2021); OHIO REV. CODE ANN. § 2152.10(B) (West, Westlaw through 2019-2020 Sess.); OR. REV. STAT. ANN. § 419C.352 (West, Westlaw through 2020 Sess.); 42 PA. STAT. AND CONS. STAT. ANN. § 6355 (West, Westlaw through 2021 Sess. Act 1); 14 R.I. GEN. LAWS ANN. § 14-1-7 (West, Westlaw through 2020 Second Sess. Ch. 79); S.C. CODE ANN. § 63-19-1210(4),(5),(9),(10) (Westlaw through 2020 Sess.); S.D. CODIFIED LAWS § 26-11-4 (Westlaw through 2021 Sess. Feb. 17, 2021); TENN. CODE ANN. § 37-1-134 (West, Westlaw through 2021 First Extraordinary Sess. Feb. 3, 2021); TEX. FAM. CODE ANN. § 54.02 (West, Westlaw through 2019 Sess.); UTAH CODE ANN. § 78A-6-703.3 (West, Westlaw through 2020 Sixth Special Sess.); VT. STAT. ANN. tit. 33, § 5204 (West, Westlaw through 2021-2022 Sess. Acts 1-2); VA. CODE. ANN. § 16.1-269.1 (West, Westlaw through 2020 Sess. cc. 1 & 2); WASH. REV. CODE ANN. § 13.40.110 (West, Westlaw through 2021 Sess. Ch. 5); W. VA. CODE ANN. § 49-4-710 (West, Westlaw through 2021 Sess. Mar. 16, 2021 legis.); WIS. STAT. ANN. § 938.18 (West, Westlaw through 2019 Act 186); WYO. STAT. ANN. § 14-6-237 (West, Westlaw through 2020 Sess.).

[73] ALASKA STAT. § 47.12.100; ARIZ. REV. STAT. ANN. § 8-327; HAW. REV. STAT. ANN. § 571-22; IDAHO CODE ANN. § 20-509; ME. REV. STAT. ANN. tit. 15, § 3101; MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06; N.H. REV. STAT. ANN. § 169-B:24; 1956 R.I. GEN. LAWS ANN. §§ 14-1-7, 14-1-7.1; S.D. CODIFIED LAWS § 26-11-4; TENN. CODE ANN. § 37-1-134; WASH. REV. CODE ANN. § 13.40.110; W. VA CODE ANN. § 49-4-710; WYO. STAT. ANN. § 14-6-237.

[74] ALA. CODE § 12-15-203; ARK. CODE. ANN. § 9-27-318; DEL. CODE. ANN. tit. 10, § 1010; FLA. STAT. ANN. § 985.556; IND. CODE. ANN. § 31-30-3-2; IOWA CODE ANN. § 232.45; KAN. STAT. ANN. § 38-2347; KY. REV. STAT. ANN. § 635.020; LA. CHILD. CODE ANN. art. 857; MICH. COMP. LAWS ANN. § 712A.4; MINN. STAT. ANN. § 260B.125; N.D. CENT. CODE ANN. § 27-20-34; OHIO REV. CODE ANN. § 2152.10; 42 PA. STAT. AND CONS. STAT. ANN. § 6355; S.C. CODE ANN. § 63-19-1210; TEX. FAM. CODE ANN. § 54.02; UTAH CODE ANN. § 78A-6-703.3; VA. CODE. ANN. § 16.1-269.1; WIS. STAT. ANN. § 938.18.

[75] COLO. REV. STAT. ANN. § 19-2-518; MO. ANN. STAT. § 211.071; MONT. CODE ANN. § 41-5-206; VT. STAT. ANN. tit. 33, § 5204.

[76] 705 ILL. COMP. STAT. ANN. 405/5-805(3)(a).

[77] Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 35 (2007); *see also* LAFAVE, *supra* note 21, at § 9.6a ("The early common law infancy defense was based upon an unwillingness to punish those thought to be incapable of forming criminal intent and not of an age where the threat of punishment could serve as a deterrent.").

committing a crime."[78] The presumption also applied to those between the ages of seven and fourteen, but was rebuttable upon a clear showing of evidence to the contrary.[79] Children over fourteen years, however, could be held responsible for their crimes, subject to the state's ability to prove the required level of intent beyond a reasonable doubt.[80]

Although the infancy defense fits within, and in fact facilitates, the goals of the juvenile justice system, courts across the country have almost uniformly rejected its application to juvenile proceedings.[81] Some have concluded that the constitutional protections instituted by the Supreme Court were sufficient in themselves to safeguard against improper prosecution, while others have found that a juvenile court's focus should be on the child's state of mind (*mens rea*), rather than on capacity.[82] Irrespective of the precise reasoning behind each court's decision, rejection of the presumption of incapacity necessarily allows for the impermissible inference that "young children are capable of formulating a criminal intent and to use that inference, explicitly or implicitly, as a basis for finding these children delinquent."[83]

As mentioned earlier, modern jurisprudence has reduced the criminal responsibility inquiry into a sole right-versus-wrong distinction. By contrast, the infancy defense doubled the state's burden by not only requiring proof that the child "had discretion to judge between good and evil," but also strong evidence demonstrating that "he *understood* what he did."[84] Proof of the latter element commands that the child could "appreciate the nature and consequences of his actions."[85] If a child is unable to fully comprehend the gravity and irreversibility of his actions, then he could not have intended the outcome in a manner consistent with the mental state required by the charged offense. In other words, the defense negates the need for inquiry into *mens rea* because it presumes children are incapable of forming it in the first place.

While the presumption of incapacity extended only to juveniles below the age of fourteen, its underlying reasoning is illustrative of how the state's discretionary transfer provision oversimplifies the criminal responsibility analysis. By allowing a child as young as thirteen to be transferred to adult court, the provision not only assumes the child's ability to form the required *mens rea* to be adjudicated a delinquent, but also that the child can in fact form the identical *mens rea* as his adult counterpart. Cognitive research on juvenile

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[78] 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, 162 (2000) (citing SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 18-19 (1736)); *Doli incapax*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[79] SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 26-27 (1736); LAFAVE, *supra* note 21, at § 9.6a.

[80] *See* HALE, *supra* note 79, at 18; *see also* Kaban & Orlando, *supra* note 77, at 36.

[81] Bazelon, *supra* note 78, at 161; *but see,* MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-05 (West, Westlaw through 2021 Sess. Apr. 13, 2021) (recognizing a presumption of incapacity as a result of infancy for children younger than seven years old); WASH. REV. CODE ANN. § 9A.04.050 (West, Westlaw through 2021 Sess. Ch. 82) (applying a presumption of incapacity to children twelve years and younger, but noting that the presumption is rebuttable with respect to those between the ages of eight and twelve years old).

[82] Bazelon, *supra* note 78.

[83] *Id.*

[84] *Id.* at 169; HALE, *supra* note 79, at 27.

[85] Bazelon, *supra* note 78, at 169.

brain function has effectively undermined both of these assertions.[86] Brain development during adolescence is highly dynamic; structural and neurobiological changes result in increased impulsivity, risk-taking, emotional instability, and vulnerability to peer influence.[87] Studies confirm that, on average, the prefrontal cortex does not fully mature until age twenty-five.[88] Escalation of delinquent behavior between the ages of twelve and seventeen is well-documented both domestically[89] and internationally.[90] Criminologists refer to this phenomenon as the "age-crime curve" because delinquency typically increases during adolescence and peaks at about seventeen years of age, before decreasing in adulthood.[91] Indeed, the majority of IDJJ commitments in 2018 involved youth between the ages of fourteen and seventeen, with the latter retaining the highest detention rate at 16.8 per 1,000 juveniles.[92]

Understanding normative distinctions between right and wrong is distinguishable from appreciating the ramifications of criminal behavior. Without fully-developed faculties governing foresight of risks and consequences, emotional reactivity, or objective judgment, juveniles are inherently less culpable than their adult counterparts. It is counterproductive to rely on age alone to determine capacity; the court must also view juvenile criminal responsibility in the context of cognitive development and social environment.

At present, no comparable defense to the common law incapacity presumption exists. Assuming that some youth between the ages of thirteen and seventeen are suitable for adult court prosecution compromises the state's intent to provide special protection for its youth. Contemporary understandings of culpability command a paternalistic and rehabilitative approach to juvenile justice.

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[86] *See* Jenny E. Carrol, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 591 (2016) (arguing that "[f]or the mens rea element to serve its designated role in the criminal justice process as the measure of guilt, it must reflect the mental state, with all its comparative cognitive deficiencies, of the adolescent it considers"); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1010-16 (2003) (discussing findings from studies on adolescent brain development and arguing that " the developmental immaturity of adolescence mitigates culpability").

[87] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS COGNITIVE SCI. 63, 63-65 (2014), https://doi.org/10.1016/j.tics.2013.11.002.

[88] Mariam Arain et al., *Maturation of The Adolescent Brain*, 2013 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451, https://doi.org/10.2147/NDT.S39776 (discussing the neurobiological changes underlying brain maturation during adolescence).

[89] Cohen & Casey, *supra* note 87, at 63-64.

[90] *See, e.g.*, Susan McVie, *Patterns of Deviance Underlying the Age-Crime Curve: The Long Term Evidence*, 7 PAPERS FROM 2004 BRITISH CRIMINOLOGY CONF., at 1, 1-2, https://www.britsoccrim.org/volume-7/.

[91] Cohen & Casey, *supra* note 87, at 63.

[92] ILL. JUV. JUST. COMM'N, ILLINOIS JUVENILE DETENTION DATA REPORT. CALENDAR YEAR 2018, at 23 (2020) [hereinafter IJJC, JUVENILE DETENTION DATA REPORT], http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/IJJC%20CY%202018%20Annual%20Illinois%20Juvenile%20Detention%20Data%20Report%20Final.pdf.

III. THE DOWNFALLS OF DISCRETION: IMPLICIT BIAS IN CRIMINAL JUSTICE

The provision's central flaw is evident in its name—*discretionary* transfer. Once an assistant state's attorney elects to file a petition, the final transfer determination remains within the sole discretion of the court.[93] While affording broad discretion ensures that these decision-making processes are not unduly hindered by inflexible standards, neither prosecutors nor judges are immune from implicit bias.[94] Assuming otherwise ignores the realities of neurobiology and the prison industrial complex. As the amount of discretion accorded increases, so does the potential for abuse. Unfortunately, the impacts of broad discretion—and the opportunities it affords for bias and abuse—are disproportionately borne by youth of color.

Black youth are overrepresented both in the juvenile justice system as a whole and in transfer decisions.[95] Although Black youth represent only one-fifth of the youth population of Illinois, they comprise 85% of youth in the juvenile justice system.[96] Disproportionate contact is apparent at all stages; Black youth are substantially more likely than white youth to be arrested, detained, and committed to the IDJJ.[97] Despite steady decreases in the number of youth in IDJJ custody in recent years, the remaining population is 71% youth of color.[98] Due to incomplete and inconsistent reporting, however, data collection on transfers remains nominal.[99] Nevertheless, available information reveals "stark patterns" of racial and ethnic disparities in adult court transfers.[100] From 1975 to 1981, 68% of youth discretionally transferred each year were Black.[101]

While these disparities are a symptom of systemic racism and cannot be reduced to a simple causal relationship, the impact of implicit bias on official decision-making should not be overlooked. As opposed to overt forms of racism, implicit bias operates discretely

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[93] KOOY, CHANGING COURSE, *supra* note 13, at 7.
[94] Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. BAR J. 40, 40 (2014).
[95] IJJC, JUVENILE DETENTION DATA REPORT, *supra* note 92, at 11-12; *FY20 Illinois Juvenile Justice Commission Annual Report*, ILL. DEP'T OF HUM. SERVS., http://www.dhs.state.il.us/page.aspx?item=133072 (last visited May 16, 2021).
[96] Leah Varjacques, *Looking Back and Casting Forward: An Emerging Shift for Juvenile Justice in America*, JUV. JUST. INFO. EXCHANGE (Jan. 16, 2013), https://jjie.org/2013/01/16/looking-back-casting-forward-emerging-shift-for-juvenile-justice-america/.
[97] ILL. JUV. JUST. COMM'N, DMC: HIGHLIGHTS FROM THE ASSESSMENT OF RACIAL AND ETHNIC DISPARITIES IN ILLINOIS' JUVENILE JUSTICE SYSTEM 1 (2013), http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/DMC%20in%20the%20IL%20Juvenile%20Justice%20System%20-%20Fact%20Sheet.pdf.
[98] ILL. DEP'T OF JUV. JUST., *supra* note 55, at 1-2 (indicating that out of 289 juveniles detained in IDJJ facilities in 2019, 205 were Black).
[99] ILL. JUV. JUST. RSCH. & INFO. CONSORTIUM, TRANSFER DATA IN ILLINOIS: GAPS AND OPPORTUNITIES 1 (2014), http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/BRIEFING%20SERIES%20-%20TRANSFER%20DATA.pdf.
[100] *Id.*
[101] ELIZABETH KOOY, JUV. JUST. INITIATIVE, WHEN JUVENILE COURT IS THE DEFAULT STARTING PLACE FOR YOUTH: A REVIEW OF OUTCOMES FOLLOWING 2015 AUTOMATIC TRANSFER CHANGES IN COOK COUNTY 8 (2020) [hereinafter KOOY, WHEN JUVENILE COURT IS THE DEFAULT] https://jjustice.org/wp-content/uploads/Transfer-Report-2020.pdf; *see also* ISHIDA ET AL., *supra* note 4, at 10.

within the subconscious.[102] Its hidden nature renders it particularly insidious; it is "a kind of distorting lens that's a product of both the architecture of our brain and the disparities in our society."[103] The human brain is hardwired for efficiency.[104] It uses mental shortcuts, or heuristics, to categorize perceptions and allow for quick inferences.[105] These shortcuts, however, create a framework for harboring biases that influence judicial outcomes.[106]

Studies have confirmed that legal actors, much like the general public, have biases that create harmful generalizations and perpetuate stereotypes.[107] There is evidence that prosecutors are more likely to file charges against Black suspects[108] and are less likely to reduce charges during plea negotiations.[109] Judges, who are ordinarily "revered as the pinnacle of objectivity," likewise hold unconscious beliefs that result in unfair treatment and disproportionate punishment.[110] These outcomes have been attributed to a variety of theories, including proclivities to recall case facts in racially-biased ways[111] and to associate Black individuals with aggression, criminality, and weapons.[112] Empirical research suggests that justice system stakeholders tend to attribute more negative characteristics to Black adults and youth than to their white counterparts.[113]

Such assumptions may impact prosecutorial discretion at every phase, from deciding whether to charge a juvenile and what charges to bring, to deciding whether to file a transfer petition.[114] These determinations require selecting a theory of guilt, evaluating the materiality of evidence for exculpatory disclosure, and ascertaining the

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[102] JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 32 (2019).
[103] *Id.* at 6.
[104] *Id.* at 24.
[105] Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 J. AM. JUDGES ASS'N 114, 114 (2013), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1428&context=ajacourtreview.
[106] *Id.*
[107] Hyman, *supra*, note 94.
[108] Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012).
[109] *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/ (citing Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C.L. REV. 1187 (2018)).
[110] Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 63, 110 (2017), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1345&context=flr.
[111] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 376-79 (2007), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1336&context=dlj.
[112] Sean Darling-Hammond, *Designed to Fail: Implicit Bias in Our Nation's Juvenile Courts*, 21 U.C. DAVIS J. JUV. L. & POL'Y 169, 181-83 (2017).
[113] ZENOBIA BELL & ANA RASQUIZA, NAT'L CTR. FOR YOUTH LAW, IMPLICIT BIAS AND JUVENILE JUSTICE: A REVIEW OF THE LITERATURE 3, 7 (2014), https://youthlaw.org/wp-content/uploads/2015/06/Implicit-Bias-Juvenile-Justice-Lit-Review-for-ncyl-web3.pdf.
[114] Smith & Levinson, *supra* note 108, at 805.

relative viability of potential defenses—all of which necessarily entail subjective judgments.[115]

Of course, each decision by the prosecutor must then be countered by defense counsel, who is most likely a state-appointed public defender faced with an onerous workload.[116] Zealous advocacy requires time to investigate, gather evidence, and prepare witnesses to testify at the transfer hearing.[117] But public defenders are "forced by circumstances to engage in triage"—that is "determining which clients merit attention and which do not."[118] In absence of objective triage standards, implicit bias may influence the underlying rationales for these decisions.[119] From evaluating ambiguous evidence to determining acceptable sentences, decision-making by public defenders involves a wide degree of discretion and subjective assessment, which in turn can contribute to their own biases.[120]

Studies indicate that the preconceived perceptions of probation officers also impact assessments of appropriate punishment.[121] Probation officers have been found to attribute juvenile crime to internal, negative personality traits of Black youth, but to focus on external, environmental influences when white youth are involved, even after accounting for the severity of the offense and prior history of adjudication.[122] Implicit bias can also be subliminally primed.[123] One study, for example, discovered that police officers and juvenile probation officers who were primed with race-related terms ascribed more negative traits, greater culpability, and increased likelihood of recidivism to two hypothetical youth suspects.[124] In turn, both groups categorically endorsed harsher punishments.[125] Notably, the study further revealed that the participants viewed Black youth as being less vulnerable and impressionable.[126] This type of association presents

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[115] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603-09 (2006), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1232&context=wmlr.

[116] L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632 (2013), https://www.yalelawjournal.org/pdf/1199_pzeey4t1.pdf.

[117] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt 1 (AM. BAR. ASS'N 2019).

[118] Richardson & Goff, *supra* note 116 (explaining that for most public defenders, "the question is not 'how do I engage in zealous and effective advocacy,' but rather, 'given that all my clients deserve aggressive advocacy, how do I choose among them?'").

[119] *Id.* at 2632-34, 2644-45.

[120] *Id.* at 2635, 2641.

[121] *E.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 557, 567 (1998), https://doi.org/10.2307/2657267 (using 233 narrative reports written by probation officers to evaluate the link between race and the officers' perceptions of juvenile offenders).

[122] *Id.* at 561, 563-64.

[123] Hyman, *supra* note 94, at 41 ("Priming is the 'incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context.'" (quoting John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCH. 230, 230 (1996))).

[124] Sarah Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 483, 499 (2004).

[125] *Id.* at 493.

[126] *Id.* at 500.

grave implications for Black youth in general, and particularly for Black juvenile offenders, as it "trigger[s] the belief that they are adult-like and therefore as blameworthy as adults who commit similar crimes."[127] The tendency to overlook developmental immaturity in nonwhite offenders may indeed be outcome determinative; the Cook County State's Attorney's Office and the Juvenile Probation and Court Services Department often work hand in hand to conduct intake screenings during which the decision is made to charge, divert, or transfer the juvenile to adult court.[128]

Significantly, the language of the discretionary transfer provision renders the transfer determination an exceedingly subjective process. A juvenile court faced with a discretionary transfer petition must engage in a twofold inquiry.[129] First, it must consider an enumerated list of factors set forth by statute.[130] Second, the court must decide whether it is "not in the best interests of the public" to proceed in juvenile court with reference to the preceding factors.[131] So long as probable cause exists to believe the allegations are true, the juvenile court may allow for prosecution under criminal laws.[132] Probable cause, under its ordinary meaning in the criminal context, exists when there is a reasonable ground to believe that a person has committed a crime.[133] This standard affords a wide degree of flexibility, rendering it a precarious threshold in practice. It speaks merely to the "probability of criminal activity" and does not require that such probability "be more likely than not."[134] The Juvenile Court Act does not provide a definition of probable cause specific to the context of juvenile delinquency, let alone adult court transfer hearings.

The Illinois legislature developed this evaluation process to comport with the individualized-hearing requirement imposed by *Kent*.[135] The weight accorded to each factor, however, ultimately undermines any notion of fundamental fairness. The statute directs juvenile courts to give greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to other factors listed in the subsection, including: (1) the age of the minor; (2) any previous abuse or neglect, mental health, or educational history; (3) the advantages of treatment within the juvenile justice system; (4) the minor's willingness to participate meaningfully in available services; and (5) the likelihood of rehabilitation.[136] It also requires courts to prioritize the safety of the public over the juvenile's overall amenability to treatment.[137] By shifting the focus away from pertinent mitigating factors and tipping the scale in favor of adult prosecution, the discretionary transfer provision dilutes the protections of juvenile jurisdiction.

Evaluations of a juvenile's likelihood for recidivism and rehabilitation are complex determinations that require thorough individualized assessments, but often must be

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[127] *Id.*
[128] BOSTWICK, *supra* note 2, at 11.
[129] 705 ILL. COMP. STAT. ANN. 405/5-805(3).
[130] *Id.* § 5-805(3)(b).
[131] *Id.* § 5-805(3)(a).
[132] *Id.*
[133] *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[134] People v. Gocmen, 2018 IL 122388, ¶19.
[135] ISHIDA ET AL., *supra* note 4, at 5.
[136] 705 ILL. COMP. STAT. ANN. 405/5-805(3)(b).
[137] *Id.* § 405/5-805(3)(a).

conducted under time constraints and the pressure of a crowded docket. In Cook County, cases are assigned to juvenile court judges according to the police district in which the charged juvenile resides.[138] Generally speaking, the higher the crime rate for a particular neighborhood, the higher the caseload for that courtroom. As a result of broader social inequities and racially restrictive policies,[139] violent crime tends to be concentrated in communities of color.[140]

In conducting an individualized assessment pursuant to *Kent*, the court may consider a variety of information including social records, psychological evaluations, letters to the court, and the probation office's disposition recommendations.[141] These materials help to compose a holistic picture of the juvenile's life in relation to the charged offense, but deducing a juvenile's prospects for amenability and recidivism necessarily entails subjective predictions of risk. Each judgment centers on "the likelihood of particular outcomes in response to certain conditions that might be imposed by the court."[142]

The statutory inquiry also places more weight on the interests of the public, rather than those of the juvenile. If a court determines that it would not be in the best interests of the public to proceed with juvenile adjudication, it may enter an order for transfer to adult court.[143] While protection of the public is undoubtedly a compelling state interest, this element appears to be a remnant of earlier societal perceptions that being tough on juvenile crime is an effective means of reducing and preventing crime. This strategy, however, incorrectly conflates criminal punishment with public safety. Studies indicate that transfer fails to serve as effective means for either general or specific deterrence.[144] On the contrary, transfer and incarceration have been shown to exacerbate recidivism rates.[145] Transferred youth—particularly those charged with violent offenses—reoffend sooner and with more serious crimes.[146]

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[138] This information is in the possession of the author.
[139] *See* Alana Semuels, *Chicago's Awful Divide*, ATLANTIC (Mar. 28, 2018), https://www.theatlantic.com/business/archive/2018/03/chicago-segregation-poverty/556649/.
[140] CITY OF CHI., OUR CITY, OUR SAFETY: A COMPREHENSIVE PLAN TO REDUCE VIOLENCE IN CHICAGO 8 (2020), https://www.chicago.gov/content/dam/city/sites/public-safety-and-violenc-reduction/pdfs/OurCityOurSafety.pdf.
[141] SHOBHA L. MAHADEV, CHILD. & FAM. JUST. CTR. & NAT'L JUV. DEF. CTR., THE ILLINOIS JUVENILE DEFENDER PRACTICE HANDBOOK 41, 137-38, 150 (2008), https://www.njjn.org/uploads/digital-library/The_Illinois_Juvenile_Defender_Practice_Notebook_NJDC_2008.pdf; *Guide to Juvenile Court*, LAW OFF. OF THE COOK CNTY. PUB. DEF., https://www.cookcountypublicdefender.org/resources/guide-juvenile-court (last visited Apr. 11, 2021).
[142] Edward P. Mulvey & Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, 18 FUTURE OF CHILD., 35, 38 (2008).
[143] 705 ILL. COMP. STAT. ANN. 405/5-805(3)(a).
[144] Redding, *supra* note 28, at 1, 2-4.
[145] *Id.* at 4.
[146] *Id.* at 6; *see also* CAMPAIGN FOR YOUTH JUST., THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 14 (2007), http://www.justicepolicy.org/images/upload/07-03_C4YJConsequences_JJ.pdf.

IV. ADULT COURT PUNISHMENT

A. The Case for Reverse Waiver

Commit an adult crime, serve adult time. Once juvenile court jurisdiction is waived, the youth's course is set; Illinois provides no recourse for a counter-transfer, or "reverse waiver," by the receiving adult court.[147] Reverse waiver statutes permit juveniles to challenge the adult court's jurisdiction.[148] If a juvenile's petition is granted, the adult court will transfer the case to juvenile court for proper disposition.[149]

States are split evenly on the issue of reverse waiver.[150] Most commonly, states with reverse waiver provide recourse only for juveniles against whom the charges originated in criminal court.[151] Opponents, however, contend that this type of provision conflicts with the juvenile justice system because it operates on the presumption that adult courts may exercise jurisdiction over minors unless affirmatively challenged.[152] Rather, waiver mechanisms should "institutionalize a presumption in favor of juvenile court jurisdiction."[153] In other words, a juvenile ought to automatically fall under the authority of the juvenile system.

Only a few states allow reverse waiver in cases where charges were initiated in juvenile court and transferred after a hearing.[154] Advocates argue that waiver provisions are necessary safeguards from unwarranted criminal prosecution, while critics assert that they allow for an adult court to arbitrarily override the determination of a juvenile court judge, who has the knowledge and experience necessary to make these decisions.[155]

There is considerable variation in the application of standards among states with reverse waiver provisions. Some require the contesting juvenile to prove by a preponderance of the evidence that waiver is in the best interests of the public or child,[156] while others demand this showing by clear and convincing evidence[157] or do not prescribe a particular burden at all.[158]

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[147] ISHIDA ET AL., *supra* note 4, at 9.
[148] PATRICK GRIFFIN, NAT'L CTR. FOR JUV. JUST., DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM 1 (2008), http://www.modelsforchange.net/publications/181.
[149] *Id.* at 4.
[150] *Id.* at 2.
[151] *Id.* at 20.
[152] *Id.* at 21.
[153] *Id.*
[154] *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-127(g) (West, Westlaw through 2021 Sess. Mar. 31, 2021); MISS. CODE ANN. § 43-21-157(8) (West, Westlaw through 2021 Sess. Apr. 20, 2021); NEV. REV. STAT. ANN. § 62B.390(5) (West, Westlaw through 2021 Sess. Apr. 21, 2021); TENN. CODE ANN. § 37-1-159(e)(1) (West, Westlaw through 2021 First Sess. Apr. 7, 2021).
[155] ABA & INSTIT. OF JUD. ADMIN., *supra* note 63, at 20-21.
[156] *See, e.g.,* MD. CODE ANN., CRIM. PROC. § 4-202(b)(3) (West, Westlaw through 2021 Sess. Apr. 13, 2021); 42 PA. STAT. AND CONS. STAT. ANN. § 6322 (West, Westlaw through 2021 Sess. Act 10).
[157] *See, e.g.,* WIS. STAT. ANN. § 938.183 (West, Westlaw through 2021 Act 19).
[158] *See, e.g.,* COLO. REV. STAT. ANN. § 19-2-517 (West, Westlaw through 2021 First Sess. May 4, 2021); DEL. CODE. ANN. tit. 10, § 1011(b) (West, Westlaw through 2021-2022 Sess. Ch. 18).

In absence of a reverse waiver mechanism in Illinois, a reversal of transfer is warranted solely if an appellate court determines that the juvenile court's transfer constituted an abuse of discretion,[159] which occurs only when the decision was "arbitrary, fanciful or unreasonable or where no reasonable man would" accept the court's view.[160] For such a finding, the record ought to reflect that the juvenile court gave "virtually no consideration" to the statutory factors.[161]

Illinois, like most states, does not allow for immediate review of transfer determinations, because transfer orders are not final judgments and therefore are not appealable.[162] The contesting juvenile must instead wait until a final judgment is entered by the adult court. This is of particular concern in jurisdictions that are backlogged and processing high volumes of cases. Cook County is home to "one of the largest unified court systems in the world,"[163] with tens of thousands of criminal cases on the docket at any given time. Just over 22,000 new felony petitions were filed in 2019 alone.[164] That same year, the clearance rate for all criminal cases only reached roughly 60%.[165] Slow rates of resolutions are apparent in all types of cases but tend to be most prevalent among serious, violent offenses.[166] For example, the average disposition of armed robbery cases is approximately 1.65 years,[167] while murders can take up to three to five years.[168] Unsurprisingly, reversals are few and far between.

Importantly, following a juvenile's transfer and conviction, the adult criminal court retains original jurisdiction for any future offenses.[169] Regardless of how trivial a subsequent encounter with the law may be, a transferred juvenile will never have the

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[159] People v. Chapai, 2011 IL App (3d) 090719, ¶ 15.

[160] People v. Morgan, 758 N.E.2d 813, 842-43 (Ill. 2001) (internal quotations omitted).

[161] People v. Clark, 518 N.E.2d 138, 146 (Ill. 1987). The Supreme Court of Illinois reversed and remanded for a new discretionary transfer hearing, noting that "the mere recitation in the record that all statutory factors have been considered is not enough to affirm an order transferring a minor to criminal court. Rather, there must be sufficient evidence in the record as to each statutory factor to support the transfer order." *Id.* at 145, 147.

[162] *See* People v. Jiles, 251 N.E.2d 529, 531 (Ill. 1969) ("To permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized. In either proceeding the primary issue is the ascertainment of the innocence or guilt of the person charged. To permit interlocutory review would subordinate that primary issue and defer its consideration.")

[163] *Organization of the Circuit Court*, STATE OF ILL., CIR. CT. OF COOK CNTY., http://www.cookcountycourt.org/ABOUT-THE-COURT/Organization-of-the-Circuit-Court (last visited May 16, 2021).

[164] ADMIN. OFF. OF THE ILL. CTS., ILLINOIS COURTS: 2019 STATISTICAL SUMMARY 58 (2020), https://courts.illinois.gov/SupremeCourt/AnnualReport/2020/2019_Statistical_Summary.pdf.

[165] *Id.* at 29.

[166] *See State's Attorney Felony Cases - Average Case Length and Sum of Length, by Offense Type*, COOK CNTY. STATE'S ATT'Y OFF. (Feb. 3, 2021), https://datacatalog.cookcountyil.gov/Courts/State-s-Attorney-Felony-Cases-Average-Case-Length-/wvbp-urjp.

[167] *Id.* (defining the average case length as the number of days between initiation and sentencing).

[168] Frank Main, *Criminal Cases Drag on for Years as Some Cook County Judges OK Repeated Delays*, CHI. SUN TIMES (Oct. 9, 2020), https://chicago.suntimes.com/2020/10/9/21507537/delayed-justice-cook-county-judges-continuances-tom-dart.

[169] BOSTWICK, *supra* note 2, at 25.

opportunity for juvenile court adjudication again.[170] This "once an adult, always an adult" mentality not only opens the door for arbitrary application, but it also thwarts the goals of the juvenile justice system by ignoring the value and malleability of youth.

B. Unwarranted Sentences

The irreversibility of transfer decisions carries grave implications for a juvenile's future. Without the shield of juvenile court jurisdiction, a juvenile in adult court is subject to harsher sentences under the state criminal code. Unlike juvenile adjudication, in which the maximum punishment entails confinement in a juvenile detention center until the age of twenty-one,[171] Illinois' sentencing provisions typically carry extensive mandatory minimums[172] and enhancements.[173] In fact, Illinois boasts the most severe mandatory firearm enhancements in the country.[174] Adult courts simply lack adequate safeguards to protect transferred juveniles from unduly long terms of incarceration.

Apart from federal protections barring life imprisonment,[175] Illinois imposes only two limitations on an adult court's sentence determination for juvenile offenders. The adult court must first take into account a delineated list of mitigating factors when fashioning an appropriate sentence for a juvenile.[176] The scheme also provides that a court, in its discretion, may decline to impose otherwise applicable sentencing enhancements.[177] The legislature enacted this new sentencing scheme in response to *Miller*, a U.S. Supreme Court

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[170] *Id.* at 7.
[171] *Id.* at 20.
[172] *See, e.g.,* 730 ILL. COMP. STAT. ANN. 5/5-4.5-20 (West, Westlaw through P.A. 102-4 of 2021 Sess.) (mandating a minimum twenty-year sentence for first degree murder); 720 ILL. COMP. STAT. ANN. 570/402 (West, Westlaw through P.A. 102-4 of the 2021 Sess.) (requiring mandatory minimums of four, six, eight, or ten years for the possession of controlled substances depending upon the amount in grams possessed); 720 ILL. COMP. STAT. ANN. 5/24-1.1 (West, Westlaw through P.A. 102-4 of the 2021 Sess.) (imposing a mandatory two-year sentence for a first offense of unauthorized use of a weapon by a felon).
[173] *See* 730 ILL. COMP. STAT. ANN. 5/5-5-3.2 (West, Westlaw through P.A. 102-4 of 2021 Sess.) (providing for extended terms of incarceration where certain aggravating factors are present or where the charged individual is convicted of a felony after conviction of the same, similar, or greater class of felony within the last ten years); *see also Know More: Firearm Sentence Enhancements*, RESTORE JUST., https://restorejustice.org/about-us/resources/know-more/know-more-firearm-sentence-enhancements/ (last visited May 17, 2021) (explaining that judges must add a ten, twenty, or twenty-five year sentence enhancement for the possession or discharge of a firearm during the commission of certain offenses).
[174] *Know More: Firearm Sentence Enhancements*, *supra* note 173.
[175] *See* Graham v. Florida, 560 U.S. 48, 79, 82 (2010) (holding that a sentence of life without parole for a nonhomicidal crime violates the Eighth Amendment); *see* Miller v. Alabama, 567 U.S. 460, 470 (2012) (determining that mandatory sentences of life without the possibility for juveniles violate the Eighth Amendment).
[176] 730 ILL. COMP. STAT. ANN. 5/5-4.5-105(a) (West, Westlaw through P.A. 102-4 of 2021 Sess.) (listing mitigating considerations including, but not limited to: the juvenile's age, level of maturity, and ability to consider risks and consequences of behavior; the influence of outside pressure; the juvenile's home environment and any childhood trauma; and the circumstances of the offense).
[177] *Id.* § 5-4.5-105(b)-(c).

decision holding that mandatory life-without-parole sentences for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment.[178]

The state's highest court crafted the second sentencing limitation for transferred juvenile offenders when it extended *Miller*'s holding to *de facto* life sentences in *People v. Reyes*.[179] It declined to provide an exact definition but noted that punishment amounts to a *de facto* life sentence if it has the "same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison."[180] The court resolved this ambiguity three years later in *People v. Buffer*, when it held that a prison sentence exceeding forty years effectively imposes a *de facto* life sentence.[181]

While in theory these limitations encourage sentence determinations that adequately reflect the mitigating circumstances of a juvenile's youth, their practical effect depends largely upon the judge's discretion. As illustrated earlier, this discretion possesses its own inherent challenges. Judges remain free to, and indeed still do, impose considerable sentences of up to thirty-nine years of incarceration on juvenile offenders.[182] Even assuming *arguendo* that the sentencing court conducted an in-depth evaluation into each mitigating factor, its determination nevertheless remains subject to a variety of mandatory minimums, the judge's own inclinations, and the ability of defense counsel to thoroughly obtain the information needed to advance favorable and viable arguments.

Regardless of how much mercy a given judge is willing to spare, sentencing disparities between juvenile and adult courts effectively nullify any grant of leniency. In 2017, for example, armed robbery was the second most common offense subject to transfer petitions, just behind first degree murder.[183] Under the Illinois criminal code, armed robbery is classified as a Class X felony, which mandates a sentence of incarceration between six and thirty years.[184] If a firearm is possessed during the commission of the offense, a fifteen-year enhancement must be added, producing a total sentencing range of twenty-one to forty-five years of incarceration in the Illinois Department of Corrections.[185] Under the new sentencing scheme and *Buffer*, a juvenile charged with armed robbery therefore must serve at least six years in prison, with a maximum of forty years.[186] On the

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[178] Pub. Act. 99-69, 2015 Ill. Laws 954 (adding 730 ILL. COMP. STAT. 5/5-4.5-105); People v. Harris, 2016 IL App (1st) 141744, ¶ 59 (noting that "[i]n response to *Miller*, Illinois enacted a new sentencing scheme for juveniles").
[179] People v. Reyes, 2016 IL 119271, ¶ 10.
[180] *Id.* ¶ 9.
[181] People v. Buffer, 2019 IL 122327, ¶ 40.
[182] *See* People v. McKinley, 2020 IL App (1st) 191907, ¶ 1 (reducing a defendant's sentence to twenty-five years of incarceration after the trial court, pursuant to *Buffer*, resentenced him to a just-below threshold sentence of thirty-nine years for a murder he committed at the age of sixteen); *State's Attorney Felony Cases - Sentencing*, COOK CNTY. STATE'S ATT'Y OFF. (May 10, 2021), https://datacatalog.cookcountyil.gov/Courts/Sentencing/tg8v-tm6u.
[183] ILL. JUV. JUST. COMM'N, TRIAL AND SENTENCING OF YOUTH AS ADULTS IN THE ILLINOIS JUSTICE SYSTEM: TRANSFER DATA REPORT, at 16 (Mar. 2020).
[184] 720 ILL. COMP. STAT. ANN. 5/18-2(b) (West, Westlaw through P.A. 102-4 of 2021 Sess.); 730 ILL. COMP. STAT. ANN. 5/5-4.5-25(a) (West, Westlaw through 102-4 of 2021 Sess.).
[185] 720 ILL. COMP. STAT. ANN. 5/18-2; 730 ILL. COMP. STAT. ANN. 5/5-4.5-25(a).
[186] 730 ILL. COMP. STAT. ANN. 5/5-4.5-25(a), 5-4.5-105(c); *see* People v. Buffer, 2019 IL 122327, ¶ 40.

contrary, a juvenile court could only impose a sentence ranging from probation to commitment in the IDJJ until the juvenile's twenty-first birthday.[187]

This disproportional punishment is precisely what proponents of transfer laws argue in support of their position. Transfer provisions, as well as the adult carceral system itself, operate in part on the assumption that imposing harsh criminal sentences serves as an effective deterrence. Increasing evidence, however, undermines this proposition. Adult court prosecution is simply counterproductive. Although national data on juvenile recidivism rates is lacking, comprehensive studies conducted at the state level are indicative of broader trends. An examination of Florida's transfer laws, for example, revealed that transferred juveniles recidivated at a significantly higher rate than those who remained within the juvenile justice system.[188] This held true within all classes of offenses involved and despite longer periods of incarceration.[189] Other large-scale studies conducted in New York, Pennsylvania, Minnesota, and New Jersey likewise exhibited similar consequences: criminal court prosecution substantially increases the probability of reoffending, even when probation is the only sentence imposed.[190] Strikingly, Pennsylvania data indicated that transfer "was associated with a 77% greater likelihood of violent felony arrest following completion of" the adult court sentence.[191] Together, these four studies demonstrate an average increase of 34% in recidivism for transferred juveniles compared to retained youth, effectively undermining the idea that harsher punishment deters juvenile crime.[192]

C. Collateral Consequences

Unlike a delinquency disposition in juvenile court, a criminal conviction is a permanent blemish on the juvenile's record because the vast majority of felony convictions are ineligible for expungement under Illinois law.[193] A single conviction, in effect, serves as a barrier to the juvenile's ability to obtain gainful employment, receive federal financial aid, and find housing upon release.[194] These obstacles are further compounded by the consequences of incarceration itself: removal from one's community, irregular contact with family and friends, and disruption in education, as well as other negative impacts.

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[187] BOSTWICK, *supra* note 2, at 18, 21.
[188] Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* 42 CRIME & DELINQ. 171, 176, 183 (1996) (analyzing the recidivism of 2,738 juveniles in Florida who were transferred to criminal court in 1987).
[189] *Id.* at 183.
[190] Redding, *supra* note 28, at 6.
[191] Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 56 CDC MORBIDITY & MORTALITY WKLY. REP., Nov. 2007, at 1, 7, https://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf.
[192] *Id.*
[193] 20 ILL. COMP. STAT. ANN. 2630/5.2(b) (West, Westlaw through P.A. 102-3 of 2021 Sess.).
[194] KOOY, CHANGING COURSE, *supra* note 13, at 7; MAHADEV, *supra* note 140, at 148-49.

To date, approximately 45,000 collateral consequences of conviction have been identified.[195] Applicability of each depends on the nature of the offense and respective state laws; some consequences are mandatory and automatic, while others are imposed on a case-by-case basis per the discretion of the reviewing agency, institution, or employer.[196] In Illinois, for example, a felony conviction automatically precludes a juvenile from participating in a College Planning Program,[197] an initiative led by the Illinois Student Assistance Commission to assist low-income and first-generation students with college admission.[198] If that conviction involved a "violent offense against youth," the juvenile must register in a public database maintained by the Illinois State Police for a period of ten years.[199] A juvenile convicted of possessing or distributing certain amounts of controlled substances will be permanently ineligible for cash public assistance.[200] Notably, a convicted felon who later becomes a victim of a violent crime is barred from receiving financial support under the Crime Victims Compensation Act until discharged from probation or parole.[201]

These are just the beginning of an extensive list of statutorily imposed impediments, yet the law neither requires legal actors to know nor consider the existence of these "hidden sentences," thereby allowing them to be overlooked.[202] It is for this reason that the American Bar Association and Uniform Law Commission both advocate for state legislatures to allow judges to consider collateral consequences when imposing a sentence and to ensure that defendants are informed of such consequences before pleading guilty.[203]

V. POLICY RECOMMENDATIONS

Illinois youth would benefit from a number of modifications to the state's discretionary transfer provision and from a requirement for implicit bias training. Although the state has shifted its focus in recent years to reinstating the original values of the juvenile court, further improvements are necessary to keep Illinois on the path of progressive reform and to protect youth from the harmful impacts of discretionary transfer.

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[195] ABA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 2 (2018) [hereinafter ABA, COLLATERAL CONSEQUENCES], https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf.
[196] *Id.* at 13; *Search Collateral Consequences*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org (last visited Apr. 11, 2021).
[197] 110 ILL. COMP. STAT. ANN. 17/20 (West, Westlaw through P.A. 102-3 of 2021 Sess.).
[198] ILL. ADMIN. CODE tit. 23, § 2774.10 (2021).
[199] 730 ILL. COMP. STAT. ANN. 154/5(a)-(b) (West, Westlaw through P.A. 102-3 of 2021 Sess.) (listing the convictions involving violent offenses against youth for purposes of registration with the Murderer and Violent Offender Against Youth Database); 730 ILL. COMP. STAT. ANN. 154/85 (West, Westlaw through P.A. 102-4 of 2021 Sess.)
[200] 305 ILL. COMP. STAT. ANN. 5/1-10(a) (West, Westlaw through P.A. 102-3 of 2021 Sess.).
[201] 740 ILL. COMP. STAT. ANN. 45/2, 2.5 (West, Westlaw through P.A. 102-4 of 2021 Sess.).
[202] Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 HARV. L. REV. 123, 165 (2016).
[203] ABA, COLLATERAL CONSEQUENCES, *supra* note 195, at 9-10; ABA, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS §§ 19-2.3–19-2.4 (3rd ed. 2004); UNIF. COLLATERAL CONSEQUENCES ACT § 5 (UNIF. L. COMM'N 2010).

At the outset, the minimum age for discretionary transfer is too low. While line-drawing is perhaps inevitable to some degree, allowing for the criminalization of those as young as thirteen no longer comports with contemporary understandings of juvenile criminal responsibility. Confining the responsibility inquiry to a narrow right-versus-wrong distinction ignores the developmental context of adolescent delinquency between the ages of thirteen and seventeen. Comprehending that an action was wrong—which generally is "adjudged by the moral standards of the community"[204]—is distinct from having the ability to act with the prudence and foresight necessary to appreciate the consequences of that action.

California's approach, for example, is instructive. At present, California is the only state in the country prohibiting discretionary transfer of juveniles under sixteen years old.[205] The California legislature voted to amend the state's transfer statute in 2018, raising the minimum age from fourteen, in light of emerging research.[206] In approving the reform, the legislature noted that "sending youth to adult prison does not help our youth and it does not make our communities safer," and acknowledged that the practice disproportionately affects communities of color.[207]

In its current form, Illinois' discretionary transfer provision mandates a balancing test that unfairly accords more weight to aggravating factors, rather than mitigating ones. The court ought to give precedence to the juvenile's mental health, social history, and family circumstances over the seriousness of the alleged offense and the juvenile's prior record of delinquency. While youthfulness is not a bar to adjudication in Illinois, it should be the lead mitigating factor weighing heavily against adult court transfer. The balancing test also improperly places the frankly generalized and vague "interests of the public" above the identifiable, individualized interests of youth. Existing research confirms that higher rates of incarceration do not increase public safety, but that individualized services that address the root causes of crime do.[208] The court's inquiry, by virtue of its balancing test, militates against juvenile court jurisdiction and is therefore incompatible with the underlying purposes of the juvenile court.

The state should also consider categorical exclusion of certain crimes from eligibility, just as it does for presumptive transfers. At present, a juvenile aged thirteen or older may be discretionally transferred to adult court for *any crime*, regardless of whether the offense would constitute a misdemeanor or a felony under the criminal code. Although it might be presumed that this method of transfer would be invoked only in the most serious of circumstances, this presumption takes for granted the force of external factors at play, including public pressure and media coverage over "heater" cases. Boundless discretion opens the door for misuse. Many nonviolent crimes are appropriate for categorical exclusion, such as drug offenses, nonviolent property crimes, and simple possession of a firearm. However, emerging research lends support for retaining juvenile jurisdiction over

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[204] Snyder, *supra* note 65, at 208.
[205] CAL. WELF. & INST. CODE § 707(a)(1) (West, Westlaw through 2021 Sess. Ch. 17).
[206] *Id*; Comm. Rep. S.B. 1391, 2017–2018 Reg. Sess., at 4 (Cal. 2018).
[207] Comm. Rep. S.B. 1391, *supra* note 205.
[208] DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 5 (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

violent crimes too. It is well established that trauma increases the risk of contact with the juvenile justice system.[209] In recent years, research on this association has centered on the role of Adverse Childhood Experiences (ACEs), a variety of traumatic events occurring before the age of 18.[210] A recent systematic review of studies analyzing the relationship between ACEs and justice system involvement revealed that higher ACE scores are associated with up to a 68% higher likelihood for contact.[211] These findings support a response to delinquency that is both trauma-informed and developmentally appropriate. Remarkably, the IDJJ recently adopted this position under the leadership of Governor J.B. Pritzker. The IDJJ, in partnership with the Justice, Equity, and Opportunity Initiative, announced that by 2024, the state's juvenile justice system would convert to a "21st Century Illinois Transformation Model," a new evidence-based model focused on rehabilitation and community integration.[212] On February 2, 2021, the Pritzker administration reported that the state would repurpose a previously shut-down development center into a new IDJJ community-based facility founded on trauma-informed and restorative justice principles.[213]

Additionally, the fact that Illinois continues to use its transfer mechanisms calls for the adoption of a reverse waiver provision. The absence of such a remedy effectively presumes that legal system actors are immune to error. The stakes are too high for the only cure to be appellate review upon final judgment of the adult court, which might not arrive for years.

In light of the racial disparities and unconscious biases deeply embedded within juvenile and criminal justice systems, specialized training is essential for all pertinent legal actors. Judges, probation officers, prosecutors, and defense attorneys should be required to take implicit bias courses as part of continuing legal education requirements. Encouraging legal system actors to recognize their own their own biases may prompt them to shape their behavior accordingly.[214] Indeed, empirical research indicates that self-awareness of one's own cognitive limitations can improve neutral decision making."[215]

CONCLUSION

As it stands, the state's discretionary transfer provision presupposes irreparability—a notion directly in conflict with modern science on adolescent brain

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[209] Haley R. Zettler, *Much to Do About Trauma: A Systematic Review of Existing Trauma-Informed Treatments on Youth Violence and Recidivism,* 19 YOUTH VIOLENCE & JUV. JUST. 113, 113-14 (2021), https://doi.org/10.1177/1541204020939645.
[210] Gloria Huei-Jong Hu et al., *Adverse Childhood Experiences and Justice System Contact: A Systematic Review*, 147 PEDIATRICS 2 (2021), https://doi.org/10.1542/peds.2020-021030.
[211] *Id.* at 4.
[212] *Transforming IDJJ: A 21st Century Transformation Model*, ILL. DEP'T OF JUV. JUST., https://www2.illinois.gov/idjj/Pages/transformation.aspx (last visited May 17, 2021).
[213] Press Release, Ill. Dep't of Juv. Just., Pritzker Administration Announces New Illinois Youth Center in Central Illinois 1 (Feb. 2, 2021), https://www2.illinois.gov/IISNews/22747-Pritzker_Administration_Announces_New_Illinois_Youth_Center_In_Central_Illinois.pdf.
[214] Richardson & Goff, *supra* note 116, at 2645-46.
[215] Burke, *supra* note 115, at 1617.

development, holistic understandings of culpability, and the underlying tenets of the Juvenile Court Act. To return to the forefront of juvenile justice reform, Illinois should shift its transfer scheme towards a more developmentally-appropriate approach. Expanding juvenile jurisdiction is necessary to protect the state's most vulnerable populations from the grasp of the adult carceral system while also affording accountability. An effective juvenile justice system is one that rehabilitates, not criminalizes, and contemplates the complexities of youth.