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*Intersecting Disciplines*

**Extended Jurisdiction Juvenile Prosecutions: "One Last Chance" or a False Promise?**

*Ari Seckler*

**INTRODUCTION TO EXTENDED JURISDICTION JUVENILE PROSECUTION**

In 1899, Richard Tuthill, presiding judge of the nation's first juvenile court in Cook County, Illinois, summed up the core purpose and methodology of the juvenile court as follows: "No child under 16 years of age shall be considered or be treated as a criminal; that a child under that age shall not be arrested, indicted, convicted, imprisoned, or punished as a criminal." Nearly one hundred years later, in the very state where the juvenile court was conceived, the Illinois legislature codified a path for the criminalization and imprisonment of children as young as 13 years old, against the premise under which Tuthill started his practice.

In 1998, on the heels of a wave of a national "tough-on-crime" response to an alleged spike of juvenile crime in the 1980s and 90s, Illinois passed 705 ILCS 405/5-810, expanding the jurisdiction of juvenile prosecution to any minor aged 13 or older who commits an offense that would be a felony if committed by an adult. By the late 1990s, exposing children to the adult criminal system was not unique. However, the introduction of Extended Jurisdiction Juvenile (EJJ) prosecutions carried a key distinguishing characteristic from previous sentencing schemes: the youth would receive both a juvenile sentence and an adult sentence held in abeyance. The legislative history of section 5-810 indicates that in the eyes of some legislators, EJJ prosecutions would provide youth with "one last chance" to avoid being pulled into the adult criminal carceral system. Unfortunately, in spite of any promises Illinois' Juvenile Justice Reform Act of 1998 might have strived to achieve, EJJ prosecutions fail to provide individuals criminalized for actions of their youth with that "one last chance" for two reasons. First, prosecutors continue to hold enormous leverage over children when triggering EJJ prosecutions, limiting its efficacy when it is utilized. Second, while amendments to Illinois' transfer laws in 2015 raised the age of jurisdiction and limited the number of individuals incarcerated in adult prisons, EJJ creates a workaround mechanism with high discretion and low burdens of proof for prosecutors to pursue adult sentences if they so choose. Both shortcomings have had a targeted, disproportionate impact on Black men incarcerated for alleged offenses of their youth, further limiting the hopes of the EJJ sentencing scheme.

**THE 1990S: THE SUPERPREDATOR MYTH AND LEGISLATIVE RESPONSES**

Following a rise in violent crime, a political science professor at Princeton University named John DiIulio coined the term "superpredator" in 1995 to describe a growing population of "impulsive," "violent," "gang-affiliated," and "remorseless" youth principally responsible for the crime wave of the 1980s. A media frenzy ensued, and in response, states began imposing juvenile court reform through a heavy-handed punitive approach. The first tool legislatures turned to was exposing more youth to the possibility of adult criminal liability at a younger age through transfer laws. Between 1992 and

1997, all but six states expanded their statutory provisions for transferring juveniles to adult criminal court, making it easier for more juveniles to be transferred. States expanded prosecutorial discretion, widened the net of offenses eligible for transfer, and lowered the minimum ages at which a juvenile may be transferred. Furthermore, a number of states adopted the use of automatic transfer laws, completely removing judicial discretion. By 1995, 21 states, including Illinois, enacted these automatic transfer laws. As a result, the number of youth under the age of 18 held in adult jails nationwide more than quadrupled between 1993 and 1999. While data on impacts isolated by race in the 1990s was sparse, the disproportionate effect on youth of color can be extrapolated; a 2018 finding showed that Black youth accounted for more than 51% of the children transferred to adult criminal court despite making up 15% of all youth under juvenile court jurisdiction that year. In Illinois, the same pattern holds true; a report from the Juvenile Justice Initiative found that of 257 children automatically transferred between 2010 and 2012, over 80% were Black.

### **ILLINOIS, A BLENDED SENTENCING SCHEME**

As the superpredator myth was exposed as a “baseless and subsequently discredited theory,” juvenile justice advocates in Illinois began pushing their legislators to adopt structural reforms challenging the efficacy of the punitive measures adopted in the early to mid 1990s. Over the past two decades, Illinois has been a leader in progressive reforms when it comes to the juvenile court; Illinois has raised the age of juvenile court jurisdiction, abolished mandatory transfer to adult criminal court, and limited eligibility criteria for presumptive transfers. Proponents of the Illinois Juvenile Justice Reform Act of 1998 saw the legislation as a shift from the increasingly punitive approach of the juvenile justice system of the 1990s to one reflective of the rehabilitative goals of the juvenile court’s founding. A favorable look at the 1998 Reform would suggest that proponents saw Extended Jurisdiction Juvenile (EJJ) prosecution as a step back in the direction of that rehabilitative approach. In these advocates’ eyes, the provision would provide a middle ground for a previously rigid system which gave judges only two sentencing options for youth – keeping the child in juvenile court or transferring the juvenile to adult criminal court. EJJ presented an alternative, a blended sentencing scheme in which juveniles who commit acts that would be charged as a felony if committed by an adult may remain in juvenile court. As such, these youth stay in proximity to the rehabilitative services of the juvenile system so long as they do not violate the conditions of their juvenile sentence.

If the juvenile commits another crime or offense, though, and the court finds the juvenile guilty in a hearing, a judge may order execution of the previously imposed adult criminal sentence. This framing might appear to give youth and adolescents an opportunity to see the error in their ways, refrain from acts which would be labeled as criminal or delinquent by law enforcement, and ultimately be diverted from system-involvement altogether. However, due to the discretion that prosecutors and judges wield through the letter of the statute, along with systemic factors of race, class, and geography, the realities for EJJ-sentenced youth have been far less rosy. While data is scarce, EJJ prosecutions often supplant any rehabilitative goals of Illinois Juvenile Justice Reform Act and recent progressive legislation for two reasons: (1) prosecutors continue to hold

enormous leverage over children when EJJ prosecutions are triggered, limiting the provision's efficacy when it is utilized and (2) EJJ creates a workaround mechanism for prosecutors to pursue adult sentences for children as young as age 13, if they so choose. Both issues have disproportionately impacted Black men incarcerated for alleged crimes of their youth, further heightening the shortcomings of the EJJ sentencing scheme.

### **SHORTCOMINGS AND HIDDEN IMPACTS OF EJJ PROSECUTIONS**

Legislators immediately recognized that youth in EJJ proceedings would be placed under enormous pressure to acquiesce to an EJJ sentence and stay out of the grips of the criminal legal system. In a general assembly debate prior to the adoption of the provision in 1998, one senator explicitly stated that the potential adult sentence would serve as a threat hanging over the juvenile's head to assure that the juvenile would take advantage of the juvenile services and avoid committing other offenses. In essence, prosecutors dangle a metaphorical "carrot" in the form of access to rehabilitative services in juvenile court but all the while make it clear to the youth the "stick" they hold: incarceration in adult prison, and for capital offenses, up to 40 years in prison. This level of coercion and pressure for youth involved in the criminal legal system is far from conducive to reintegrate the child into society as a "model citizen" as legislators hoped. Transfer to adult prison carries a number of severe adverse consequences for adolescents including increased risk of being physically or sexually victimized, and significant developmental delays. In order to successfully avail themselves of educational and rehabilitative services of the juvenile justice system, youth should not have the threat of longer sentences, an increased likelihood of sexual violence and physical assault within prison, and decreased connection with the outside world hanging over their heads. Furthermore, the EJJ sentencing scheme fails to consider the impact of trauma on the developing brains of system involved youth. Statistics show that the majority of youth coming into contact with in the juvenile justice system have experienced trauma, including community violence, abuse and neglect, and racial trauma and discrimination. A more comprehensive, trauma-informed understanding of how the developing brain reacts to stress and threats might lead to a reduction in recidivism; by minimizing the looming threat of incarceration in the adult system, youth might feel less boxed into a corner, make fewer impulsive decisions, and ultimately avoid system contact altogether.

A second shortcoming of EJJ prosecutions lies in the number of procedural concerns that the provision raises, both at the time of imposition and in the enforcement of an EJJ sentence. First, in deciding who to apply an EJJ sentence to, the statute does not distinguish between different classes of offenses; all felony offenses if committed by an adult, regardless of severity, could lead to the imposition of EJJ. Thus, while the Illinois legislature closed an unjust and disproportionately harsh loophole to automatic transfer laws in 2015 by limiting transfer of 16 and 17-year-olds to only first-degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm, the EJJ provision did not receive the same reforms. As a result, an EJJ juvenile as young as 13 can still be exposed to adult criminal jurisdiction for a relatively minor offense, compared to the class of felonies carved out by the 2015 reform. Another concern raised when an EJJ prosecution is imposed is the high levels of judicial discretion combined with the low standards of proof that the statute lays out in order to pursue EJJ. The statute states that if

the juvenile judge assigned to the case determines that there is probable cause to believe that the allegations in the petition are true, there is a rebuttable presumption that the proceeding shall be designated as an extended jurisdiction juvenile proceeding. As such, the threshold for initiating an EJJ sentence, probable cause, is quite low, while the discretion the judge has to follow the State's Attorney's petition for EJJ is high.

The language of section 5-810 raises similar procedural concerns in how an EJJ sentence is enforced. First, while most hearings in juvenile court are closed from the public, all EJJ pre-sentencing hearings, sentencing hearings, and trials, are open to the public. This lack of privacy is antithetical to the restorative goals of the juvenile court and risks exacerbating harms for system-involved youth, both during and after the proceeding, as they navigate sensitive issues. Next, a low burden of proof in tandem with a high level of discretion for a judge to trigger an adult sentence creates enormous vulnerability for youth at the enforcement stage of an EJJ proceeding. For youth that commit a second felony after beginning an EJJ sentence, the statute reads that "if the court finds by a preponderance of the evidence that the minor committed a new offense, the court shall order execution of the previously imposed adult criminal sentence." Herein lies the low burden and standard of proof: the court must find that a youth committed an undefined "new offense" by a mere preponderance of the evidence in order to impose an adult criminal sentence. Finally, for youth who violate their juvenile sentence in some other way, such as a probation violation, the judge has wide discretion to execute an adult sentence after finding a violation occurred, once again by a preponderance of the evidence. These procedural concerns, both at the imposition of an EJJ sentence and at its execution, undermine the progressive reforms that juvenile justice advocates have fought for in Illinois in recent years. While prosecutors might choose not to pursue this workaround to Illinois' general bar on children younger than 16 entering into the adult criminal system, the continued existence of EJJ prosecutions' loose procedural protections present an enduring threat for system-involved youth in Illinois.

### **CONCLUSION: A LACK OF DATA, RECONCILING DIFFERING VIEWS, AND IMAGINING THE FUTURE**

While data is limited, existing statistics from juvenile justice advocates indicate that since 2015, the number of juvenile offenders in Illinois in general has decreased. Some data indicates that recently, a relatively small number of children are actually being sentenced in EJJ prosecutions; a report from the Illinois Juvenile Justice Commission shows that in 2017 out of the 138 cases filed for discretionary transfer to adult criminal court, only 27 were extended jurisdiction. The same trend was true in 2018, with only 17 of 106 transfer cases arising under EJJ sentences. Notably, about 80% of those EJJ youth were Black, further exhibiting the disproportionality in the criminal legal system.

Proponents of EJJ prosecutions argue that if trends have continued since 2018, legislative reforms to protect such a small number of children would not be worth the resources and effort necessary to abolish or change the law. Additionally, for some youth, EJJ truly is "one last chance." After an EJJ sentence, a child surrounded by a strong support system who stays in compliance with their juvenile sentence can effectively access the rehabilitative services the juvenile justice system promised in 1899. Despite these arguments, EJJ prosecutions should be amended for two reasons: (1) the harms for

youth pulled into the adult criminal system are expansive and well-documented, suggesting that this option should truly be a last resort and (2) EJJ is not in line with Illinois' decade-long mission of juvenile justice reform, and continues to disproportionately impact Black youth.

By raising the age of EJJ prosecutions to match the lower limit for automatic transfer, age 16, the Illinois legislature could mirror the intent of the 2019 Youthful Parole Law in the recognition that "even when a crime is particularly severe...a minor with their whole life ahead has the potential to be reformed." The Illinois legislature should also consider conducting an investigation of all individuals sentenced through EJJ's blended scheme since 1998 to assess the circumstances in which youth were sent to adult prison, the age when they were incarcerated, and the severity of their offense. Individuals in these circumstances deserve access to clemency hearings and post-conviction petitions in order to retroactively provide those in Illinois' prisons with an opportunity for the off-ramp that was promised to them in 1998. Finally, the Illinois legislature should continue to investigate implicit bias among prosecutors and judges, while instituting training on trauma responses of youth, in order to combat the disproportionate representation of Black children in adult prisons. By pursuing these reforms, and closely examining the true impacts of EJJ prosecutions through widespread data collection, Illinois can continue to live up to its progressive aspirations by providing individuals affected by EJJ sentences with the "last chance" that they deserve.

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