

# CHILDREN SENTENCED AS ADULTS

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## INTRODUCTION

Imagine a situation where a child is sentenced to death. That could never happen, you are thinking. Yet just seventeen years ago, capital punishment was legal for children over the age of sixteen.<sup>1</sup> There has been recognition that our criminal laws should acknowledge juveniles' ages for over one hundred years.<sup>2</sup> That is precisely why we have both juvenile and adult courts. Despite the longstanding recognition of a need for separate courts for juveniles and adults, youths can still be charged and sentenced as adults in certain instances. There has been a shift away from treating adults and children differently and now many of our current laws have not been updated to reflect and incorporate how juveniles are biologically different from adults.

This article will analyze juvenile criminal justice laws with a concentration on the transfer process in which juveniles can be tried and sentenced as adults. The article will further discuss policies that should be considered in any new legislation concerning juvenile transfer laws. Every state currently has a transfer process for handling allegations of serious crimes committed by juveniles. Many of these cases are transferred to adult courts where juveniles are tried as adults and face the possibility of a more severe, adult sentence.<sup>3</sup> Most of the juvenile transfer statutes which are still in existence were enacted in the 1980s and 1990s, when crime was on the rise and states were cracking down on juvenile offenders by making it easier to prosecute them as adults.<sup>4</sup>

Researchers have looked closely at the neuroscience underlying adolescent behavior and discovered that the brain plays an enormous role in determining behavior.<sup>5</sup> The brain is in an active state of developmental and functional change during adolescence and through early adulthood.<sup>6</sup> Consequently, the brain of an adolescent is dramatically different from that of a fully grown adult.<sup>7</sup> The prefrontal cortex, for example, which regulates

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1. See generally *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper v. Simmons*, the Supreme Court held that it was unconstitutional to impose the death penalty for individuals who commit crimes while under the age of eighteen. *Id.* The Court relied on developments in brain science to come to this long overdue decision. *Id.*

2. See generally *infra* Section I.

3. See generally *Juvenile Justice Reform Initiatives in the States 1994-1996*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/reform2/ch2\\_j.html](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/reform2/ch2_j.html) (last visited Aug. 22, 2021). If an adult is convicted of a crime, they receive a sentence as a punishment, which could include probation and/or prison. *Id.*

4. See *id.* The introduction of new transfer laws and expansion of pre-existing transfer laws saw the number of states with automatic transfer statutes, for instance, increase from 14 states in 1979 to 31 by 2003. See Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP: JUV. JUST. BULL., June 2010, at 1, <https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf>.

5. See generally *infra* Section II.A.

6. See *id.*

7. See *id.*

behavior, is not fully mature in adolescents and its maturation actually occurs *during* adolescence.<sup>8</sup> The many differences between the brains of adolescents and adults, as well as the ongoing changes experienced by the brains of adolescents, account for stark differences in cognitive brain function between the two demographics.<sup>9</sup> Laws should accurately reflect the developing science which now exists to explain differences in decision-making based on age.

The advances in neuroscience and adolescent brain development have been recognized by the United States Supreme Court in the context of adolescent sentencing, and have begun to reflect reduced culpability of juveniles.<sup>10</sup> Along similar lines, several states have raised the age of juvenile court jurisdiction and developed laws that view youth over the age of eighteen through a developmental lens.<sup>11</sup> While there have been attempts at nationwide juvenile justice reform, most states still do not consider developmental issues at the point of transferring a case from juvenile to adult court.<sup>12</sup>

Laurence Steinberg, one of the leading scholars in adolescence, has written extensively about how adolescents and young adults under the age of twenty-five engage in riskier behavior than adults.<sup>13</sup> Steinberg asserts that one of the primary reasons risk-taking increases during adolescence is due to the brain's "social-emotional system," which is when adolescents are seeking rewards.<sup>14</sup> The substantial increases in risk-taking, according to Steinberg, are a result of changes which the brain undergoes during puberty.<sup>15</sup> The risk-taking declines as adolescents are able to improve self-regulation.<sup>16</sup> Based on the understanding that adolescents are less competent decision makers than are adults because their brains are not fully developed,<sup>17</sup> Steinberg has been an advocate for criminal justice reform tailored toward adolescents.<sup>18</sup> According to Steinberg, "treating young adults like older prisoners does not reduce

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8. *See id.*

9. *See id.*

10. *See generally infra* Section II.B.

11. *See generally infra* Section IV.B.

12. *See id.*

13. *See* LAURENCE STEINBERG, <https://www.laurencesteinberg.com/> (last visited Aug. 22, 2021); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78 (2008).

14. Steinberg, *supra* note 13, at 83.

15. *See id.*

16. *See id.*

17. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 31 (2008).

18. B. J. Casey et al., *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience*, MACARTHUR FOUND. RSCH. NETWORK ON L. AND NEUROSCIENCE, Feb. 2017, at 1, 4, <https://papers.ssrn.com/abstract=2881607> (recognizing the need for policymakers to work cooperatively with behavioral scientists and neuroscientists to adopt "developmentally informed justice policies").

recidivism,”<sup>19</sup> especially where young offenders have a “capacity for change,” and many will not continue to reoffend as they mature.<sup>20</sup>

Against the backdrop of such research by leading scholars of adolescence, this article focuses on the procedural process for transferring cases and discusses why the science of adolescent brain development should be taken into account before juvenile cases are indicted or transferred to adult courts, where juveniles face adult sentences. This article will discuss Massachusetts law in addition to juvenile justice reform both in the United States and internationally.

This paper proceeds as follows. Section I of the article provides a brief history of the juvenile courts and the juvenile transfer statutes. Section II provides an overview of the neuroscience of adolescent brain development and its application in the United States Supreme Court. Section III discusses why juvenile transfer laws have not worked and do not reduce recidivism rates. Section IV discusses juvenile justice reform both in the United States and internationally. Section V provides recommendations for juvenile transfers statutes with an emphasis on the Massachusetts Youthful Offender Statute.<sup>21</sup>

## I. BRIEF HISTORY OF JUVENILE TRANSFER STATUTES

### A. Overview of Juvenile Courts and Juvenile Transfer Statutes

The United States has two primary systems for criminally prosecuting individuals: a juvenile system and an adult system.<sup>22</sup> As the name suggests, the juvenile system is for children and adolescents. Juvenile courts have jurisdiction over (or are able to handle the cases of) adolescents accused of crimes, depending on their age.<sup>23</sup> Each state, however, determines its own age range in which cases can be heard in juvenile court; after which, an adolescent “ages out” of juvenile court.<sup>24</sup> For most states, a juvenile “ages out” upon turning just seventeen years old.<sup>25</sup>

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19. *Id.* at 4.

20. *Id.*

21. MASS. GEN. LAWS ch. 119, §58 (2021).

22. See *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview> (last visited Aug. 22, 2021) (giving an overview of the history of the juvenile justice system in the United States). The first juvenile court in the United States was established in 1899; by the 1920s, “every state in the country had established a separate system of criminal justice designed to acknowledge” that children are less culpable and have a “greater capacity for change.” *Id.*

23. See *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL’Y, PRAC. & STATS., <http://www.jjgps.org/jurisdictional-boundaries> (last visited Aug. 22, 2021) (noting each state’s jurisdictional boundaries for addressing delinquency based upon age).

24. *Id.* North Carolina has the lowest age minimum in the United States, where children as young as six years old can be charged in juvenile courts. *Id.*

25. *Id.* (forty-two states set the age of seventeen as the highest age in which conduct can be considered delinquent).

Typically, cases in juvenile courts are called delinquency cases.<sup>26</sup> When a child is alleged to have committed a serious offense, however, the juvenile can be tried and sentenced as an adult under certain circumstances. Every state allows juveniles under the age of eighteen to be tried and sentenced as adults, which means that juveniles in such instances would also be subject to the same mandatory sentencing guidelines that adults have.<sup>27</sup> Depending on the state, the case can either stay in juvenile court or it can be transferred to an adult court; regardless of the venue, the juvenile can receive an adult sentence in these types of cases.<sup>28</sup>

The procedural process to determine whether a juvenile can be tried as an adult varies in each state.<sup>29</sup> Generally, there are three ways juvenile cases can be handled as if they were an adult case: (1) judicial or discretionary waiver,<sup>30</sup> (2) prosecutorial discretion or concurrent jurisdiction,<sup>31</sup> and (3) statutory exclusion.<sup>32</sup> Most states allow the transfer of juveniles starting at fourteen years old.<sup>33</sup>

Judicial or discretionary waiver is when a juvenile court judge authorizes the waiver of a juvenile case to an adult criminal court.<sup>34</sup> The Juvenile Court judge is able to consider mitigating factors before making a determination as to whether the case should be waived or not.<sup>35</sup> While waiver standards and evidentiary issues vary, nearly every state considers “the nature of the alleged

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26. *Id.* Delinquency is the word used to describe juveniles who are charged with a criminal act; these cases are heard in juvenile courts. *See id.*

27. *Id.* (providing a chart titled “Compare transfer provisions,” which offers a state-by-state comparison of transfer provisions in the United States).

28. *Id.* Transfer provisions are essentially “exceptions to age boundaries of delinquency” that permit or require jurisdiction of the (adult) criminal court, depending on the minor’s age. Sections of such transfer provisions elaborate upon when an adult sentence, as opposed to a juvenile disposition, can or must be ordered. *Id.*

29. *Id.*

30. *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Dec. 1998), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/tryingjuvasadult/transfer.html>.

31. *See* Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS & VICTIMS: NAT’L REP. SERIES, Sept. 2011, at 2.

32. *See id.* It is important, however, to distinguish between statutory exclusion and mandatory waiver. *See* Griffin et al., *supra* note 31. An offense excluded by law from juvenile court jurisdiction is arraigned in criminal court, whereas in a mandatory waiver case the juvenile court initially receives the case but then simply conducts a preliminary hearing to ensure the application of the mandatory waiver statute is appropriate. *See id.* (providing a more detailed discussion of the nuances between statutory exclusion and mandatory waiver).

33. *Minimum Transfer Age Specified in Statute, 2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [https://www.ojjdp.gov/ojstatbb/structure\\_process/qa04105.asp](https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp) (last visited Aug. 22, 2021).

34. *See* Griffin et al., *supra* note 31 (establishing that the overwhelming majority of states allow for judicial or discretionary waiver).

35. *See id.*

crime and the individual youth's age, maturity, history, and rehabilitative prospects."<sup>36</sup>

Prosecutorial discretion or concurrent jurisdiction gives the prosecution full discretion and authority to decide which court handles the case.<sup>37</sup> Cases can be brought in either a juvenile or criminal court without a hearing by a judge.<sup>38</sup> The Massachusetts Youthful Offender Statute, for example, allows that anyone over the age of fourteen who is accused of a serious offense and meets the statutory criteria can be subject to a juvenile, adult, or combination sentence at the prosecutor's discretion.<sup>39</sup>

Finally, statutory exclusion laws mandate that certain cases must be tried exclusively in an adult court.<sup>40</sup> If a case meets the statutory criteria, it is automatically filed in an adult criminal court. Typically, statutory exclusion applies to the most serious or violent crimes, such as murder.<sup>41</sup> Additionally, some states have laws that require the prosecution of a juvenile as an adult if they have already been prosecuted as an adult in the past.<sup>42</sup> This is often called "Once an adult, always an adult."<sup>43</sup>

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36. *Id.*

37. *See id.*

38. *See id.*

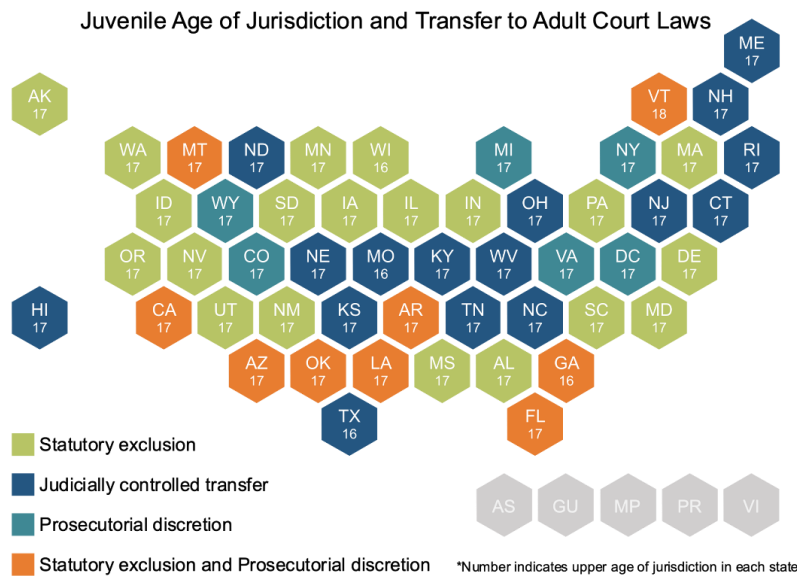
39. MASS. GEN. LAWS ch. 119, §58 (2021). In order to adjudicate a child as a youthful offender, the court must conduct a hearing at which it considers the testimony of any witnesses and any relevant evidence. *Id.* If adjudicated a youthful offender, the court can sentence them to any punishment allowable for the offense for which they are accused. *Id.*

40. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.

41. *See id.*

42. *See id.*

43. *Id.*

Figure 1<sup>44</sup>

### *B. The Juvenile Crime Statute has Shifted from Rehabilitation to Harsher Punishments*

“In one form or another a system of punishing criminals has been in effect since pre-historic times.”<sup>45</sup> Initially, incidents were handled between “the victim and the transgressor.”<sup>46</sup> As societies developed, the aggrieved party would report the incident to a government, which was presumed to be a neutral party, who would decide a fair and just punishment.<sup>47</sup>

Our system of punishment is based on the traditional concept that most individuals can distinguish and choose between right and wrong.<sup>48</sup> Therefore, if one chooses a wrong, they should be punished.<sup>49</sup> This is called the retributive theory of punishment.<sup>50</sup>

44. *Id.*

45. Eugene J. Harmon, *The Theory of Punishment*, 1955 JAG J. 3, 3 (1955) (outlining the concept of punishment and its intended result from a historical perspective).

46. *Id.*

47. *See id.* at 4.

48. *See id.* at 3.

49. *See id.*

50. *See generally Retributive Justice*, STAN. ENCYC. PHIL. (July 31, 2020) <https://plato.stanford.edu/entries/justice-retributive/>.

The current American criminal justice system also uses the utilitarian theory of punishment, which punishes offenders with the goal of deterring and discouraging other people from committing criminal acts.<sup>51</sup> Justification for use of the utilitarian theory stems from the belief that its use will reduce crime, thereby leading to a better and safer society.<sup>52</sup> The utilitarian approach additionally seeks to rehabilitate the offender.<sup>53</sup> Rehabilitation such as treatment and educational programs gives individuals the ability to succeed.

Under both theories, we don't punish those who cannot distinguish between right and wrong.<sup>54</sup> Similarly, we do not punish juveniles who are deemed incompetent by the Court.<sup>55</sup> Initially, American criminal law did not distinguish between juveniles and adults, and people of all ages and genders were held together in adult jails.<sup>56</sup> For many years, people of all ages and genders were held together in adult jails.<sup>57</sup> It soon became apparent, however, "that young people who were imprisoned with adults in overcrowded institutions learned only how to become better criminals."<sup>58</sup> In 1825, The New York House of Refuge was established for youth detention, even though criminal courts still tried both youth and adults together.<sup>59</sup> Many states had similar institutions soon thereafter; Massachusetts being one of them.<sup>60</sup>

51. See generally Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 227–280, 227 (2021) (arguing "that deterrent punishment can be justified as a means of rectifying an offender's contribution to 'criminality'").

52. See Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 300-01 (1990) (recognizing that of the multiple theories of punishment, only the denunciation theory of punishment takes into account the impact of the crime on "law-abiding society").

53. See John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 314 (1999).

54. See Harmon, *supra* note 45, at 3.

55. See NAT'L JUV. JUST. NETWORK, COMPETENCY TO STAND TRIAL IN JUVENILE COURT: RECOMMENDATIONS FOR POLICYMAKERS, (2012), [https://www.njjn.org/uploads/digital-library/NJJN\\_MfC\\_Juvenile-Competency-to-Stand-Trial\\_FINAL-Nov2012.pdf](https://www.njjn.org/uploads/digital-library/NJJN_MfC_Juvenile-Competency-to-Stand-Trial_FINAL-Nov2012.pdf).

56. See Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. JUV. L. & POL'Y 93, 99 (2012).

57. See generally ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. Univ. Chi. Press 1977) (1969) (offering an excellent retelling of the movement responsible for our current juvenile justice system). See also *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcrj.org/education1/juvenile-justice-history.html> (last visited Aug. 18, 2020).

58. Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 396 (2017) (discussing the effect of institutionalized racism in the juvenile justice system).

59. See *id.*; see also N. Y. STATE ARCHIVES, *THE GREATEST REFORM SCHOOL IN THE WORLD: A GUIDE TO THE RECORDS OF THE NEW YORK HOUSE OF REFUGE*, at 3 (1989) (the House of Refuge began in 1825) [http://www.archives.nysed.gov/common/archives/files/res\\_topics\\_ed\\_reform.pdf](http://www.archives.nysed.gov/common/archives/files/res_topics_ed_reform.pdf).

60. See *Juvenile Justice History*, *supra* note 57 (giving an overview of the inception of houses of refuge in the late 18th and early 19th centuries); *Juvenile Corrections Reform in*



During the nineteenth century, The United States saw the advent of a movement which eventually led to the establishment of the juvenile court.<sup>61</sup> The movement “had its roots in 16<sup>th</sup> century European educational reform movements,” which “changed the perception of children from one of miniature adults to one of persons with less than fully developed moral and cognitive capacities.”<sup>62</sup> In 1899, Chicago, Illinois established the first juvenile delinquency court in Cook County, and new juvenile courts soon spread across the country.<sup>63</sup> Instead of using an adversarial approach like that of the adult system, the juvenile courts took a “*parens patriae*,” or the “state as parent,” approach that asserted that the court itself should act and serve as a guardian in the interest of children.<sup>64</sup> With the inception of juvenile courts, juvenile court judges had broad discretion over juvenile cases.<sup>65</sup> The goal of the juvenile court was to have a rehabilitative effect.<sup>66</sup> Judges were able to tailor individual needs of juvenile offenders in an attempt to turn them into productive citizens.<sup>67</sup> By enacting legislation to this effect, States:

believed that the juvenile justice system was a vehicle to protect the public by providing a system that responds to children who are maturing into adulthood. They recognized that conduct alone—that is, the alleged criminal act—should not be dispositive in deciding when to invoke the heavy hand of the adult criminal justice system. By providing for accountability, treatment, and supervision in the juvenile justice system—and in the community whenever possible—the juvenile justice system promoted short-term and long-term public safety.<sup>68</sup>

Following Chicago’s establishment of the first juvenile court in 1899, Massachusetts also established its first juvenile delinquency system with the

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*Massachusetts*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcr.org/Education1/Massachusetts-Training-Schools.html> (last visited Aug. 24, 2021) (discussing the process of deinstitutionalization under the Miller administration).

61. See Howard N. Snyder & Melissa Sickmund, *Juvenile Justice: A Century of Change*, OJJDP: JUV. JUST. BULL., Dec. 1999, at 1, 2. Prior to the 19th century movement, children were incarcerated with adults. *Id.* The 19th century movement was the start of a shift in the way juveniles were perceived and treated. *Id.* States started to establish reform homes for juveniles and shifting from a punitive system to one focused on rehabilitation. *Id.* at 2–3.

62. NAT’L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 1, 84 (Melissa Sickmund & Charles Puzzanchera eds., 2014) <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

63. CHARLES E. SPRINGER, JUSTICE FOR JUVENILES 20–21 (1986).

64. NAT’L CTR. FOR JUV. JUST., *supra* note 62.

65. See *Juvenile Justice History*, *supra* note 57 (noting that judges in early juvenile courts “exercised broad discretion on how each case was handled”).

66. See *id.*

67. See *id.*

68. Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL’Y & L. 410, 410 (2017).

same *parens patriae* rehabilitation philosophy in 1906.<sup>69</sup> In the first fifty years since the initiation of a juvenile court, juvenile courts had exclusive jurisdiction over all youth under the age of eighteen.<sup>70</sup> Additionally, youths could only be transferred to adult criminal courts on a case-by-case basis.<sup>71</sup>

Although there were separate courts for juveniles, youths still did not have the same constitutional rights as adults.<sup>72</sup> Several concerns about due process and the protection of legal rights for youth arose. In 1967, the United States Supreme Court in *In re Gault* recognized that the due process clause also applied to juveniles.<sup>73</sup> Specifically, the Court held that juveniles in the delinquency system were entitled to notice of charges, counsel, confrontation, cross-examination of witnesses and the privilege against self-incrimination.<sup>74</sup>

### C. Race in the Juvenile Justice System

The United States has a history of racial injustice stemming back to our interactions with Native people.<sup>75</sup>

[W]e took land, we killed people, we disrupted a culture. We were brutal. And we justified and rationalized that land grab, that genocide, by characterizing native people as different. It was the first way in which this narrative of racial difference was employed to justify behaviors that would otherwise be unjustifiable. When you are allowed to demonize another community and call them savages, and treat them brutally and cruelly, it changes your psyche. We abused and mistreated the communities and cultures that existed on this land before Europeans arrived, and then that narrative of racial difference was used to develop slavery.<sup>76</sup>

Since the inception of the House of Refuge in 1825, and in purported accordance with the *parens patriae* philosophy, an additional objective was to

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69. *DYS - Juvenile Justice Legal Issues*, MASS.GOV, <https://www.mass.gov/service-details/dys-juvenile-justice-legal-issues> (last visited June 18, 2019).

70. See NAT'L CTR. FOR JUV. JUST., *supra* note 62, at 84. See also SHAY BILCHIK, OFF. OF JUV. JUST. & DELINQ. PREVENTION, *JUVENILE JUSTICE: A CENTURY OF CHANGE 2* (1999). At that time, a case in the juvenile court could only be transferred to a criminal court for the child to be tried as an adult if the juvenile court chose to waive its jurisdiction. See *id.* at 2. Such decisions to transfer at that time were more likely to fall "within the realm of individualized justice" because they considered both the interests of the child and the public and were "made on a case-by-case basis." *Id.*

71. See NAT'L CTR. FOR JUV. JUST., *supra* note 62, at 84.

72. See *Youth in the Justice System: An Overview*, *supra* note 22.

73. *In re Gault*, 387 U.S. 1, 1 (1967) (holding that the Due Process Clause of the 14<sup>th</sup> Amendment applied to juvenile defendants).

74. See *id.* at 33–34, 36–37, 55–57.

75. See James McWilliams, *Bryan Stevenson on What Well-Meaning White People Need to Know About Race*, PAC. STANDARD, <https://psmag.com/magazine/bryan-stevenson-ps-interview> (Feb. 18, 2019).

76. *Id.*

“Americanize” children who were of European descent who were deemed worthy of rehabilitation.<sup>77</sup> Blacks and other youth of color were not considered suitable for rehabilitation.<sup>78</sup> Prior to the civil war, slavery was the method of choice for dealing with Black juveniles. Punishment was determined by the slave owner rather than the state.<sup>79</sup> After slavery was abolished[,] Black youths were incarcerated in adult penal facilities.<sup>80</sup> It wasn’t until 1849 that Philadelphia, for instance, established a separate House of Refuge for Colored Juvenile Delinquents.<sup>81</sup>

The initial foundation of juvenile courts shifted as violent crime rose in the 1960s and 1970s.<sup>82</sup> In response to rising crime, states began cracking down on juvenile crime. In 1978, New York City passed the Juvenile Offender Act, a law that allowed children as young as thirteen who were accused of a serious offense to be tried in adult courts.<sup>83</sup> This era marked the beginning of the juvenile transfer laws in the United States and the shift from previous practices, focusing on punishment rather than rehabilitation.

Racism and the War on Drugs in the 1980s unfairly focused on minorities as the enemy, especially in the news.<sup>84</sup> Media stories regarding illegal drugs, such as crack cocaine warned that an entire generation—consistently portrayed as a frightening “biological underclass” of mainly black urban youth—would be born addicted and diseased.<sup>85</sup> This was the beginning of the “tough on crime” and “War on Drugs” laws still in existence, such as mandatory minimum sentences and zero-tolerance policing.<sup>86</sup>

During the 1990s, “[y]oung men in their teens through their mid-twenties—a group that was disproportionately Black—committed a disproportionate number of the serious and violent crimes of this period, and arrests of this subgroup increased ‘significantly and more sharply’ than for older

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77. GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE* 33, 52, 87, 238 (2012).

78. *See id.* at 3.

79. *See* Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 905 (2010).

80. Vernetta D. Young, *Race and Gender in the Establishment of Juvenile Institutions: The Case of the South*, 73 PRISON J. 244, 246 (1994).

81. *See* CHRISTOPHER A. MALLET & MIYUKI FUKUSHIMA TEDOR, *JUVENILE DELINQUENCY: PATHWAYS AND PREVENTION*, 27–28 (2018).

82. *See* Simon I. Singer & Charles Patrick Ewing, *Juvenile Justice Reform in New York State: The Juvenile Offender Law*, 8 LAW & POL’Y 463, 465 (1986).

83. Katherine Lazarow, *The Continued Viability of New York’s Juvenile Offender Act in Light of Recent National Developments*, 57 N.Y. L. SCH. L. REV. 595, 597 (2012).

84. Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665, 682 (2003).

85. *Id.* at 683 (quoting Bryony J. Gagan, *Ferguson v. City of Charleston, South Carolina: “Fetal Abuse,” Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 496 (2000)).

86. Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 120 (2020).

adults.”<sup>87</sup> In the 1990s, a then Princeton professor used the word “superpredators” to describe the rise in crime happening across the country and to describe the perceived threat of the juvenile offender.<sup>88</sup> The word was racialized and “[s]uperpredators’ was unambiguously a term meant to malign, stereotype and target black and Latino youths.”<sup>89</sup> Although young Black men who committed murders with guns were a very narrow segment of the youth crime phenomenon, this cohort and the fear they engendered catalyzed the “tough on crime” policies of the 1990s.<sup>90</sup>

This rhetoric led to a “moral panic,” and, in response, almost every state passed laws lowering the age at which courts could—or in some cases must—try juveniles as adults.<sup>91</sup> Politicians quickly exploited the theory by calling for “adult time for adult crime.”<sup>92</sup> By the late 1990s, every state enacted laws cracking down on juvenile offenders and made it easier to prosecute youths as adults because of a perceived need to protect society from them. The new laws expanded the type of offenses eligible for transfer, lowered the age juveniles could be transferred to adult courts, and expanded prosecutorial power in the process.<sup>93</sup> This was an unfortunate shift from our initial foundation and many of these laws are still in existence today.

#### *D. Massachusetts Youthful Offender Statute*

Massachusetts’ response to rising juvenile crime across the country in the 1990s was the enactment of the Juvenile Justice Reform Act of 1996, which established the youthful offender statute that allows juveniles to be tried as adults and exposed to adult sentences (the “Youthful Offender” statute).<sup>94</sup>

87. Birkhead, *supra* note 58, at 408–09. See also BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 207 (1999).

88. Birkhead, *supra* note 58, at 409. See also Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001) <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> (discussing the now disproven “superpredator theory” and the regrets of the man who coined the term).

89. Kirsten West Savali, *For the Record: ‘Superpredators’ Is Absolutely a Racist Term*, THE ROOT (Sept. 30, 2016, 12:42 PM), <https://www.theroot.com/for-the-record-superpredators-is-absolutely-a-racist-t-1790857020>.

90. Birkhead, *supra* note 58, at 409.

91. Devina Douglas, Comment, *A Suggested Minor Refinement of Miller v. Alabama*, 46 MCGEORGE L. REV. 907, 911 (2014) (noting that former President Bill Clinton also passed the 1994 Crime Bill). The ‘moral panic’ which occurred in the 1990s as a result of the rising rates of adolescent crime is best described as a time “in which politicians, the media, and the public have reinforced each other in a pattern of escalating alarm about the seriousness of the threat of youth violence and the urgent need to respond.” Elizabeth S. Scott, *Keynote Address: Adolescence and the Regulation of Youth Crime*, 79 TEMP. L. REV. 337, 351–52 (2006).

92. Birkhead, *supra* note 58 at 410.

93. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP: JUV. JUST. BULL., June 2010, at 1, <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

94. *DYS - Juvenile Justice Legal Issues*, *supra* note 69.

Massachusetts is unique in its approach to youthful offender cases. If a juvenile is charged as an adult, the case remains in the Juvenile Court where it continues to be heard by a Juvenile Court Judge who can impose both a juvenile sentence and an adult sentence that includes adult prison time.<sup>95</sup> The youthful offender statute requires that a juvenile charged with a felony has to be at least fourteen years old and under eighteen years old to be tried as a youthful offender.<sup>96</sup> Statutorily, first and second-degree murders are excluded from juvenile court jurisdiction and must be tried exclusively in Superior Court.<sup>97</sup> The Massachusetts youthful offender statute is unique in that it is a hybrid of the juvenile and adult systems. Massachusetts follows the prosecutorial discretion approach in determining which cases should be indicted.<sup>98</sup> In other words, prosecutors have full discretion to seek a grand jury indictment and prosecute a youth accused of certain crimes as a juvenile under the delinquency laws or as an adult under the youthful offender statute.<sup>99</sup>

While both delinquency and youthful offender cases remain in juvenile courts, youthful offender cases are open to the public, unlike delinquency cases.<sup>100</sup> In youthful offender cases, juvenile court judges are able to give a hybrid or blended juvenile and adult sentence. Juveniles in youthful offender cases can be sentenced in the Massachusetts juvenile system up to the age of twenty-one and can also be sentenced to serve a sentence in the adult system after they age out of the juvenile system.<sup>101</sup> The Massachusetts agency that serves juveniles who are detained or committed is called the Department of Youth Services (“DYS”).<sup>102</sup>

## II. ADOLESCENT BRAIN DEVELOPMENT

Labeling children as “super predators” and availing them to increasingly detrimental sentencing measures did not make sense during any time period, but

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95. *Id.*

96. MASS. GEN. LAWS ANN. ch. 119, § 54 (2019). The Massachusetts youthful offender statute also requires that one of the following conditions is also met: (1) a previous commitment to DYS; (2) the offense involved the infliction of threat or serious bodily harm; or (3) the individual is charged with a firearm offense. *Id.*

97. MASS. GEN. LAWS ANN. ch. 119, § 74 (2013).

98. MASS. GEN. LAWS ANN. ch. 263, § 4 (2022).

99. *See id.* In Massachusetts the prosecution decides what cases to proceed with an indictment. *Id.* The case is presented to a grand jury and if an indictment is issued, it is then bound over to the Juvenile Court for prosecution. *Id.*

100. MASS. GEN. LAWS ANN. ch. 119, § 60A (2013).

101. MASS. GEN. LAWS ANN. ch. 119, § 58(b)–(c) (2013). Possible dispositions for youthful offender cases include: any sentence provided by law; or a combination sentence that includes a commitment to the department of youth services (DYS) until the age of twenty-one with an adult sentence; or a commitment to DYS to the age of twenty-one. *Id.*

102. *DYS - Juvenile Justice Legal Issues*, *supra* note 69. The Massachusetts correctional system known as DYS was established in 1846. *DYS - History of Youth Services*, MASS.GOV, <https://www.mass.gov/service-details/dys-history-of-youth-services> (last visited Aug. 19, 2020). DYS focuses on positive youth development to ensure that all juveniles receive services, education and job training in an effort to reduce recidivism and improve public safety. *Id.*

such legislative endeavors, including those in Massachusetts, are unconscionable now.<sup>103</sup> More recent advances in neuroscience research, as this section further explores, simply do not support the nation's reactive swing from rehabilitative efforts for adolescents to harsher, adult-level punishments.

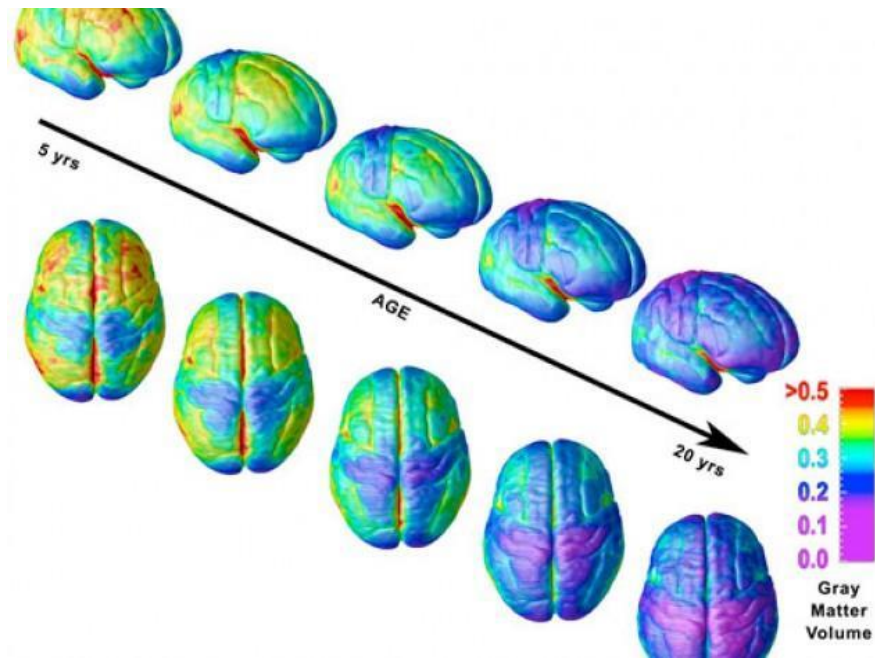


Figure 2<sup>104</sup>

*Figure 2* provides a clear and concise picture of how the brain changes and develops during adolescence. As *figure 2* indicates, the volume of gray matter in the human brain, which corresponds with better decision-making and “mature” behavior, increases exponentially as adolescents age.<sup>105</sup> In a society that currently still insists on treating children like adults to a certain extent in the justice system, it is important to elucidate just how different they truly are.

#### A. The Neuroscience

Adolescence is a distinct period of development between childhood and adulthood and is full of significant changes physically, emotionally, cognitively, and socially. Historically, researchers thought that the adolescent brain was just like the adult brain. However, with the advent of imaging technology such as

103 See Douglas, *supra* note 91.

104. Debra Bradley Ruder, *The Teen Brain*, HARV. MAG. (Sept.-Oct. 2008), <https://www.harvardmagazine.com/2008/09/the-teen-brain.html>.

105. *Id.*

magnetic resonance imaging (“MRI”), studies have discovered that the brain of an adolescent differs in significant ways from that of adults.<sup>106</sup> Researchers have looked closely at the neuroscience underlying adolescent behavior and discovered that the brain plays an enormous role in determining behavior.<sup>107</sup> During adolescence, the brain is in an active state of functional change as it is also fully developing.<sup>108</sup> The prefrontal cortex, which regulates behavior, is the last part of the brain to mature and this happens during adolescence.<sup>109</sup> Scientists argue that this area of the brain is responsible for higher-order cognition.<sup>110</sup>

The frontal lobe, the judgment center or CEO of the brain, allows the individual to contemplate and plan actions, to evaluate consequences of behaviors, to assess risk, and to think strategically. It is also the “inhibition center” of the brain, discouraging the individual from acting impulsively. The frontal lobe ultimately develops connections to many other areas of the brain, so that experiences and emotions are processed through the judgment center. The frontal lobe does not fully mature until approximately 23 – 25 years of age.<sup>111</sup> The immaturity of the adolescent’s judgment center explains much of the inability of adolescents to properly interpret experiences in the environment and thus make appropriate and healthy decisions.<sup>112</sup>

According to developmental psychologist Laurence Steinberg, there are four important structural changes that occur in the brain during adolescence.<sup>113</sup> First, during early adolescence the brain has less gray matter in the prefrontal region.<sup>114</sup> Gray matter is responsible for processing information to the brain.<sup>115</sup> This is a result of synaptic pruning, which means that unused synapses or connections between brain cells are pruned or eliminated.<sup>116</sup> This helps to improve how information is processed. “The pruning process allows the adolescent brain to function more rapidly for tasks that are already known, but decreases the brain’s capacity to learn new tasks or acquire new skills.”<sup>117</sup>

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106. See *id.*; see also Jay N. Giedd, *The Teen Brain: Primed to Learn, Primed to Take Risks*, CEREBRUM DANA FOUND. (Feb. 26, 2009) <https://www.dana.org/article/the-teen-brain-primed-to-learn-primed-to-take-risks/>.

107. Steinberg, *supra* note 13, at 81–84.

108. See *id.*

109. *Id.*

110. See Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216 (2009).

111. *The Teenage Brain: Under Construction*, AM. COLL. PEDIATRICIANS (May 2022), <https://acped.org/position-statements/the-teenage-brain-under-construction>.

112. See *id.*

113. See Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. Med. & Phil. 256, 259 (2013).

114. *Id.*

115. See Anthony A. Mercadante & Prasanna Tadi, *Neuroanatomy, Gray Matter*, STATPEARLS, <http://www.ncbi.nlm.nih.gov/books/NBK553239/> (last updated July 31, 2020).

116. See Steinberg, *supra* note 113, at 259.

117. *The Teenage Brain: Under Construction*, *supra* note 111 (footnote omitted).

Second, around puberty there are substantial hormonal changes of the neurotransmitter dopamine, which is responsible for feelings of pleasure.<sup>118</sup> During adolescence there is an increase in the levels of dopamine in the prefrontal cortex and dopamine levels in the reward center of the brain are changing.<sup>119</sup> Due to the dopamine changes and their role in our experience for pleasure, the increased levels cause adolescents to seek pleasure sensations.<sup>120</sup> This can result in riskier behavior.<sup>121</sup>

The third change in the brain is an increase in white matter, or myelin, in the prefrontal cortex.<sup>122</sup> White matter is responsible for the flow of information.<sup>123</sup> The growth of white matter increases slightly with girls and steeply with boys during adolescence.<sup>124</sup> The increase in white matter is because of myelination, which is the process of coating neurons with myelin, which helps conduct signals and improves the efficiency of brain circuits, which continues until early adulthood.<sup>125</sup> This is important for higher-order cognitive functions regulated by multiple prefrontal areas working in concert—functions such as planning ahead, weighing risks and rewards, and making complicated decisions.<sup>126</sup>

The fourth change is an increase in the connections between the prefrontal cortex and the limbic system. This anatomical change is especially important for emotion regulation,<sup>127</sup> as the limbic system is responsible for our emotions and our emotional responses.<sup>128</sup>

In addition to the structural changes in the brain during adolescence, Steinberg also identifies four major changes in how the brain functions. First, over the course of adolescence and into early adulthood, there is a strengthening of activity in brain systems involving self-regulation. During tasks that require self-control, adults employ a wider network of brain regions than do adolescents, which may make self-control easier.”<sup>129</sup>

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118. Steinberg, *supra* note 113, at 259.

119. *The Teenage Brain: Under Construction*, *supra* note 111.

120. *Id.*

121. *See* Steinberg, *supra* note 13, at 83.

122. *See* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453–54 (2013).

123. Tomáš Paus, *Growth of White Matter in the Adolescent Brain: Myelin or Axon?*, 72 BRAIN & COGNITION 26, 30 (2010).

124. Jennifer S. Perrin et al., *Growth of White Matter in the Adolescent Brain: Role of Testosterone and Androgen Receptor*, 28 J. NEUROSCIENCE 9519, 9519 (2008).

125. Steinberg, *supra* note 113.

126. *Id.* at 260.

127. *Id.*

128. *See* Steinberg, *supra* note 113; *see also* *Teen Brain: Behavior, Problem Solving, and Decision Making*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Sept. 2017), [https://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx](https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/The-Teen-Brain-Behavior-Problem-Solving-and-Decision-Making-095.aspx).

129. Steinberg, *supra* note 113, at 260 (citation omitted).



Additionally, there are changes in the brain when it responds to rewards and the brain is activated more when it anticipates a reward.<sup>130</sup> “Heightened sensitivity to anticipated rewards motivates adolescents to engage in acts, even risky acts, when the potential for pleasure is high, such as unprotected sex, fast driving, or experimentation with drugs.”<sup>131</sup> Adolescents’ hypersensitivity to reward is particularly even more pronounced when with their friends.<sup>132</sup>

Third, multiple brain regions respond to arousing stimuli.<sup>133</sup> “During adolescence, very strong feelings are less likely to be modulated by the involvement of brain regions involved in impulse control, planning ahead, and comparing the costs and benefits of alternative courses of action.”<sup>134</sup>

Lastly, the human brain maturation both structurally and functionally does not occur in a uniform timeline. The developments occur at different points of adolescence, which can lead to an imbalance in communication.<sup>135</sup> Essentially, this means that brain maturation is not chronological and occurs at different times.

The ongoing changes in the adolescent brain account for many of the behavioral differences between adolescents and adults. The position taken by an overwhelming number of healthcare associations and the scientific community as a whole is that “adolescents are inherently less blameworthy than adults as a consequence of their neurobiological and developmental immaturity.”<sup>136</sup> Adolescence has long been associated with increased experimentation, risk taking, not thinking about long-term consequences, and heightened sensitivity to peer and social influences.<sup>137</sup>

What we know now, is that adolescents are behaviorally different from adults as a result of the state of developmental flux of their brain structure and development. These structural and developmental differences separate adolescents from adults in three important ways: (1) adolescents have less capacity for self-regulation in emotionally charged contexts; (2) they have a heightened sensitivity to external influences like peer pressure and immediate incentives; and (3) they have less ability to make judgments that require future orientation.<sup>138</sup> It is also critical to note that neurodevelopmental differences can be accentuated by adverse life circumstances which are often common for youth

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130. *Id.*

131. *Id.*

132. *See id.* (discussing how adolescents’ maturity in making decisions when influenced by emotional arousal and peer pressure is drastically worse than adolescents’ abilities to make decisions under different circumstances).

133. *See id.*

134. *See id.* at 260–261.

135. *See* Casey et al., *supra* note 18, at 2.

136. Steinberg, *supra* note 113, at 257.

137. *See* Steinberg, *supra* note 68, at 413; Steinberg., *supra* note 113, at 260.

138. Steinberg, *supra* note 113, at 260–61.

in the juvenile justice system.<sup>139</sup> The science tells us that adolescent brains are not miniature adult brains, as they function differently. These structural changes in the brain from adolescent to adulthood underpin the findings of behavioral science through qualitative analysis: teens are generally more impulsive and are often known to make bad decisions.

While the legal system has primarily used the age of eighteen as the distinction between adolescence and adulthood since the nineteenth century, the now-available neuroscience findings do not conform to this demarcation. A legal system that arbitrarily distinguishes between juveniles and adults based on the age of eighteen cannot be reconciled with the psychological, behavioral, and cognitive research that shows significant development through the age of twenty-five.<sup>140</sup> Given the clear-cut differences between rapidly developing adolescent brains and those of adults, how can we continue to hold some youth to the same standards as adults?

### *B. United States Supreme Court Application of Brain Science- Kids are Different*

Advances in neuroscience have allowed theories surrounding the brain development of adolescents to be adopted by the United States Supreme Court. In a landmark ruling in 2005, the United States Supreme Court ruled that juveniles under the age of eighteen could not be subject to capital punishment/the death penalty because they are different. In *Roper v. Simmons*,<sup>141</sup> “the Court, relying on scientific data, held ‘juvenile offenders’ cannot with reliability be classified among the worst offenders.”<sup>142</sup> The argument in *Roper* was based on behavioral psychology. Justice Kennedy noted three differences of juveniles:

First, as any parent knows and as the scientific and sociological studies . . . “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth . . .” The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult. . . . The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult. . . .”

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139. Katie A. McLaughlin, Margaret A. Sheridan & Hilary K. Lambert, *Childhood Adversity and Neural Development: Deprivation and Threat as Distinct Dimensions of Early Experience*, 47 NEUROSCIENCE & BIOBEHAVIORAL REVS. 578 (2014). Many youths who are in the juvenile system have experienced trauma and experienced or witness domestic violence, abuse or neglect. *See id.*

140. Melissa S. Caulum, Comment, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 732 (2007).

141. *Roper v. Simmons*, 543 U.S. 551 (2005).

142. *Id.* at 569.

[J]uveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.<sup>143</sup>

Based on this reasoning, the Court held that a death penalty sentence for juveniles was unconstitutional and in violation of the Eighth Amendment.<sup>144</sup> A death penalty for juveniles, it found, is a naturally disproportionate sentence to the crime committed when the defendant is a juvenile, because it is “cruel and unusual” to punish juveniles like adults. The Court further

reasoned that juveniles have less control over their behaviors and their environment and they lack the ability to remove themselves from environmental exposure to criminality and violence. The Court’s opinion was supported by reports from psychologists who had evaluated the defendant. The psychologists determined that the defendant was “very immature,” “very impulsive,” and “very susceptible to being manipulated or influenced.” The Court noted that forensic psychologists and psychiatrists typically refrain from diagnosing juveniles as having criminal personalities such as antisocial personality disorder and psychopathy (severe criminal personality) because of the need to differentiate the two groups from a developmental perspective.<sup>145</sup>

In the next line of cases—*Graham v. Florida*,<sup>146</sup> *Miller v. Alabama*,<sup>147</sup> and *Montgomery v. Louisiana*<sup>148</sup>—the Supreme Court utilized neuroscience as a foundational basis for their holdings. In 2010, the Supreme Court held in *Graham v. Florida* that a sentence of juvenile life without parole was unconstitutional in non-homicide cases.<sup>149</sup> There, Graham was a juvenile convicted of armed robbery and attempted armed robbery.<sup>150</sup> The Supreme Court expanded its discussion about neuroscience and the developmental psychology of adolescent development, noting that youth status matters regardless of the type of crime committed.<sup>151</sup> The Court stated that the distinctive attributes of youth have to be taken into account in sentencing practices, including even the fact that juveniles are at a disadvantage from adults in criminal proceedings because they have a lack of familiarity with the court

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143. *Id.* at 569–70 (citations omitted).

144. *Id.* at 578.

145. John Matthew Fabian, *Applying Roper v. Simmons in Juvenile Transfer and Waiver Proceedings: A Legal and Neuroscientific Inquiry*, 55 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 732, 733–34 (2011) (citation omitted).

146. *Graham v. Florida*, 560 U.S. 48 (2010).

147. *Miller v. Alabama*, 567 U.S. 460 (2012).

148. *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

149. *See Graham*, 560 U.S. at 50.

150. *Id.* at 57.

151. *Id.*

process.<sup>152</sup> Justice Kennedy cited to amicus briefs from the American Psychology Association and American Medical Association and wrote that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” including, critically, the maturation of the parts of the brain “involved in behavior control . . . through late adolescence.”<sup>153</sup>

In 2012, the Supreme Court in *Miller v. Alabama* decided that use of mandatory sentences of life without parole for juveniles under the age of eighteen was unconstitutional.<sup>154</sup> The Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments’” and that a “judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”<sup>155</sup> The Court in *Miller* again relied on scientific findings to create what are now referred to as the “Miller Factors.” The Court stated that “[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds . . .” youth.<sup>156</sup> A mandatory sentencing scheme provides no opportunity to take into account individual circumstances and specific potentially mitigating factors about the specific juvenile. As Justice Kagan discussed in *Miller*:

Our decisions rested not only on common sense—on what “any parent knows”—but on science and social science as well. . . . [I]n *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adults minds”—for example, in “parts of the brain involved in behavior control.” We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and the neurological development occurs, his “deficiencies will be reformed.”<sup>157</sup>

The Supreme Court’s 2011 decision in *J.D.B. v. North Carolina*, while not explicitly mentioning advances in neuroscience, followed the Court’s recent

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152. *Id.* at 78.

153. *Id.* at 68 (citation omitted).

154. *Miller v. Alabama*, 567 U.S. 460 (2012).

155. *Id.* at 465, 489 (noting sentencing of juveniles to life without parole requires individual review, while a statute mandating a life sentence does not).

156. *Id.* at 477.

157. *Id.* at 471–72 (citations omitted). In 2016, in *Montgomery v. Louisiana*, the Supreme Court found that juveniles sentenced to life without parole as juveniles prior to *Miller* were entitled to resentencing or a parole hearing, applying the ruling in *Miller* retroactively. This decision meant that *Miller* could be applied to more than 2,600 children who had previously been sentenced to life without the possibility of parole. *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

rulings that children are in fact different.<sup>158</sup> *J.D.B. v. North Carolina* is a case about a thirteen-year-old seventh grade student who was not given his Miranda warnings during an interrogation and prior to making statements.<sup>159</sup> The Supreme Court ruled that a child's age must be considered by law enforcement in determining whether Miranda warnings need to be given to children during police interrogations.<sup>160</sup> The Court said that children cannot be viewed simply as miniature adults and that special rules for children are required when they are interrogated by the police.<sup>161</sup>

The U.S. Supreme Court has repeatedly held that the brains of juveniles are different from those of adults, and it impacts the way we should sentence juveniles in certain cases. By eliminating the death penalty and certain types of life sentences for juveniles, the Court is acknowledging that the brain science mitigates juvenile culpability. The advances in brain science impact the way we should sentence juveniles. Juveniles should not be punished as if they were adults. Our criminal justice laws can no longer simply be applied to juveniles without factoring in the significant developmental differences.

### III. JUVENILE TRANSFER LAWS DO NOT WORK

[E]vidence suggests that transfer to adult court does not have the intended general or specific deterrent effects. In contrast, cities and states in which waiver laws are implemented do not experience greater reductions in juvenile crime than those that do not, and juveniles processed by the criminal court for violent crimes tend to have *higher* recidivism rates. The increase in recidivism may be due to the reinforcing effects on delinquency of placing adolescents in facilities with criminogenic adults.<sup>162</sup>

Many of the transfer laws now in place were enacted without the current scientific knowledge cited above, and at a time when crime across the country was at an all-time high. We now know that risk-taking behavior common among adolescents peaks around age seventeen and then declines.<sup>163</sup> Studies have shown that adolescents age out of crime as they mature into adulthood.<sup>164</sup> Only “between five and ten percent[ ] become chronic offenders or continue offending during adulthood.”<sup>165</sup>

These punitive laws have not been revisited to address and incorporate adolescent brain development. States should consider reversing the expanded

158. *JDB v. North Carolina*, 564 U.S. 261 (2011).

159. *Id.* at 265–66.

160. *Id.* at 275, 280.

161. *Id.* at 274.

162. UNIV. OF PA., UNDERSTANDING THE “WHYS” BEHIND JUVENILE CRIME TRENDS 119 (2012) (emphasis in original) (citation omitted), <https://www.ojp.gov/pdffiles1/ojdp/grants/248954.pdf>.

163. Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21, 26 (2018).

164. *Id.* at 26.

165. *Id.*

transfer and sentencing laws enacted in the 1990s. The overwhelming majority of the transfer laws in the United States do not improve recidivism rates and do not focus on rehabilitation. Instead, they are based on the retributive theory of punishment.

Additionally, the transfer laws disproportionately affect youth of color. In 2017, for example, Black youth accounted for 35% of the delinquency cases in the United States, however, 54% of Black youths were transferred to adult courts.<sup>166</sup> Meanwhile, white youth accounted for 44% of the delinquency cases and 31% were transferred to adult courts.<sup>167</sup>

#### A. Recidivism

The intended purposes of the juvenile transfer laws—retribution and deterrence—have done nothing to help reduce recidivism.<sup>168</sup>

When policymakers changed laws to make it easier to transfer youth to the adult criminal justice system by a number of different pathways, they did so under the rationale that the change would help improve public safety and reduce youth crime. By sharp contrast, over the past two decades, research has emerged showing that youth in the adult court and correctional system are more likely to have higher recidivism rates than those served in the juvenile justice system.<sup>169</sup>

The Office of Juvenile Justice and Delinquency Prevention included a study in their annual report on juveniles who were prosecuted in adult court versus those who remained in the juvenile system.<sup>170</sup> Recidivism rates for juveniles who were prosecuted as adults were higher than those who remained in the juvenile system.<sup>171</sup> One study found that approximately “76 percent of

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166. WENDY SAWYER, THE PRISON POL’Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE (2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

167. *Id.* See also *supra* Section I.C.

168. See generally James C. Howell et al., BULLETIN 5: YOUNG OFFENDERS AND AN EFFECTIVE RESPONSE IN THE JUVENILE AND ADULT JUSTICE SYSTEMS (2013) (discussing the downfalls of the current state of the juvenile justice system in the United States and making suggestions for meaningful reform). The two primary purposes of enacting criminal laws are retribution and deterrence. Retributive justice is the theory that the punishment is proportionate to the seriousness of the crime. See *id.* Deterrence is the theory that criminal penalties should discourage people from committing similar offenses. See *id.* Rehabilitation, on the other hand, is an alternative approach that focuses on treatment, and as the name suggests, rehabilitating the offender. See generally *supra* Section I.B.

169. JUST. POL’Y INST., RAISE THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM 53 (2020), <http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheage.fullreport.pdf> (footnote omitted).

170. Griffin et al., *supra* note 31, at 26.

171. *Id.*

people who were under the age of 25 when released from prison were rearrested within three years, and 84 percent were rearrested within five years.”<sup>172</sup>

Additional research has confirmed that transfer laws do nothing to effectuate a reduction in offenses or recidivism. Given what we know about the developmental differences of juveniles, “punishing juveniles as adults is not likely to reduce recidivism and is likely to increase the social cost of juvenile crime.”<sup>173</sup>

A study by the Center for Disease Control and Prevention (CDC) found that juveniles transferred to an adult system were 39% more likely to be re-arrested on a violent offense than juveniles not transferred to adult court.<sup>174</sup> The phenomenon of youth incarcerated in adult prisons recidivating at a higher rate than youth released from juvenile facilities is not limited to any singular area in the country, though the recidivism rate amongst youths does vary. In Massachusetts, for example, “[r]ecidivism among young people incarcerated in the adult corrections is *more than double* similar youth released from department of youth services commitment.”<sup>175</sup>

Further support for this phenomenon is elucidated in the National Institute of Corrections’ (“NIC”) report called “You’re an Adult Now,” which revealed that juveniles transferred to adult correction systems reoffend at a higher rates than those who stayed in the juvenile justice system.<sup>176</sup> The report also found insufficient evidence that trying youths as adults is a deterrent for crime.<sup>177</sup> Additional studies have compared juvenile offenders in the juvenile system to those in the adult system, and have all come to a similar conclusion:

Analyses of these studies have repeatedly asserted that transfer laws are ineffective (i.e., they do not prevent future crime among those transferred) and may in fact be harmful (i.e., counterproductive for the purpose of reducing crime and enhancing public safety). . . . Most of the analyses of these results, however, align with the assessment . . . that transferred adolescents are ‘more likely to

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172. THE COUNCIL OF STATE GOV’TS. JUST. CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS 2 (2015).

173. RICHARD J. BONNIE ET AL., NAT’L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 134 (2013). The premise that punishing youths as adults increases the social cost of juvenile crime is better known as the utilization argument.

174. See Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, CTR. FOR DISEASE CONTROL (November 30, 2007), <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

175. *An Act to Promote Public Safety and Better Outcomes for Young Adults – S.825/H.3420*, CITIZENS FOR JUV. JUST., <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5da775cf2ed07a162e6ee87e/1571255761015/FACT+SHEET+RtA21+with+sponsors.pdf>.

176. U.S. DEP’T OF JUST. NAT’L INST. OF CORR., YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 5 (2011).

177. *Id.*

reoffend, and reoffend more quickly and more often, than those retained in the juvenile system.<sup>178</sup>

Not only do juveniles transferred to adult courts recidivate at a higher rate than juveniles who were prosecuted in the juvenile system,<sup>179</sup> but they were also found to have recidivated sooner and more frequently.<sup>180</sup>

The U.S. Department of Justice, Office of Juvenile and Delinquency Prevention sponsored a study on serious juvenile offenders between the ages of fourteen and eighteen, focusing on length of incarceration versus rehabilitative measures. The study found that longer juvenile incarcerations were ineffective at reducing recidivism, and instead, most youth who commit serious offenses reduce offending over time and respond best to community-based services and substance abuse treatments.<sup>181</sup> “[I]ncarceration is especially ineffective for less-serious youthful offenders. Many studies find that incarceration actually increases recidivism among youth with lower risk profiles and less-serious offending histories.”<sup>182</sup> Additionally, studies have shown that emerging adults are uniquely amenable to interventions focused on rehabilitation, finding that “[e]vidence-based family intervention models like Multisystemic Therapy, Functional Family Therapy, and Multidimensional Treatment Foster Care . . . [are] three specific intervention models that have repeatedly proven effective

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178. Bonnie et al., *supra* note 173, at 175 (citations omitted).

179. Griffin, et al., *supra* note 31, at 26.

180. *Id.* There are also racial disparities when it comes to rates of recidivism. For example, “African American males [not only] recidivated at a significantly higher rate than white male[s], but also . . . in a shorter time frame.” *Id.* Further both “Black and Hispanic youth were more likely to fail earlier in comparison to Whites. *Id.* These unfortunate outcomes can be attributed to several causes, including the effects of criminal conviction on the life chances of transferred youth, the lack of access to rehabilitative resources in the adult corrections system, and the hazards of association with older criminal mentors. *Id.*

181. See EDWARD P. MULVEY, OFF. JUV. DELINQ. PREVENTION, HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS 1–3 (2011).

182. RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 12 (2021).



with serious youthful offenders.”<sup>183</sup> Investing in alternatives such as programs, mentoring, skill-training and treatment have shown to lower offending rates.<sup>184</sup>

### B. Rehabilitation

The Office of Juvenile Justice and Delinquency Prevention also found that rearrest rates for youth within 1 year of release from an institution average 55 percent, while reincarceration and reconfinement rates during the same time frame average 24 percent. These statistics underscore the need to reduce reoffending by providing systematic services to address reentry issues and facilitate a juvenile’s reintegration back into society.<sup>185</sup>

Juvenile courts were created to provide rehabilitative services to help youth and to be distinct from the punitive adult system.<sup>186</sup> Many juveniles in the delinquency system benefit from community-based programs and services that focus on and address education, job training, treatment and counseling.<sup>187</sup> Additionally, in juvenile courts cases can be diverted out of the system so that youth can avoid having a delinquency record.<sup>188</sup> The adult criminal system has fewer opportunities for rehabilitative services and adult sentences can have significant collateral consequences that can completely alter life-course outcomes. The juvenile system can mitigate some of those collateral consequences due to its rehabilitative nature by providing appropriate services and maintaining confidentiality.

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183. *Id.* at 30. In Multisystemic Therapy (“MST”), therapists oversee a family intervention process over a span of three to five months, consisting of multiple home visits and community-based visits each week. *Id.* at 19. Functional Family Therapy (“FFT”) “employs office-based counseling ([for] an average of 12 sessions)” which initially engages family members, and then helps create meaningful behavioral changes geared towards improving family interactions. *Id.* As for Multidimensional Treatment Foster Care (“MTFC”), the youths are relocated to “specially trained foster families for six to nine months,” during which time their biological parents (or legal guardians) undergo intensive training and counseling. *Id.* at 17. All three methods, MST, FFT, and MTFC have begun to be adopted in multiple jurisdictions as they have had astounding results. Experimental studies of MST have resulted in arrest rates 25% to 70% lower than youth receiving usual services . . . FFT participants proved nearly six times more likely to avoid rearrest (40% vs. 7%) than youth receiving other treatments . . . [and] serious and chronic youthful offenders participating in MTFC were twice as likely as comparable youth placed into group homes to complete the program (and not run away), and they spent an average of seventy-five fewer days incarcerated over the subsequent two-year period. *Id.*

184. *Id.* at 30.

185. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE REENTRY, LITERATURE REVIEW: A PRODUCT OF THE MODEL PROGRAMS GUIDE I (2017) (citations omitted).

186. See *Juvenile Justice History*, *supra* note 57.

187. See OFF. JUV. JUST. DELINQ. PREVENTION, EMPLOYMENT AND TRAINING FOR COURT-INVOLVED YOUTH (2000) (reporting on the many diversionary tactics currently in place in the juvenile justice system and the obvious benefits of each).

188. Juvenile Diversion is a model used across the country that provides an alternative to youth for certain offenses. Juveniles voluntarily participate in programs and receive services. *Id.* at 7.

When youth are sentenced to youth facilities under the juvenile delinquency court, they are less likely to recidivate, and can instead benefit from rehabilitative services. “Studies examining the negative impact of transfer on recidivism have concluded that youth in juvenile custody benefit from services that the juvenile facilities are uniquely equipped to provide, whereas youth subject to transfer are often placed in an environment where ‘adult criminals [are] their teachers.’”<sup>189</sup>

Criminal behavior tends to increase in adolescence and decline through the twenties.<sup>190</sup> In fact, long-term studies have shown that delinquency in adolescents is usually not an indication of an indelible personality trait; most adolescents, even those who commit serious crimes, will age out of offending and will not become career criminals.<sup>191</sup> The vast majority of cases “people will reach an age where their ability to self-regulate will overcome their impulses effectively helping them ‘age out’ of criminal behavior if treated appropriately.”<sup>192</sup> Given that the adolescent brain is still developing, the young adult is theoretically “highly amendable to rehabilitation.”<sup>193</sup> Because this behavior generally declines as individuals age, “targeted interventions that focus on deterring emerging adults from further involvement in the criminal justice system during this more volatile age range can be highly effective.”<sup>194</sup>

#### IV. JUVENILE JUSTICE REFORM

##### A. Raise the Age

Over the last several years, the “raise the age movement” has focused on moving youth under the age of eighteen out of the adult criminal justice system and into the juvenile system. According to the Justice Policy Institute, “the pathway that feeds the most 16-and-17-year-olds into adult court, adult jail, or adult prison is automatic exclusion of young people from the juvenile justice system solely based on their age.”<sup>195</sup> Many states that originally excluded sixteen- and seventeen-year-olds from the juvenile justice system have raised the juvenile court jurisdictional age to include youth under eighteen.<sup>196</sup> States

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189. UCLA SCH. OF L. JUV. JUST. PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM 32 (2010) (reviewing literature relevant to the juvenile justice system).

190. Casey et al., *supra* note 18, at 1–2.

191. *Id.* at 2.

192. CYNTHIA S. CREEM & PAUL F. TUCKER, EMERGING ADULTS IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM 12 (2020).

193. *Why Raise the Age to Include 18–20 Year Olds in the Juvenile Justice System?*, RAISE THE AGE MA, <https://www.raise-the-age.org/why-raise-the-age> (last visited Aug. 25, 2021) (outlining the arguments for raising the age in Massachusetts).

194. Creem & Tucker, *supra* note 192, at 12.

195. JUST. POL’Y INST., *supra* note 169, at 5.

196. Teigen, *supra* note 40. Only five states in the United States still prosecute 17-year-olds as adults (Georgia, Michigan, Missouri, Texas, and Wisconsin). *Id.*

have made this change because research shows that teenagers are better served under the rehabilitative model of the juvenile justice system than an adult criminal justice system.<sup>197</sup>

In 2007, Connecticut was one of the first states to raise the age of juvenile court jurisdiction from 16 to 18.<sup>198</sup> According to the Columbia Justice Lab, it has been so successful in Connecticut that the state began considering raising the age of juvenile court jurisdiction to twenty-one.<sup>199</sup> Policy Institute:

The reason for this continuing change is a growing acknowledgement that raising the age is good public policy, and because today there are increasingly more scientifically proven and cost-effective ways to address delinquency by relying on *developmentally appropriate juvenile justice approaches*. Because these approaches lead to more youth being served in their home communities, and not placed in more expensive, more restrictive, and less effective settings, an increasing number of states have seen that initial concerns about escalating costs have not materialized, and there are cost-effective pathways to serve 16- and 17-year-old youth in their juvenile justice systems.<sup>200</sup>

In 2018, Connecticut, Massachusetts, Illinois, and Vermont considered legislation to include kids over the age of eighteen in the juvenile justice system.<sup>201</sup> This is due to the positive outcomes attributed to the juvenile system that uses a developmental approach.<sup>202</sup> In many of these states, cases and re-arrest rates are down; most notably, since Massachusetts raised the age to include seventeen-year-olds in the juvenile system in 2013, juvenile crime has declined by 34 percent.<sup>203</sup> Additionally, in Massachusetts younger people

197. JUST. POL'Y INST., *supra* note 169, at 5.

198. *Raised the Age Connecticut*, CONN. JUV. JUST. ALL., <http://www.raisetheagect.org/> (last visited Aug. 20, 2020).

199. *New Emerging Adult Justice Reform Bills in Illinois and Connecticut*, COLUM. JUST. LAB, <https://justicelab.columbia.edu/new-EAJ-reform-bills-IL-and-CT> (last visited Aug. 25, 2021) (discussing Gov. Malloy's Bill No. 5040, An Act Concerning Adjudication of Certain Young Adults in Juvenile Court). Bill No. 5040 was originally intended to go into effect in July of 2021; a new iteration of the bill is currently pending, and now seeks to raise the age of juvenile jurisdiction to twenty-years-old. See *H.B. 5040, An Act Concerning Adjudication of Certain Young Adults in Juvenile Court and H.B. 5042, An Act Concerning Prosecution of Low-Risk Young Offenders in Adult Court*, ACLU Conn., <https://www.acluct.org/en/legislation/hb-5040-act-concerning-adjudication-certain-young-adults-juvenile-court-and-hb-5042-act> (last visited Aug. 25, 2021).

200. JUST. POL'Y INST., *supra* note 169, at 7 (emphasis in original).

201. See Selen Siringil Perker et al., *Emerging Adult Justice in Illinois: Towards an Age-Appropriate Approach*, COLUM. JUST. LAB Jan. 2019, at 4.

202. Additionally, in 2018 Washington State extended their juvenile court jurisdiction for certain youthful offender cases from age twenty-one to twenty-five. See S.B. 6160, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (extending juvenile court jurisdiction of serious cases to age twenty-five). The bill also extends the age limit for confinement in a juvenile rehabilitative facility from age twenty-one to age twenty-five. *Id.*

203. See *Frequently Asked Questions*, RAISE THE AGE MA, <https://www.raisetheage.org/faqs> (last visited Aug. 20, 2020).

released from DYS after being committed have lower recidivism rates than young adults who were incarcerated in the adult system as opposed to being released.<sup>204</sup>

In 2018, Massachusetts passed the “Criminal Justice Reform Act of 2018.”<sup>205</sup> It decriminalized minor offenses for juveniles under the age of 18, expanded juvenile diversion, and raised the minimum age where juveniles could be prosecuted in a delinquency case from age seven to twelve years old.<sup>206</sup> Massachusetts now has the second highest minimum juvenile court age in the United States.<sup>207</sup> The bill also decriminalized nonviolent school-based public order offenses.<sup>208</sup> While Massachusetts’ previously considered a bill to increase the age of juvenile court jurisdiction beyond age eighteen, which did not pass, the state is still looking to include eighteen-to-twenty-year-olds in juvenile court.<sup>209</sup> An additional proposal is to expand the upper age of commitment to DYS from age twenty-one to age twenty-three for youths between the ages eighteen and twenty or otherwise referred to as “emerging adults.”<sup>210</sup> “In 2018, 3,716 emerging adults between the ages of 18-24 appeared in Massachusetts adult criminal courts. Of those, 718 were 18 or 19 years old [*sic*].”<sup>211</sup> Recognizing that there is much work to be done with juvenile justice reform, this is precisely why, in 2020, a task force was created in Massachusetts to look at these issues.<sup>212</sup>

In 2019, Massachusetts introduced another bill to raise the age of juvenile court jurisdiction, though this bill proposed that the juvenile court system

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204. *Id.*

205. S.B. 2371, 189th Gen. Ct. (Mass. 2018).

206. *Id.* Comparatively, Florida prosecutes children as young as 7. *Raising the Minimum Age for Prosecuting Children*, NAT’L JUV. JUST. NETWORK, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> (last visited November 3, 2022).

207. *Id.*

208. See *Criminal Justice Reform Act of 2018: A Path Forward for Youth Justice*, CITIZENS FOR JUV. JUST., <https://www.cfjj.org/jjreforms-2018> (last visited Aug. 25, 2021) (summarizing the strides made towards juvenile justice reform in light of Massachusetts’ Criminal Justice Reform Act of 2018).

209. See *H.B. 5040, An Act Concerning Adjudication of Certain Young Adults in Juvenile Court and H.B. 5042, An Act Concerning Prosecution of Low-Risk Young Offenders in Adult Court*, *supra* note 194.

210. See *Summary of Juvenile Justice Provisions in An Act Relative to Criminal Justice Reform*, CITIZENS FOR JUV. JUST., <https://www.cfjj.org/jjreforms-2018> (last revised Oct. 17, 2018).

211. Deborah Becker, *Why Vermont Raised Its Juvenile Court Age Above 18 — And Why Massachusetts Might Too*, WBUR NEWS (Oct. 3, 2019), <https://www.wbur.org/news/2019/10/03/juvenile-court-age-vermont-massachusetts>.

212. See Task Force on Emerging Adults in the Criminal Justice System, Gen. Ct. of the Commonwealth of Mass., <https://malegislature.gov/Commissions/Detail/344/Hearings> (last visited Aug. 20, 2020). The task force issued a report on February 25, 2020, however, declining to recommend expanding the juvenile court’s jurisdiction as the task force could not agree on what should be done. See Sarah Betancourt, *Task Force Punts on Raising the Age of Juvenile Offenders*, COMMONWEALTH MAGAZINE (Feb. 26, 2020), <https://commonwealthmagazine.org/criminal-justice/task-force-punts-on-raising-the-age-of-juvenile-offenders/>.

gradually incorporate eighteen-to-twenty-year-olds over a five-year period.<sup>213</sup> Pursuant to this proposed act, adolescents would be required to attend school and participate in rehabilitative programming which would in turn, lower recidivism.<sup>214</sup> The 2019 bill has still not passed, and Massachusetts is still looking to raise the age of juvenile court jurisdiction to include eighteen-to-twenty-year-olds.<sup>215</sup> Not only does such reform make practical sense, knowing what we know now about the adolescent brain, it also makes fiscal sense. Nationwide, Massachusetts currently spends the most money on young adults in criminal courts, while simultaneously having the highest recidivism rate.<sup>216</sup>

Vermont has arguably had much greater success with its attempts to “raise the age.” A few years ago, Vermont conducted a study that compared the recidivism rates of juveniles adjudicated in the delinquency system versus those convicted in the adult criminal court.<sup>217</sup> The study found that juveniles who were not convicted in the adult criminal division recidivated at a lower rate.<sup>218</sup> The study revealed that “[t]he three-year recidivism rate for juveniles adjudicated in the Family Division was 25% compared to a 47% three[-]year recidivism rate for juveniles convicted in the Criminal Division.”<sup>219</sup> As a result, in 2018, Vermont was the first state in the country to raise the age of juvenile court jurisdiction to above age eighteen.<sup>220</sup> Vermont now treats all teenagers under the age of nineteen as juveniles in the criminal justice system.<sup>221</sup> They also voted to raise the age of juvenile court jurisdiction to include twenty-year-olds by the year 2022.<sup>222</sup>

California has also taken part in helping to lead the way for juvenile justice reform. In January 2020, California proposed a bill to raise the age of juvenile courts.<sup>223</sup> The bill would expand the juvenile courts jurisdiction to include nineteen- and twenty-year-olds, and juveniles could be supervised by probation up until age twenty-four.<sup>224</sup> The term “emerging adults” is used to describe the

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213. See *Emerging Adult Justice Reform*, CITIZENS FOR JUV. JUST., <https://www.cfjj.org/emerging-adult-justice> (last visited Sept. 4, 2022).

214. *Id.*

215. *An Act to Promote Public Safety and Better Outcomes for Young Adults — S.825/H.3420*, *supra* note 175.

216. *Id.*

217. Robin Weber, et al., CRIME RSCH. GRP., JUVENILE RECIDIVISM STUDY: 2008–2011 (2015), <https://dcf.vermont.gov/sites/dcf/files/Youth/Juvenile-Recidivism-Study.pdf>.

218. *Id.*

219. *Id.* (observing that the Family Division is where juveniles are prosecuted for criminal cases in Vermont).

220. Becker, *supra* note 211.

221. *See id.*

222. Perker, *supra* note 201, at 4 (establishing that the law has exceptions for 12 serious crimes).

223. Trevor Boyer, *Raise the Age Advocates Eye Controversial New Goal — 20 — But Are Met With Stiff Resistance*, JUV. JUST. INFO. EXCH. (May 15, 2020), <https://jjie.org/2020/05/15/raise-the-age-advocates-eye-controversial-new-goal-20-but-are-met-with-stiff-resistance/>.

224. *Id.*

developmental transitional period from youth to adulthood.<sup>225</sup> The duration of human maturation has been underestimated; an additional 4–6-year pre-adult period of “emerging adulthood,” should be included in models of human maturation.<sup>226</sup> Ongoing brain maturation in young adulthood has implications for policies related to culpability and punishment, and especially for rehabilitation—policies that give young adults the opportunity to stop offending and become contributing members of society.<sup>227</sup> As a result, emerging young adult justice reform is happening across the country.<sup>228</sup> It aims at creating a more effective, fairer and developmentally appropriate response for youth ages eighteen to twenty-five who are in the adult criminal justice system.<sup>229</sup>

Emerging adults “make up 10 percent of the United States population, but in 2012 they comprised 29 percent of arrests and 21 of admissions into adult prisons across the country.”<sup>230</sup> This was further verified in a 2015 report by the Council of State Government Justice Center, finding that in 2013, young adults comprised 10% of the U.S. population, but accounted for nearly 30% of people arrested for both serious and non-serious crimes.<sup>231</sup> Adolescent brain development has been used to explain why this population has such a high arrest rate. Of particular relevance to the legal system is what criminologists refer to as the “age-crime curve”, or emergence of criminal behavior, especially in males, during adolescence that peaks around 17 years of age and then decreases. An imbalance model of brain development has been proposed to help explain these phenomena.<sup>232</sup>

The emerging adult population is currently a priority for many states which have the highest rates of violent offending.<sup>233</sup> “Few youths who are

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225. See JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES* 12 (2d ed., Oxford U. Press, 2004). The term “Emerging Adults” was coined in 2000 by Psychologist Jeffrey Arnett. See Perker et al., *supra* note 201, at 2.

226. Ze'ev Hochberg & Melvin Konner, *Emerging Adulthood, a Pre-adult Life-History Stage*, 10 *FRONTIERS IN ENDOCRINOLOGY* art. 918 (2020), <https://www.frontiersin.org/articles/10.3389/fendo.2019.00918/full>.

227. Casey et al., *supra* note 18, at 4.

228. See Dana Shoenberg, *How State Reform Efforts Are Transforming Juvenile Justice*, PEW RSCH. CTR. (Nov. 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/26/how-state-reform-efforts-are-transforming-juvenile-justice>.

229. Emerging Adult Justice Learning Community, *A Roadmap to Reform: Key Elements of Specializing Courts for Emerging Adults*, COLUMBIA UNIVERSITY JUST. LAB, Apr. 2021, at 1., <https://justicelab.columbia.edu/sites/default/files/content/Key%20Elements%20of%20Specialized%20Courts%20for%20Emerging%20Adults.pdf>.

230. Perker et al., *supra* note 201, at 4.

231. THE COUNCIL OF STATE GOV'TS JUST. CTR., *REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS* 2 (2015).

232. Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 *TRENDS COGNITIVE SCIS.* 63, 63 (2014).

233. Bianca E. Bersani et al., *Thinking About Emerging Adults and Violent Crime*, Colum. Univ. Just. Lab, May 2019, at 3,

involved in even serious delinquent behavior actually go on to engage in criminal behavior during adulthood. Compared to older adults, emerging adults are also more responsive to rehabilitation and appropriate interventions. . . .”<sup>234</sup> Emerging adults are more likely to be incarcerated, but also more likely to recidivate when they leave a correctional facility. Higher recidivism rates among emerging adults are not surprising. Justice-involved emerging adults have been victims of violent crime and have experienced emotional and physical trauma at a higher rate than any other populations. Exposure to toxic environments such as adult jails and prisons further traumatizes justice-involved emerging adults, making them more vulnerable to negative influence, and as a result, increases recidivism among this group. Tailoring the justice system’s response to emerging adults’ developmental needs can reverse this cycle of crime and improve public safety.<sup>235</sup>

Additionally, exposure to toxic environments, like adult jails and prisons, entrenches young people in problematic behaviors, increasing the probability of recidivism.<sup>236</sup> Having nineteen and twenty-year-olds in the juvenile system and providing them to rehabilitative programs would lower recidivism.<sup>237</sup> For this reason, many states are focusing on this age group and developing justice reform specifically for this demographic population. Given that most young adults “age out” of offending by their mid-twenties—especially with age-appropriate interventions—this transitional period is also a time of opportunity. Most emerging adults will mature normally through this stage between childhood and adulthood, and naturally age out of crime as their cognitive skills develop, responsibility and independence grow, and social ties are strengthened through key milestones such as employment, and marriage. Research again shows that few youths who are involved in delinquent behavior actually continue into adult criminal behavior. Emerging adults are also more malleable to rehabilitation and appropriate interventions that promote growth during this critical period.<sup>238</sup>

Given young people’s capacity for change, and the likelihood that many of them will stop committing crimes as they mature, it makes sense to consider special, expedited parole-based policies that allow young adults to demonstrate that they are no longer a threat to society.<sup>239</sup> Under that same line of reasoning, lawmakers should consider excluding people between eighteen and twenty-four from the mandatory minimum sentences currently imposed on adults.<sup>240</sup>

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<https://static1.squarespace.com/static/5c6458c07788975dfd586d90/t/5cefe1b23cd4e3000135efaa/1559224929928/Emerging-Adults-Violent-Crime.pdf>.

234. Perker et al., *supra* note 201, at 9.

235. Selen Siringil Perker & Lael Chester, *Emerging Adults: A Distinct Population That Calls for an Age-Appropriate Approach by the Justice System*, HARV. KENNEDY SCH., June 2017, at 2, [https://scholar.harvard.edu/files/selenperker/files/emerging\\_adult\\_justice\\_issue\\_brief\\_final.pdf](https://scholar.harvard.edu/files/selenperker/files/emerging_adult_justice_issue_brief_final.pdf).

236. *Emerging Adult Justice Reform*, *supra* note 213.

237. *See id.*

238. Perker & Chester, *supra* note 235, at 3.

239. CASEY ET AL., *supra* note 18, at 4.

240. *Id.*

Jurisdictions across the country are in the midst of discussing whether to handle emerging adult cases as juveniles or adults. Some of the recommendations have been to have specialized courts. For example, in 2017, Illinois opened a Young Adult Restorative Justice Community Court for emerging adults between the age of eighteen and twenty-six who are charged with nonviolent felonies and misdemeanors.<sup>241</sup> Illinois also has a new piloted multisystem of therapy for adolescents who are court-involved and have mental health issues, called Multisystemic Therapy-emerging Adults (MST-EA).<sup>242</sup> This court focuses on restorative justice, community engagement and alternatives to addressing cases.<sup>243</sup>

In Massachusetts, the Counsel for State Governments Justice Center, which works on criminal justice initiatives, found that emerging adults (ages) have the highest risk of reoffending, with a recidivism rate of 76% within three years of release.<sup>244</sup> Unlike the adult criminal justice system, DYS has an explicit focus on rehabilitation. “Keeping, [18-year] old’s in the juvenile system gives these older teenagers access to this high-quality rehabilitative programming, which will reduce the rate of recidivism and have a long-term positive impact on public safety.”<sup>245</sup> Additionally, “[b]ased on available data of Massachusetts justice-involved populations aged 18–20, those involved in the juvenile system have a 26% re-conviction rate versus 55% in the adult system.”<sup>246</sup>

In 2019, Massachusetts established a task force of twenty-one members on “emerging adults.”<sup>247</sup> The task force was asked to examine whether juvenile court jurisdiction should include eighteen to twenty-year-olds.<sup>248</sup> On February 26, 2020, the task force issued a report on their recommendations.<sup>249</sup> The panel did not agree on whether the age of juvenile court jurisdiction should be raised.<sup>250</sup> Instead, they proposed increased use of rehabilitative services for emerging adults.<sup>251</sup> They also recommended incorporating some of the services Massachusetts DYS offers in the juvenile system to younger offenders in the adults corrections system.<sup>252</sup> Additionally, they recommended that judges in the district court have the discretion to refer cases involving younger defendants

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241. See Perker et al., *supra* note 201, at 10.

242. *Id.* (describing Illinois’ adaption of the multisystemic therapy for emerging adults with mental illness).

243. See *id.*

244. CREEM & TUCKER, *supra* note 192, at 12.

245. Sen. Creem Guest Commentary: *Raise Age of Juvenile Jurisdiction*, WICKED LOCAL: NEWTON (Mar. 12, 2020), <https://newton.wickedlocal.com/news/20200312/its-time-for-massachusetts-to-raise-age-of-juvenile-jurisdiction-to-include-18-year-olds>.

246. CREEM & TUCKER, *supra* note 192, at 12.

247. See Betancourt, *supra* note 207.

248. *Id.*

249. See CREEM & TUCKER, *supra* note 192.

250. See Betancourt, *supra* note 207.

251. See CREEM & TUCKER, *supra* note 192, at 6, 12, 14, 15.

252. See *id.* at 6–7, 9, 26.



to juvenile courts.<sup>253</sup> They also proposed creating a new specialized emerging adult court for eighteen to twenty-four-year-olds.<sup>254</sup>

Additionally, in Massachusetts there is a newer emphasis on treatment and rehabilitation for juvenile offenders as an alternative to prosecution. Massachusetts has research-based diversion programs where juveniles accused of certain crimes are given an opportunity to avoid an arraignment and criminal record by participating in community programs and engaging with services.

In New York, meanwhile, they are considering expanding the state's youthful offender law so that it incorporates those up to age 25 and removes restrictions on those with prior felonies.<sup>255</sup> Currently in New York only youth under age nineteen who are tried in adult courts are eligible for youthful offender status, which results in their records being sealed.<sup>256</sup>

### B. European Models

This section focuses on comparative models of juvenile practices in Europe which could be incorporated in Massachusetts. In Europe, some countries follow a "welfare" model in contrast with the justice model we use in the United States. A welfare model focuses on the needs of the child, diagnosis, treatment and more informal procedures, in addition to education and rehabilitation.<sup>257</sup>

Europe, by and large, has been providing emerging adults with developmentally appropriate juvenile court protections.<sup>258</sup> The United Nations' definition of a youth, for example, is between the ages of fifteen and twenty-four.<sup>259</sup> A majority of European nations, logically, "have extended the applicability *rationae personae* of their juvenile justice laws to the age of 21 as neuro-scientific evidence and brain development studies have indicated that it is difficult to distinguish between the brain of an older child and that of a young adult."<sup>260</sup> Croatia, Germany, and the Netherlands, additionally, allow youth

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253. See *id.* at 9 (providing proposals for legislative consideration).

254. *Id.* at 1820. Modeled after a specialized emerging adult court in San Francisco which presides over adults aged 18–25, the Hampden County District Attorney's office has created a specialized court serving 18–24-year-old emerging adults. *Id.* at 20, 38. The court is referred to as the Emerging Adult Court of Hope ("EACH") (excluding murder and certain sex offenses). *Id.* at 20. The task force's report admits that this current Massachusetts-based model is too recently formed to assess its effects, but San Francisco's has shown promise. *Id.* at 6.

255. Boyer, *supra* note 223, at 4.

256. *Id.*

257. Susan Young et al., *Juvenile Delinquency, Welfare, Justice and Therapeutic Interventions: A Global Perspective*, 41 BJPSYCH BULL 21, 22 (2017).

258. Sibella Matthews et al., *Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System*, 1 JUST. EVALUATION J. 1, 6 (2018).

259. *Youth*, UNITED NATIONS: GLOBAL ISSUES, <https://www.un.org/en/global-issues/youth> (last visited Aug. 25, 2021) (acknowledging that while there is no universally agreed definition of youth as an age group). The UN defines "youth" as people between 15 and 24 years old. *Id.*

260. See Matthews et al., *supra* note 258, at 6.

over the age of eighteen to be punished in the same manner as people in the juvenile justice system.<sup>261</sup>

In Germany, for example, juveniles are not transferred to adult courts.<sup>262</sup> In 1953, responding to the “fatherless generation” of young people following World War II, Germany decided to rehabilitate in lieu of institutionalizing youth.<sup>263</sup> Germany changed its juvenile laws to allow youth up to the age of twenty-one to be tried as juveniles.<sup>264</sup> Under the law, anyone under the age of eighteen cannot be tried or sentenced as an adult, even if charged with a serious offense.<sup>265</sup> There is also a limit on the maximum time youths under twenty can be sentenced for very serious offenses.<sup>266</sup> For example, the maximum sentence youths between fourteen to seventeen can get is ten years of imprisonment.<sup>267</sup> Additionally, youths under the age of fourteen are not considered criminally responsible.<sup>268</sup> The German model focuses on diversion, minimal interventions, mediation, and education.<sup>269</sup>

Similarly, in the Netherlands, the 2014 reforms allow juvenile sanctions to be applied to emerging adults up to age twenty-three.<sup>270</sup> Dutch emerging adults are specially evaluated by probation and forensic psychologists who recommend whether they should be handled under adult or juvenile law.<sup>271</sup> The maximum sentence for juveniles from ages sixteen or seventeen is two years and the maximum for those ages twelve to fifteen is one year.<sup>272</sup>

### C. Transfer Hearing Reform in the United States

The criminal justice system is already changing the way it treats juveniles in light of adolescent brain development. In November of 2016, California passed Proposition 57, which reversed the decision-making power of transferring a juvenile to adult court from the prosecutors back to the juvenile

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261. *Id.* at 20.

262. *See id.* at 7–11 (describing Germany’s approach with juveniles and young adults in the justice system).

263. *Id.* at 7.

264. John Lam, *Germany Progressive Juvenile Justice Approach*, SAN QUENTIN NEWS (Sept. 12, 2018), <https://sanquentinnews.com/germany-progressive-jvenile-justice/>.

265. *See* Matthews et al., *supra* note 258, at 7.

266. *See id.* at 11.

267. *Id.*

268. *Id.* at 7. Comparatively, in Belgium, the minimum age of criminal responsibility is eighteen years old. Young et al., *supra* note 257, at 22.

269. *See* Mathews et al., *supra* note 258, at 6.

270. *See id.* at 6, 13.

271. *See id.* at 13.

272. *Penalties for Juvenile Offenders*, GOV’T OF NETHERLANDS, <https://www.government.nl/topics/sentences-and-non-punitive-orders/penalties-jvenile-offenders> (last visited June 20, 2019).

court judges.<sup>273</sup> It also eliminated statutory waiver. Prosecutors in California need to demonstrate that the individual should be tried in adult court.

California's Proposition 57 overrides Proposition 21, which was enacted during the "get tough" on crime era.<sup>274</sup> Proposition 21 allowed prosecutors to make the sole decision to try a youth as a juvenile or as an adult via direct file.<sup>275</sup> The law now requires a hearing by a juvenile court judge to determine whether the youth should be transitioned to adult court and prosecuted as an adult.<sup>276</sup> Now, if the juvenile is over sixteen and alleged to have committed a certain offense, including murder and attempted murder, the prosecution can request a fitness hearing.<sup>277</sup> The prosecution has the burden of proof of establishing unfitness.<sup>278</sup> Judges in California hold fitness hearings, which are initiated by the prosecution where a Judge determines whether a case is "fit" for the juvenile system. Judges consider five factors in determining whether the case should stay in the Juvenile system: (1) the degree of criminal sophistication; (2) whether the child can be rehabilitated before jurisdiction ends; (3) previous delinquency history; (4) the success of previous attempts by the court to rehabilitate; and (5) the circumstances and gravity of the offense allegedly committed by the juvenile. The court also orders an investigation and report by the probation department on the behavior and social history of the minor. The judge evaluates whether the minor is amenable to treatment, identifies the programs available through the juvenile court, and looks at the totality of circumstances to determine where the case should be tried.<sup>279</sup> The bill was amended in 2018 and now prosecutors are unable to transfer fourteen-or fifteen-year-olds to adult courts.<sup>280</sup> Additionally, in 2019 California stopped prosecuting kids under 16 in the adult criminal justice system.<sup>281</sup> Of course, one potential issue with the approach in California is consistency and accountability of the decision-maker.

Thirty-six states have passed laws limiting the treatment of youth as adults. However, all fifty states and the District of Columbia still allow youth

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273. See *Proposition 57*, FRESNO CNTY, <https://www.co.fresno.ca.us/departments/public-defender/proposition-57> (last visited Aug. 25, 2021).

274. See Steven Greenhut, *How California Softened its 'Tough-on-Crime' Approach*, R Street Policy Study No. 102, R ST. (July 2017), <https://www.rstreet.org/wp-content/uploads/2017/07/102.pdf>.

275. J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 57: "THE PUBLIC SAFETY AND REHABILITATION ACT OF 2016" 14 (2017), <https://www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf> (providing a description of the changes made by Proposition 57).

276. See *id.*

277. See Cal. Welf. & Inst. Code § 707 (West 2019).

278. COUZENS & BIGELOW, *supra* note 275, at 14. Judges in California hold fitness hearings, which are initiated by the prosecution where a Judge determines whether a case is "fit" for the juvenile system. Judges consider the juvenile's criminal sophistication and whether they can be rehabilitated. See *id.*

279. See Welf. & Inst., *supra* note 277, at 707(a).

280. See S.B. 1391, Reg. Sess. (Cal. 2018).

281. *Id.*

under eighteen to be prosecuted in adult court under certain circumstances.<sup>282</sup> In 2020, Virginia signed a new law that raised the age a juvenile can be tried as an adult from age fourteen to age sixteen.<sup>283</sup> While there have been some transfer hearing reforms across the country, there is still significant reform that needs to happen to limit transferring youth to the adult criminal system.

## V. RECOMMENDATIONS

### A. *Juvenile Transfer Statutes Should Factor in Brain Science*

Historically, when it comes to the laws applied to juveniles, states have simply used the laws for adults and extrapolated them into the juvenile system. The judicial system of the United States treats adolescents who have committed serious crimes more harshly than any other industrialized country.<sup>284</sup> We now know that simply does not work for juveniles.

In a utilitarian system, it would be easy to say that no youth should ever be sentenced as an adult and given an adult sentence. However, that is not probable in our current society. Our ancestral retributionist history wants some form of accountability. The best practice would be to have bright line rules that essentially state that all crimes committed by individuals under the age of twenty-one would not be subject to an adult sentence.

Many states are revisiting the age of jurisdiction for Juvenile Courts and addressing the emerging adult population that is currently prosecuted in the adult system. States should examine their transfer laws in light of the scientific research which makes clear that children's brains do not magically become those of adults at age eighteen. Nationally, there is a newer understanding that our former criminal justice laws need to be revised to account for the science that children are not fully developed and are better served under a juvenile rehabilitative model that includes services. The harsh and punitive transfer laws that were enacted in the 1980s and 1990s and expanded the prosecution of juveniles have not worked to deter youth crime. Many jurisdictions are still operating under harsh laws passed in the 1990s that rejected the relevance of the developmental differences between adolescents and adults to justice policy. Adolescents' brains, behavior, and needs are different from those of adults, and states should align their law and policies with that evidence.<sup>285</sup>

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282. Maureen Washburn, *California's Latest Adult Transfer Law Models Pathways for Reform for Rest of U.S.*, JUV. JUST. INFO. EXCH. (Oct. 3, 2018), <https://jjie.org/2018/10/03/californias-latest-adult-transfer-law-models-pathways-for-reform-for-rest-of-u-s/>.

283. See H.B. 477, 2020 Sess. (Va. 2020); S.B. 546, 2020 Sess. (Va. 2020).

284. Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REVS. NEUROSCIENCE 513, 513 (2013).

285. Committee on Assessing Juvenile Justice Reform, *Juvenile Justice Reforms Should Incorporate Science of Adolescent Development*, NAT'L ACADEMIES (Nov. 13, 2012), <https://www.nationalacademies.org/news/2012/11/juvenile-justice-reforms-should-incorporate-science-of-adolescent-development>.

In a 2011 bulletin, the U.S. Department of Justice discussed the effectiveness of laws which allow for or force juveniles to be transferred to adult courts. Understanding the many practical ways in which state transfer laws vary in their scope and operation, blanket statements about their effects should be read with caution. However, insofar as these laws are intended to deter youth crime generally, or to deter or reduce further criminal behavior on the part of youth subjected to transfer, research over several decades has generally failed to establish their effectiveness.<sup>286</sup>

The original purpose for the transfer laws was to improve public safety and reduce crime. Studies have shown that they do not work for their intended purpose, they must be revisited and revised in light of the developmental science.<sup>287</sup>

To transfer a minor to adult court for prosecution is to engage in a legal fiction out of step with developmental reality. Juveniles may commit crimes that cause as much harm as an adult's crime, but those equivalencies do not obviate brain-development differences relevant to both culpability and amenability to reform. Transfer should be abolished or, if allowed, triggered only by specific findings by a juvenile court judge focused on the attributes of the individual juvenile.<sup>288</sup>

States should eliminate transfer mechanisms and reinvest resources in community-based programming to serve juveniles. The justice system should correlate to the developmental needs of youth which may ultimately help to improve public safety and lower incarceration rates. Youth cases should be treated with a developmental approach that focusses on rehabilitation and addresses the juveniles underlying needs. Focus for youth should include services for mental health and education and community-based approaches. Focusing on services and following a rehabilitative model for youth may reduce recidivism and improve life outcomes for young adults.

Similar to what California recently enacted with Proposition 57, states should consider implementing an individualized hearing conducted by a judge before a juvenile can be transferred to an adult court and exposed to an adult sentence. Individualized hearings are a necessity now that we know that juvenile offenders are less culpable than adults who commit the same crimes. Determinations as to whether they should be punished in the adult system should be made very carefully and on an individual basis that factors in the individual brain development of the accused. Mandatory transfer statutes and statutory exclusion statutes do not allow juvenile court judges to consider individual circumstances and the rehabilitation needs of youth before they are treated as an adult. As recommended by the Committee on Assessing Juvenile Justice Reform ("the Committee"), "an individualized decision by a judge in a

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286. Griffin et al., *supra* note 31, at 26.

287. See Lila Kazemian, *Pathways to Desistance From Crime Among Juveniles and Adults: Applications to Criminal Justice Policy and Practice*, NAT'L INST. JUST., Nov. 2021, at 15.

288. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 112–13 (2009) (footnotes omitted).

transfer hearing should be the basis for the jurisdictional decision.”<sup>289</sup> The Committee further counsels against allowing the prosecutor to make the jurisdictional decision as is allowed under direct-file statutes. The Committee also opposes automatic transfer based solely on the offense with which the youth is charged because it fails to consider the maturity, needs, and circumstances of the individual offender, or even his or her role in the offense or past criminal record—all of which should be considered in a transfer hearing.<sup>290</sup>

An anticipated critique of this approach is that courts are not perfect, and neither are judges. Individual interpretations and implementations of the law can drastically differ from judge to judge, which could continue to shape the outcomes of these proceedings. Additionally, racial bias, both explicit and implicit, pervades society at large and the criminal legal system in particular.<sup>291</sup> Research has found that “Black people are treated more harshly at every stage of the criminal process than their white counterparts” for the same alleged conduct.<sup>292</sup> Research has also found that Latinx and Black defendants are detained at a higher rate than similarly situated white defendants.<sup>293</sup>

In lieu of sentences that include adult prison time, the small number of youthful offenders who have committed serious offenses should be placed in smaller, treatment-focused facilities. Smaller facilities allow the youth to engage, cooperatively with their families, with treatment and building skills needed in the community.

#### *B. Reform of the Massachusetts Youthful Offender Statute*

Massachusetts is one of just four states that does not have a judicial discretion transfer statute.<sup>294</sup> In Massachusetts, the District Attorney’s office decides which cases will be indicted and thus exposed to an adult sentence. Once a juvenile case is indicted as a Youthful Offender (“YO”), the Massachusetts YO statute uses a blended sentence structure that allows for juveniles to be sentenced under juvenile and adult criminal laws. This allows juvenile court judges to sentence a juvenile to both a juvenile disposition and an adult sentence. Full prosecutorial discretion is very challenging for delinquency attorneys and has the potential for an innocent juvenile to take a plea in an effort to avoid an adult sentence.

Lawmakers should reexamine the Massachusetts YO statute and consider whether the prosecutor’s office should be the sole decision-maker in deciding which cases should be indicted as an adult. One suggestion, again similar to

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289. Bonnie et al., *supra* note 173, at 135.

290. *Id.*

291. Mitali Nagrecha et al., *Court Culture and Criminal Law Reform*, 69 DUKE L.J. ONLINE 84, 105 (2019).

292. *Id.*

293. *Id.* at 106.

294. See JEREE THOMAS, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015-2017) 30 (Bonnie Newman Davis ed., 4th ed. 2017).

what has previously been passed in California with Proposition 57, would be to have a judicial hearing prior to the arraignment of a YO case. The hearing would determine if the juvenile would be best served by the juvenile court and thus the case would stay in the juvenile system with only juvenile sentencing options. A judge, rather than a prosecutor, would determine what cases are transferred to adult courts. Massachusetts juvenile courts should consider criminal acts from a developmentally appropriate response and in the context of diminished responsibility especially before exposing a youth to an adult sentence. Massachusetts should recognize the malleable personality and character of the individual juvenile. In addition to their mental and emotional conditions, likelihood of rehabilitation, maturity, and vulnerability to peer pressure. Courts should also review information regarding youth's mental, physical, educational, social history, and neurological development.

An anticipated critique of this approach is that depending on who is in office as the prosecutor, they might actually be better equipped to handle these cases than some judges. For example, a progressive prosecutor can effectuate meaningful reform. Regardless of that claim, the decision making should not be left *solely* with the prosecutor's office. If such a prosecutor is truly equipped to handle cases which should remain within the jurisdiction of the juvenile court as opposed to facing adult sentencing, then the prosecutor in that instance would not move for the matter to be transferred to adult court during the judicial hearing prior to the arraignment of the YO case.

Additionally, judicial discretion may not make improvements due to potential racial bias. Differences between juveniles and adults are not observable by prosecutors or judges, so perhaps the best practice is a bright line rule that no juveniles can be sentenced as an adult. The benefit of certain bright line rules is that it eliminates such inconsistencies.

## VI. CONCLUSION

Just fifteen years ago, it was legal to kill children. While we have come a long way, there is significant work that needs to be done. It is painfully clear that juveniles do not have the same cognitive brain development to that of adults, and our laws need to reflect that. If there is recognition that juveniles are better served under the juvenile rehabilitative model that provides services and community-based programs, why are we still transferring their cases to adult courts where they face adult punishments?

Our initial criminal justice system used to recognize that children are fundamentally different from adults. Unfortunately, we moved away from that understanding because of the racist policies during the 1980s and 1990s. Youth of color continue to outnumber white youth at every stage of the juvenile justice system.<sup>295</sup> Compared to similarly situated white people, Black people are more likely to be arrested, prosecuted and convicted, and are also more likely to be

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295. *Racial and Ethnic Disparities in the Juvenile Justice System*, NAT'L CONF. OF STATE LEGISLATURES (July 15, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-juvenile-justice-system.aspx>.

sentenced to harsher punishments.<sup>296</sup> Youth of color are one-third of the adolescent population yet make up two-thirds of the incarcerated youth population.<sup>297</sup> Our criminal justice system needs to go back the initial understanding that children are different, as our current juvenile system does not work. We need to have policies that support youth in their development.

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296. Nagrecha et al., *supra* note 291, at 105.

297. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 295.