

MANDATORY TRANSFER OF JUVENILES TO ADULT COURT: A DEVIATION FROM THE PURPOSE OF THE JUVENILE JUSTICE SYSTEM AND A VIOLATION OF THEIR EIGHT AMENDMENT RIGHTS

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I. Introduction

Prior to the seventeenth century, minors were viewed as property.¹ According to Springer, “during the colonial times and up to the first part of the 1800s, youths labeled as rowdy out-of-control were either sent home for a court-observed

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¹ Robin M. Hartinger-Saunders, *The History of Defining Youth: Current Implications for Identifying and Treating Delinquent Youth*, GEORGIA STATE UNIVERSITY, https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1064&context=ssw_facpub, at 88-104 (last visited May 23, 2018).

whipping, assigned tasks as farmer's helpers, or placed in deplorable rat-infested prisons with hardened adult offenders² and mentally ill individuals regardless of their gender³ or well-being. The minors were placed with adult offenders due to the lack of other options.⁴ During the nineteenth century, however, juveniles started to receive different treatment⁵ with the opening of multiple detention facilities for juvenile offenders.⁶ Although these detention facilities separated minors from adults, minors were still exposed to harsh and inhumane treatment as when they were previously housed in adult prisons.⁷

In the nineteenth century, many “major social changes”⁸ and “ideological changes in the cultural conception of children and in strategies of social control”⁹ paved the way for the first juvenile court in Cook County, Illinois, United States in 1899.¹⁰ The first juvenile court was created as a social welfare alternative to the adult courts that minors were exposed to.¹¹ The juvenile court, which emphasized on rehabilitation rather than punishment,¹² adopted the *parens patriae* legal doctrine to make decisions that best served the interest of the minors.¹³

² David W. Springer, et. al, *Introduction and Overview of Juvenile Delinquency and Juvenile Justice: A Brief Historical Overview of Juvenile Justice and Juvenile Delinquency*, http://samples.jbpub.com/9780763760564/60564_CH01_Springer.pdf (last visited May 17, 2018).

³ *Juvenile Justice History*, CENTER ON JUVENILE AND CRIMINAL JUSTICE <http://www.cjcr.org/education1/juvenile-justice-history.html> (last visited May 17, 2018).

⁴ *Id.*

⁵ See *The History of Juvenile Justice*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>, at 5 (last visited May 17, 2018).

⁶ *Id.*

⁷ Springer, *supra* note 2, at 4.

⁸ Hartinger-Saunders, *supra* note 1.

⁹ Barry C. Field, *Juvenile Justice: History and Philosophy*, ENCYCLOPEDIA, <http://www.encyclopedia.com/law/legal-and-political-magazines/juvenile-justice-history-and-philosophy> (last visited May 17, 2018).

¹⁰ Kristin M. Finklea, *Juvenile Justice: Legislative History and Current Legislative Issues*, CONGRESSIONAL RESEARCH SERVICE, (Nov. 27, 2012), <https://cardenas.house.gov/sites/cardenas.house.gov/files/CRS%20-%20Juvenile%20Justice%20Overview.pdf>. See *infra* note 27, at 9. (“child savers movement book”) (“there is some dispute whether or not Illinois was the first state to create a special tribunal for children. Massachusetts and New York passed laws, in 1874 and 1892 respectively, providing for the trials of minors apart from adults charged with crimes. Ben Lindsey, a renowned judge and reformer, also claimed this distinction for Colorado where a juvenile court was, in effect, established through an educational law of 1899.”).

¹¹ Field, *supra* note 9.

¹² *The History of Juvenile Justice*, *supra* note 5, at 5.

¹³ *Id.* *Parens Patriae* is a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. The Free Dictionary, <https://legal-dictionary.thefreedictionary.com/parens+patriae>. See also Lawrence, History and development of juvenile court and justice process, SAGE PUBLISHING (Feb. 16, 2008), https://us.sagepub.com/sites/default/files/upm-binaries/19434_Section_I.pdf, at 22. The *parens patriae* doctrine was first used in the case of *Ex*

The *parens patriae* doctrine was central to the juvenile justice philosophy which aimed to treat juvenile offenders different from adult criminals.¹⁴ In distinguishing the juvenile justice system from the adult court system, a new set of definitions and labels were created.¹⁵

One of the main purposes of creating a separate court for minors was to focus on their best interests by treating them differently from adults. Due to the escalation of juvenile violent crimes in the late 1900s,¹⁶ states have enacted laws that allow for minors to be prosecuted in adult criminal courts.¹⁷ As The Office of Juvenile Justice and Delinquency Prevention (OJJDP) acknowledged it, “this trend has increased in recent years to permit transfers [of persons under eighteen years of age] to adult court at lower ages and for more offenses”¹⁸ without considering the purposes and the primary goal of the newly created system, which aims at rehabilitating juveniles who engage in delinquent behavior.

As juvenile crimes escalated, critics were aghast with the leniency of the juvenile justice system to severely punish minors who engaged in criminal activity. As a response, legislators from different jurisdictions within the United States have created different transfer mechanisms to try minors in adult courts. The transfer of minors to adult courts has been detrimental to the minors’ well-being as after standing trial in adult courts, they are housed with adults.

This article aims to advocate for a ban on mandatory transfer laws and any other form of transfer that does not give a juvenile court officer the chance to decide whether to transfer the minors after a full hearing, in which a determination is made based on the minors’ characteristics, if they are fit to stand trial in adult court. The article is not proffering that minors should not be transferred to adult court, but that they should not be subject to mandatory transfer. They should enjoy the due process right of the Fourteenth Amendment of the United States Constitution that the Supreme Court has established in *Kent*. The transfer procedure should start in

parte Crouse, 4 Whart. 9 (Pa. 1839) (Mary Ann Crouse was incarcerated after a complaint made by her mother, Mary Crouse, stating that the minor vicious conduct made it impossible for the mother to exercise her parental control over the minor. The mother asked for the minor to be held in the House of Refuge. The minor’s father filed an habeas corpus on behalf of his daughter which the court denied by saying that the institution was not a prison but a reformation institution. The court further stated that “although the right of parental control was a natural right, it was not an unalienable one...and that the child has been snatched from a course that would have ended in confirmed depravity.”) *Id.* at 11.

¹⁴ *Ex parte Crouse*, 4 Whart. at 11.

¹⁵ MATTHEW BENDER & CO., INC., REPRESENTING THE CHILD CLIENT ¶ 5.03 (2017).

¹⁶ Juvenile Justice Reform Initiatives in the States 1994-1996, *Juvenile Transfer to Criminal Court*, OFFICE OF JUSTICE PROGRAMS, https://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited May 18, 2018).

¹⁷ Patrick Griffin, et. al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 1, U.S. DEPARTMENT OF JUSTICE, (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>.

¹⁸ Juvenile Justice Reform Initiatives in the States 1994-1996, *supra* note 16 (emphasis added).

juvenile court where a juvenile court officer will determine the appropriateness of such transfer.

This article suggests that jurisdictions that still allow mandatory transfer, instead of mandatorily transferring minors to adult court, should create a different process in which a minor will appear before a juvenile court officer who will determine whether the minor should be transferred to adult court or whether the juvenile justice system should retain jurisdiction over the minor for rehabilitation purposes. This process will first guarantee fairness and will be in line with the due process and rehabilitation rights of minors. It will also take away the prosecutors' discretionary powers to file charges against minors in adult courts. Second, it will be in accordance with the main goals of the juvenile justice system which are "crime reduction and rehabilitation of minors,"¹⁹ and the different Supreme Court rulings regarding juveniles' constitutional rights.

Part II discusses the history of the juvenile justice system and its main goals. It discusses issues related to transferring juveniles to adult courts. It shows that the purposes of the Juvenile Justice System have been ignored, in violation of the minors' Eighth Amendment rights, which led to the adult treatment of minors who need help and deserve to be rehabilitated.

Part III discusses and distinguishes the juvenile justices and the adult court system. It discusses the reason the juvenile court uses a different set of legal terms and the effect of sentencing minors in adult courts. It further discusses the philosophical ideas behind the creation of both the criminal justice system and the juvenile justice system.

Part IV discusses the different Supreme Court decisions relating to the juvenile's constitutional rights. It also focuses on the Court's analysis in *Miller*, *Kent*, *Roper*, and *Graham*, while touches upon the social study that the Court used in *Roper* and *Graham*.

Part V discusses the issues related to mandatory transfers of juveniles to adult court. And also, any other form of transfers that do not give a juvenile court officer the chance to make a finding on whether the minor is fit to stand trial in adult court. This section focuses on the importance of the individualized justice approach.²⁰ It emphasizes on the need to eliminate mandatory transfer laws which lead to harsher sentences and deviate from the purposes of the juvenile justice system. It also discusses the mental development stages. This article is not proposing a categorical

¹⁹ Hilary Hodgdon, *Assessing Juvenile Offenders*, PRINCETON UNIVERSITY, https://www.princeton.edu/futureofchildren/publications/highlights/18_02_Highlights_06.pdf (last visited May 17, 2018).

²⁰ See DAVID MATZA, DELINQUENCY AND DRIFT 115 (1964) ("The individualized justice implies that offense, like many other forms of behavior, is to be taken as an indication or symptom of the juvenile's personal and social disorder. The principle of individualized justice suggests that disposition is to be guided by a full understanding of the client's personal and social character and by his individual needs.").

ban on transfers of juveniles to adult courts, but rather proposes to hold a hearing before a juvenile court officer who will determine the fairness and appropriateness of such transfer.

II. History of the juvenile justice system

The United States Juvenile Justice System, which is the fruit of the nineteenth century movement, is rooted in the sixteenth century “European Educational Reform Movements.”²¹ Before the creation of the juvenile justice system, in the late eighteenth century, children under seven were presumed to lack criminal intent, and therefore were exempt from criminal prosecution.²² Meanwhile, children “fourteen years of age and older possessed full criminal responsibility. Between the ages of seven and fourteen years, the law rebuttably presumed that offenders lacked criminal capacity. If found criminally responsible, however, states executed youths as young as twelve years of age.”²³

The early movement for the separation of the adult and juvenile justice systems started in 1825 with the Society for the Prevention of Juvenile Delinquency.²⁴ Soon thereafter, the first juvenile facility opened in New York.²⁵ And some years later the first juvenile court opened in Illinois.²⁶ The opening of the first juvenile court²⁷ in

²¹ *Juvenile Justice: A Century of Change*, *The juvenile justice system was founded on the concept of rehabilitation through individualized justice*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (Dec. 1999), https://www.ncjrs.gov/html/ojdp/9912_2/juv1.html.

²² *Id.*

²³ Field, *supra* note 9.

²⁴ *Juvenile Justice: A Century of Change*, *supra* note 21.

²⁵ Hartinger-Saunders, *supra* note 1, at 93.

²⁶ Lawrence, *supra* note 13, at 24. See Herbert C. Hoover, *Separate Justice: Philosophical and Historical Roots of the Juvenile Justice System*, https://www.cengage.com/custom/static_content/troy_university/data/CJ3325.pdf, at 14 (last visited April 6, 2018) (“By the end of the 1800s, reform schools introduced vocational education, military drill and calisthenics into the institutions’ regimens. At the same time, some reform schools changed their names to “industrial schools” and later to “training schools,” to emphasize the “treatment” aspect of corrections. For example, the Ohio Reform Farm School opened in 1857, later became the Boy’s Industrial School, and was renamed again to the Fairfield School for Boys. Several other significant events occurred during the 1800s that altered the administration of juvenile justice (Griffin and Griffin, p.20): 1870—First use of separate trials for juveniles (Massachusetts) 1877—Separate dockets and records established for juveniles (Massachusetts) 1880—First probation system applicable to juveniles instituted 1898—Segregation of children under 16 awaiting trial (Rhode Island) 1899—First juvenile court established (Illinois)”).

²⁷ See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 142-43 (1969). (“The role model for the juvenile court judges was doctor-counselor rather than lawyer. Judicial therapists were expected to establish a one-to-one relationship with delinquents in the same way that a country doctor might give his time and attention to a favorite patient. The courtroom was arranged like a clinic and the vocabulary of the participants was largely composed of medical metaphors...the idea that justice can be personalized was a significant clue as to what the child savers hoped to achieve.”)

Chicago, Illinois was followed by the opening of a juvenile court in Denver, Colorado.²⁸ By 1910, thirty-two states had established juvenile courts and/or probation services.²⁹ By 1917, every single state had passed legislation related to juvenile court except three.³⁰ By 1925, only two states had no form of juvenile justice system.³¹ Through 1932, there were over 600 independent juvenile courts within the United States,³² and by 1945 every single State had established juvenile courts.³³

In the 1980s, the skyrocketing of juvenile crimes led to the reform of States juvenile justice practices. As a result, seventeen states redefined their juvenile justice system approaches to focus on community safety, accountability, and punishment.³⁴ These states have “stressed [on] punitiveness, accountability, and a concern for public safety, [by] rejecting traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment.”³⁵

A. First juvenile court in the United States

The first juvenile court in the United States was established in Cook County, Illinois³⁶ with the passage of the Juvenile Court Act of 1899.³⁷ The Act gave original jurisdiction to the juvenile court over anyone sixteen and under.³⁸ The separation of the juvenile system from the criminal system was designed with the purpose to rehabilitate youths, who violate the laws, in a non-punitive way.³⁹ The “Act [of 1899] marked the first time that probation and probation officers were formally made specifically applicable to juveniles.”⁴⁰

²⁸ Lawrence, *supra* note 13, at 25.

²⁹ *Juvenile Justice: A Century of Change*, *supra* note 21.

³⁰ PLATT, *supra* note 27, at 10.

³¹ *Juvenile Justice: A Century of Change*, *supra* note 21.

³² PLATT, *supra* note 27, at 10.

³³ Lawrence, *supra* note 13, at 25.

³⁴ JOAN MCCORD, ET. AL., *JUVENILE CRIME, JUVENILE JUSTICE* 155 (2001).

³⁵ *Id.*

³⁶ Hartinger-Saunders, *supra* note 1, at 94.

³⁷ *Juvenile Justice: A Century of Change*, *supra* note 21. *See also* Hoover, *supra* note 26, at 14. (The act of 1899 is recognized as the first time that a jurisdiction in the United States acknowledged that minors are different therefore need to be detained in separate facilities from, and treated different than, adults. The Act was based on the treatment model, which believed that delinquency, if prevention did not work, could be treated and cured. The Act offered a new societal structure in which a better control can be exercised over minors.)

³⁸ Hoover, *supra* note 26, at 15.

³⁹ Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 472-73 (2016).

⁴⁰ Hoover, *supra* note 26, at 15. (“The act stipulated: The court shall have authority to appoint or designate one or more discreet persons of good character to serve as probation officers during the

The creation of that special court for minors was established on the basis that 1) minors are “cognitively” and “morally” underdeveloped, therefore, have lessened culpability, and 2) they can be changed and rehabilitated⁴¹ because their characters are not yet well formed.⁴² Because their characters are not well-formed, courts have emphasized that they deserve to be protected and guided, and states should be the guide and protector. For instance, the Supreme Court of Pennsylvania, in 1905, acknowledged that minors are different, therefore need guidance. The Pennsylvania Supreme Court noted that:

The design [of 1903 Pa. Laws 274] is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child’s liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated.⁴³

The Court recognized that the *parens patriae* doctrine gives the states the authority to act as the minors’ parents, and therefore to make decision in their best interests. The Court also stressed that children and adults are different; hence, when deciding on juvenile cases, courts should operate differently. The different operation system emphasizes on the facts that, unlike in adult court where the judge must consider the offender’s due process rights, the juvenile court officer does not have to consider certain constitutional rights when making decision in the minors “best

pleasure of the court . . . it shall be the duty of the said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require; and to take such charge of any child before and after trial as may be directed by the court.”).

⁴¹ Hartinger-Saunders, *supra* note 1, at 94.

⁴² Miller v. Alabama, 567 U.S. 460, 471 (2012).

⁴³ Commonwealth v. Fisher, 213 Pa. 48, 56-57 (Pa. 1905) (emphasis added) (Frank Fisher was committed to House Refuge in Pennsylvania under the provisions of the Act of April 23, 1903, P.L. 274. Fisher moved to challenge the decision of the lower court and the constitutionality of the Act because his due process rights were violated, he was denied the right to a jury trial, the tribunal which committed him to the house of refuge had no jurisdiction over him. The court affirmed the seven-year sentence for the minor stipulating that it was in the best interest of the minor. The Court reasoned that when the State’s objective is not punishment but rather to provide care and protection, the State has the right and the duty to take custody of the youth. Moreover, that right supersedes the child and parental rights.

interests”. In its analysis, the Court acclaimed the state’s power to act as the minors’ parents but rejected the constitutional due process right of minors. It noted that “[t]he constitutional guaranty that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law does not apply in saving a child from becoming a criminal.”⁴⁴ Although refusing to recognize minors’ due process rights in non-criminal cases, the court recognized that minors have some constitutional rights. For instance, the right to a jury trial in criminal cases.⁴⁵ The Court also implied the need to use the “individualized approach” in cases involving minors.

The first juvenile courts prioritized the “best interest of the child” doctrine over minors’ constitutional rights by relying on two juvenile justice’s premises⁴⁶ – minors have diminished capacity thus cannot be real criminals and the state power to intervene to guide minors when their parents fail to assume their parental rights. Unfortunately, states have as of lately treated minors as criminals by concluding that they are not corrigible; meanwhile, violating their constitutional rights.

B. Goal of the juvenile justice system

The juvenile justice system aims to provide a setting in which minors can be held accountable for their wrongdoings and receive protection from the states when need be.⁴⁷ Prior to the creation of the juvenile justice system, there was no difference between adults and minors in the eyes of the law, they were treated alike.⁴⁸ There was a need to create a new and separate system for minors. With the progressive movement, a new and separate system was created.⁴⁹ With the creation of the separate system, minors received different legal treatment. The main goals of that

⁴⁴ *Id.* at 53.

⁴⁵ *Id.*

⁴⁶ Hartinger-Saunders, *supra* note 1, at 94.

⁴⁷ Hoover, *supra* note 26, at 15.

⁴⁸ Alyssa Calhoun, Comment, *Youth’s Right to Counsel in the Missouri Juvenile Justice System: Is their Constitutional Right Being Upheld?*, 34 ST. LOUIS U. PUB. L. REV. 151, 154 (2014).

⁴⁹ Regarding this subject Platt explains that:

The progressive child savers were a group of reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests. They went beyond humanitarian reforms of existing institutions. They brought attention to new categories of youthful behavior which had been hitherto unappreciated. They viewed themselves as altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order. They were concerned with protecting children from the physical and moral dangers of an increasingly industrialized and urban society.

See PLATT, *supra* note 27, at 3.

separate System are to 1) reduce crimes;⁵⁰ 2) treat; 3) supervise; and 4) rehabilitate minors⁵¹ through the individualized justice approach.⁵²

As society changes and crimes increase, critics began to attack the leniency of the juvenile justice system.⁵³ In the late 1970s, the rehabilitative goal of the juvenile justice system started to dissipate. This created a vacuum within the juvenile system for the prioritization of punishment and deterrence over rehabilitation and states' protections.⁵⁴ Legislators from different jurisdictions started to pass punitive laws that harshly dealt with juvenile offenders.⁵⁵ These laws categorically shifted from the rehabilitative purposes of the juvenile justice system to punishment, retribution, and deterrence. Furthermore, these states created laws that mandatorily transferred minors to adult courts for the commission of certain violent crimes like murders and carjacking that result in murder. Although mandatory transfer laws were implemented to deal with juvenile crimes, they have been ineffective in tackling juvenile crimes. Not only have mandatory transfer laws been ineffective, they deviate from the purposes of the juvenile justice system. That deviation violates the minors' Eighth Amendment right to rehabilitation and hinders the objective of the juvenile justice system.⁵⁶

A separate justice system for juveniles was created with the approach that juveniles are mentally, physically, and psychologically different consequently need treatments that meet their needs. To accomplish such goal of differentiating minors from adults, to keep a complete separation of the two systems, and to treat minors differently than adults, a new set of legal terms for the juvenile courts were created. Minors who commit violent offenses are not viewed as criminals but delinquents.⁵⁷ The difference between the two terms is that one labels and stigmatizes a person for life while the other, although labels, does not stigmatize. The reason for the latter is that it is used to transform minors into productive adults by focusing on rehabilitating them rather than punishing them.⁵⁸

The juvenile justice system's "planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from

⁵⁰ Hodgdon, *supra* note 19.

⁵¹ Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U.L. REV. 141, 143 (2004).

⁵² *Juvenile Justice: A Century of Change*, *supra* note 21.

⁵³ See Langemo, *supra* note 51, at 144.

⁵⁴ *Id.*

⁵⁵ Finklea, *supra* note 10. See also Griffin, Torbet, and Szymanski, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, (1998) ("From 1992 through 1995, 40 States and the District of Columbia passed laws making it easier for juveniles to be tried as adults.").

⁵⁶ Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 576 (2008).

⁵⁷ Lawrence, *supra* note 13, at 24.

⁵⁸ *Id.*

youthful indiscretions and stigmas due to criminal charges or convictions.”⁵⁹ They did not envision a system that makes punishment “so severe as to make it impossible for [minors] to resume or initiate a decent life.”⁶⁰ They designed a system in which every aspect of the minors’ lives are considered with the focus on the offenders rather than the offense(s), and on rehabilitation rather than punishment. This process has given the juvenile court officers the flexibility to make appropriate decision to rehabilitate the minors and attempt to turn them into productive citizens.

C. Punishment over rehabilitation

Trying minors in adult courts subject them to adult treatment.⁶¹ Unlike adults, minors are not mentally fit to be exposed to the adversarial system. However, many states have ignored that fact in the objective of promoting tough on crime policies.⁶² The people who advocate for tough on crime policy advance three main reasons: 1) minors who commit crimes are not children but criminals; 2) the juvenile justice system is too lenient on youth offenders and violent crimes committed by youths are rampant; and 3) rehabilitation does not work on minors who commit violent crimes.⁶³ They have argued that the leniency of the juvenile justice system leads the minors to act as they please because they believe that they will only get a slap on the wrist.⁶⁴

The tough on crime policies have pushed States to enact laws that label minors as young as six years old as delinquents, subject them to the juvenile justice jurisdiction, and reduce the age of adulthood from eighteen to fifteen years old. For instance, thirty-three states do not specify the minimum age for delinquency status which leaves the matter open to prosecutor’s discretion. In North Carolina, a minor as young as six years old can be labeled as a delinquent. In Connecticut, Maryland, Massachusetts, New York, and North Dakota minors as young as seven years old can be labeled as delinquents.⁶⁵ Meanwhile at the federal level, the age of adulthood for

⁵⁹ In re Gault, 387 U.S. 1, 60 (1967) (Black, J., concurring). See also United States v. A.C.P., 379 F. Supp. 2d 225, 227 (D.P.R. 2005) (“The federal juvenile delinquency process is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.”). (Quoting United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990)).

⁶⁰ PLATT, *supra* note 27, at 17 (quote omitted) (emphasis added).

⁶¹ Langemo, *supra* note 51, at 154.

⁶² Field, *supra* note 9.

⁶³ Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, RESEARCHGATE (Dec. 11, 2008), https://www.researchgate.net/publication/37713611_Rethinking_Juvenile_Justice, at 9.

⁶⁴ *Id.*

⁶⁵ Angel Zang, *U.S. Age Boundaries of Delinquency 2016*, NATIONAL CENTER FOR JUVENILE JUSTICE (2017) <http://www.ncjj.org/Publication/U.S.-Age-Boundaries-of-Delinquency-2016.aspx>.

certain crimes is sixteen. In New York and North Carolina, persons who are sixteen years old are adults.⁶⁶

The Supreme Court of the United States has established that minors and adults are not alike. Minors are not yet mature; they are easily influenced by peers.⁶⁷ The Court has long recognized that the individualized sentencing is the best approach when dealing with minors.⁶⁸ In *Allen*, the Supreme Court of the United States noted that “a person between the ages of twelve and fourteen is incapable of discerning good from evil, until the contrary is affirmatively shown.”⁶⁹ The Court in this opinion established the importance of the individualized sentencing in the juvenile justice system which counters the mandatory transfer. In stating minors between the ages of fourteen and twelve are incapable of knowing good and bad until it can be proven otherwise, the Court emphasized that there should be an individualized finding in regard to each specific youth who stands before the court.

The individualized justice approach is “the basic precept in the philosophy of the juvenile court”⁷⁰ thus crucial when adjudicating minors. It “differs fundamentally from equity,”⁷¹ which gives juvenile courts the flexibility needed to make decision based on the needs of the minor who is before the court. Each minor’s social background is different; as a result, they require special and individual attention. Punishment over rehabilitation will not serve the purpose of the juvenile justice system because it sets society up for more social and legal issues for the years to come. Mass incarceration of juveniles in adult jails also will not serve as deterrence, thus will not help minors nor society. Minors who are incarcerated with adults know only what they are being taught by those adult offenders. They are not learning any valuable lessons. They are losing their social values and bonds with the community. Keeping the minors separately from adults can increase their likelihood of being

⁶⁶ *Id.* (Louisiana on June 14, 2016 passed Louisiana Act 501 which raised the minor’s age to seventeen starting July 1, 2018 and others starting July 1, 2020. New York on April 10, 2017 passed the A3009C legislation which raised the minor’s age to sixteen years of age starting on Oct. 1, 2018 and to seventeen starting on Oct. 1, 2019. North Carolina on June 14, 2017 passed SL2017-57 which raised the minor’s age to seventeen starting Dec. 1, 2019. South Carolina on June 6, 2016 passed the South Carolina Act 268 which raised the minor’s age to seventeen starting July 1, 2019. After the implementation of these laws, only five states (GA, MI, MO, TX and WI) will prosecute seventeen-year olds as adults.).

⁶⁷ *Graham v. Florida*, 560 U.S. 48, 68 (2010).

⁶⁸ 150 U.S. 551, 558 (1893).

⁶⁹ *Id.*

⁷⁰ MATZA, *supra* note 20, at 111.

⁷¹ *Id.* at 113. (“Equity in criminal proceedings is a doctrinal qualification of the principle of equality. Individualized justice is itself a principle. It is a principle which on first appearances seems merely to substitute one set of relevant criteria for another. This it does – and considerably more. It does more than simply substitute frames of relevance for two reasons. To understand why this is so, we must first appreciate that the usual claim that equality is violated by individualized justice is at least in theory wrong, or beside the point.”).

rehabilitated. Increasing educational and rehabilitative programs such as vocational skills and social responsibilities can help them turn their lives around and turn them into responsible, productive and law-abiding citizens.⁷²

Two major issues can arise when dealing with minors – mental health issues and recidivism.⁷³ In dealing with these two issues, the individualized approach is warranted. The frequency of “youth with mental disorders within the juvenile justice system is found to be consistently higher than those within the general population of adolescents.”⁷⁴ It is resulted from the fact that minors who have mental health issues often engage in delinquent behaviors. Engaging in delinquent behaviors is a “method of coping with some underlying problem adjustment. The delinquent differs from the non-delinquent in that he has frustrations, deprivations, insecurities, anxieties, guilt feelings, or mental conflicts which differ in kind or degree from those of non-delinquent children.”⁷⁵ These young persons need to be assessed individually before being transferred to adult courts. In the event they commit crimes, “although incarceration and detainment [are] necessary...long-term confinement experiences tend to do more harm than good, often leading to continued offending and recidivism.”⁷⁶ To help and rehabilitate these minors, there is a need for a combined effort from the following institutions: “education, child protection, juvenile justice, and mental health.”⁷⁷ A combined effort from these institutions will help to prevent recidivism within this population, which is a huge problem within the juvenile’s population.⁷⁸

The juvenile justice system can vary from state to state, county to county, and municipality to municipality; meanwhile, the federal government has its own juvenile system.⁷⁹ Although each jurisdiction has its own juvenile justice system, they all

⁷² Lawrence, *supra* note 13, at 30. *See also* A.C.P., 379 F. Supp. 2d 225 (D.P.R. 2005) (The District Court of the United States for the District of Puerto Rico denied the motion to transfer A.C.P. to adult court after the minor, who was involved in an armed robbery, was rehabilitated. The minor, during the armed robbery, shot a guard three times and the guard was unconscious for a month but survived. The minor was detained and placed in juvenile detention. The minor became a leader while in detention. He has shown remorse for his action. While in juvenile detention, he became a leader and mature. Because of the rehabilitative program, he became a new person.)

⁷³ Gina M. Vincent, *Screening and Assessment in Juvenile Justice Systems: Identifying Mental Health Needs and Risk of Reoffending*, MODELSFORCHANGE (Jan. 18, 2012), <http://www.modelsforchange.net/publications/328>.

⁷⁴ Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, INT. J. ENVIRON. RES. PUBLIC HEALTH, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4772248/>, at 2.

⁷⁵ ALBERT K. COHEN, *DELINQUENT BOYS: THE CULTURE OF THE GANG* 15 (1955).

⁷⁶ Underwood, *supra* note 74, at 2. (emphasis added) (quote omitted).

⁷⁷ *Id.*

⁷⁸ Brittany Bostic, *Reducing Recidivism for Juvenile Criminal Offenders* (March 11, 2014), MICHIGAN YOUTH VIOLENCE PREVENTION CENTER, <http://yvpc.sph.umich.edu/exploring-rehabilitation-programs-juvenile-criminal-offenders/>.

⁷⁹ McCORD, *supra* note 34, at 155.

have “common aspects that make them universally different from the criminal [justice] system.”⁸⁰ To better deal with youth offenders, states have used different juvenile justice models.⁸¹ The traditional model focuses on the minors rather than the offenses. The restorative model focuses on a more balanced approach where the needs of the offender, the victims and the community are all considered. The tough-on-crime approach focuses on punishment and deterrence.⁸² Any model that fails to take into account the minors’ mental health will fail in its objective because “punishment on the basis of deterrence is inherently unjust,” and ineffective.⁸³

III. The difference between the juvenile justice system and the criminal justice system

The distinction between the juvenile justice system and the criminal justice system is based on the English Common Law.⁸⁴ The main difference is based on the age and the intent of the offender.⁸⁵ To find someone guilty of a crime, two elements are crucial – 1) *actus rea* or criminal act and 2) *mens rea* or the intent to commit the act.⁸⁶ These two elements are equally important although the latter is often ignored.⁸⁷ With minors, the question becomes: When are they capable of forming intent to commit crimes?⁸⁸ This question serves as the basis for a separate court system for juveniles.

Juvenile court proceedings differ from adult court proceedings⁸⁹– “the court hearings in the juvenile justice system are less formal than criminal court proceedings.”⁹⁰ In creating the juvenile justice in the nineteenth century, the progressives envisioned a system that is “informal, [and a] discretionary social welfare agency whose dispositions reflected the ‘best interests’ of the child.”⁹¹ However, that changed in *In re Gault* when the Supreme Court extended due process rights to minors.⁹²

⁸⁰ Juveniles Justice System vs. Criminal Justice System, GET A REAL DEGREE, <https://getarealdegree.com/juveniles-justice-system-vs-criminal-justice-system/> (last visited May 17, 2018).

⁸¹ McCORD, *supra* note 34, at 155.

⁸² *Id.*

⁸³ PLATT, *supra* note 27, at 17.

⁸⁴ Lawrence, *supra* note 13, at 28.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Adjudication of Youths as Adults in the Criminal Justice System*, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/AoYaACJS.pdf (last visited May 17, 2018).

⁹⁰ *Juvenile Justice: A Century of Change*, *supra* note 21.

⁹¹ Field, *supra* note 9.

⁹² 387 U.S. 1, 13 (1967).

The juvenile and the adult justice systems are based on two different viewpoints. The adult justice system commonly called the criminal justice system focuses on deterrence, punishment, retribution, and rehabilitation. The juvenile justice system, on the other end, focuses on the offenders' needs – rehabilitation and supervision – which gives the court the latitude to divert cases from court action.⁹³ The juvenile justice system views youths' behavior as malleable; therefore, rehabilitation is the best approach when dealing with them. On the other end, the criminal justice system focuses on the proportionality of the punishment.

A. Juvenile Court v. Adult Court

The criminal court decides on guilt.⁹⁴ On the other end, the juvenile court decides on the type of treatment that is more beneficial to the minors' well-being. The difference between the procedures in juvenile court and the adult court is based on the notion that minors and adults are different.⁹⁵ The difference in juveniles' maturity is based on their limited knowledge of the law and its consequences, and their mental capability to understand the severity of their actions.

To differentiate the juvenile justice system from the adult court system, a new set of legal terms were invented. As I mentioned earlier, minors are called delinquents instead of criminals.⁹⁶ They are adjudicated rather than sentenced.⁹⁷ In juvenile court, the proceedings are not open to the public; only selected people – attorneys, parents, minor, social workers, the person who files charges against the minor, and probation officers⁹⁸ – are allowed in the court. Meanwhile adult court proceedings are open to everyone. There is also a limitation to public access to juvenile court proceeding information.⁹⁹ The court proceedings information is released for very specific and limited reasons in order to assure that the minors' information is kept confidential. The purpose of using different proceedings and legal terms in juvenile courts instead of the ones that are used in adult courts is to turn the minors into productive adults when they age out of the juvenile justice system, and to protect them from being labeled and from societal stigmas.¹⁰⁰ This change increases the states' focus on rehabilitation instead of punishment. The juvenile court does not

⁹³ Lawrence, *supra* note 13, at 28.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Juvenile Justice: A Century of Change, The juvenile justice system differs from the criminal justice system, but there is common ground*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, https://www.ncjrs.gov/html/ojjdp/9912_2/juv4.html (last visited May 17, 2018).

⁹⁸ Lawrence, *supra* note 13, at 29.

⁹⁹ *Id.*

¹⁰⁰ Finklea, *supra* note 10, at 3.

consider legal guilt because minors are not mature and cannot appreciate the legal consequences of their actions.¹⁰¹ It, however, focuses on treatment rather than punishment, on minors' social and family backgrounds and history, and, on short term supervision and detention.¹⁰²

In the juvenile justice system, the concept of legal guilt is absent. Minors are deemed incapable of forming criminal intent with the exceptions of some minors who demonstrate great sense of maturity.¹⁰³ Because of this conclusion, the individualized approach should be used in every juvenile case, either resulting in detention or not. More importantly, it is a crucial component in deciding whether a minor should be transferred to adult court. In the criminal justice system, offenders are presumed to possess the capacity and can commit crimes and appreciate the legal consequences of their offenses. The juvenile justice system, on the other end, favors rehabilitation over punishment. Unlike the criminal justice system, the juvenile justice system's purposes are to treat minors and guide them while protecting the community.¹⁰⁴ Lastly, the juvenile justice system, among other factors, focuses on the minors' social backgrounds, community ties, educational backgrounds, mental health, and family histories.¹⁰⁵

B. Juvenile Court Proceedings

The juvenile court system, unlike the adult court system, is a non-adversarial system.¹⁰⁶ Although in "a series of decisions beginning in the 1960's, the U.S. Supreme Court required that juvenile courts become more formal – more like criminal courts"¹⁰⁷ – it has clarified that minors are different, thus require different treatment than adults.¹⁰⁸ The extension of the constitutional rights to minors should not be taken as a leeway to treat juveniles as adults or to mandatorily transfer them to adult courts. Since its creation, "juvenile courts have traditionally emphasized

¹⁰¹ Lawrence, *supra* note 13, at 28.

¹⁰² *Id.* at 29.

¹⁰³ *Id.* at 28.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *The History of Juvenile Justice, supra* note 5.

¹⁰⁷ *Juvenile Justice: A Century of Change, supra* note 21.

¹⁰⁸ *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (Simmons, eighteen years of age, was sentenced to death in 1993 due the commission of a capital offense. He appealed his case to both state and federal courts but to no avail. Simmons filed another appeal to the Missouri Supreme Court which set aside Simmons' death sentence but sentenced him to life without parole. The Supreme Court of the United States affirmed the decision of the Supreme court of Missouri. The Court differentiates youths from adults. The Court stated three reasons why youths are different from adults: 1) lack of maturity and underdeveloped sense of responsibility; 2) more vulnerable to negative influences and easily succumb to peer pressures; and 3) youths' characters are not well formed as adults' characters.).

on social rehabilitation for young offenders, but recent legal trends toward punitive justice have substantially diluted rehabilitation efforts.”¹⁰⁹

To avoid labeling the minors, to keep them separate from adults, and separate the juvenile justice system from the criminal justice system, as we said earlier, different legal terms are used in the juvenile courts. The legal terms used in juvenile court reflects the minors’ immaturities.¹¹⁰ Minors are not taken to jail, but they are taken into custody. This term reflects the *parens patriae* doctrine. A delinquency petition is filed in juvenile court contrary to adult court where a criminal indictment is filed. The minors are adjudicated instead of convicted. Unlike trials in adult courts that open to the public, juvenile court proceedings are not public. This helps to protect the minors’ records and prevent societal stigma, as well as to facilitate a smooth rehabilitative process and community reentry.¹¹¹

C. Effect of sentencing minors in adult court

Sentencing a minor in adult court defeats the purpose of the juvenile justice system’s objective. Minor offenders cannot, with certainty, be classified among the worst offenders when their characters are not well formed compared to adult offenders.¹¹² They are at the stage of their lives where they are acting out of impulse. Furthermore, their immaturities impede their ability to appreciate the legal consequences of their actions. Sentencing them in adult court will not change that. It, however, stigmatizes them which can affect their lives once becoming adults. For instance, a number of studies have shown that negative *labeling* and system involvement can negatively affect a youth’s employment, social life, and education.¹¹³

Minors sentenced and imprisoned in adult court are more likely to reoffend.¹¹⁴ The exposure to adult treatment may strongly and negatively affect them. Since the “transition from youth to adulthood is largely a process of increasing one’s investment in conformity and developing one’s social identity, an interruption as stigmatizing and socially crippling as serious involvement in the criminal justice system early in life may have serious long-term implications.”¹¹⁵ Therefore, it is in

¹⁰⁹ Pattison, *supra* note 56, at 575.

¹¹⁰ See Lawrence, *supra* note 13, at 29.

¹¹¹ McCORD, *supra* note 34, at 154.

¹¹² Graham v. Florida, 560 U.S. 48, 68 (2010).

¹¹³ *The context of Juvenile Justice: Defining Basic Concepts and Examining Public Perceptions of Juvenile Crimes*, http://samples.jbpub.com/9780763762513/62513_ch01_elrod3e.pdf, at 5 (last visited April 6, 2018) (emphasis added).

¹¹⁴ Jason Ziedenberg, *You’re An Adult Now, Youth in Adult Criminal Justice Systems*, NATIONAL INSTITUTE OF CORRECTIONS (Dec. 2011), <https://nicic.gov/youre-adult-now-youth-adult-criminal-justice-systems>, at 55.

¹¹⁵ Nathaniel Ascani, *Labeling Theory and the Effects of Sanctioning on Delinquent Peer Association: A New Approach to Sentencing Juveniles*, 81, UNIVERSITY OF NEW HAMPSHIRE, https://cola.unh.edu/sites/cola.unh.edu/files/student-journals/P12_Ascani.pdf. (last visited May 17, 2018).

the best interest of the minors, as it is the main goal of the juvenile justice system, to rehabilitate them rather than incarcerate them along with adult criminals.

The unfortunate effect of mandatory transfer of minors to adult courts “[u]necessarily saddle a youth with the lifelong stigma of a criminal conviction.”¹¹⁶ Youths’ delinquent behaviors are due to their immaturity, they are easily influenced by peers, they have an underdeveloped sense of responsibility, and their characters are not well formed.¹¹⁷ It will not serve the interest of justice to sentence to a prison term a person who cannot appreciate the legal consequences of his actions.

IV. Constitutional rights of minors

The Supreme Court of the United States has recognized – in different decisions – that youths are different but have constitutional rights.¹¹⁸ In *Kent*, the Supreme Court of the United States decided that minors are entitled to “essential due process” in transferring them to adult courts.¹¹⁹ In *In re Gault*, the Court extended the due process right to minors when the hearing may result in commitment to a detention facility.¹²⁰ In *In re Winship*, the Court held that “beyond reasonable doubt” is the standard to be used in the adjudication phase.¹²¹ In *McKeiver*, the Court stated that the due process clause of the Fourteenth Amendment does not require a jury trial in juvenile proceedings.¹²² In *Breed*, the Court held that the adjudication of a minor in juvenile court is the equivalent of sentencing the minor in adult court; therefore, it would be double jeopardy to try the minor in both courts.¹²³

The Supreme Court’s extension of constitutional rights to minors make the juvenile justice system a mock of the criminal justice system yet keeps a thin line

¹¹⁶ Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 107 (2010).

¹¹⁷ *Graham*, 560 U.S. at 68.

¹¹⁸ *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

¹¹⁹ 383 U.S. 541 (1966).

¹²⁰ 387 U.S. 1 (1967).

¹²¹ 397 U.S. 358 (1970).

¹²² 403 U.S. 528 (1971).

¹²³ 421 U.S. 519 (1975). Gary Jones was found guilty of an offense that would be considered robbery if he was subject to adult court jurisdiction. After disposition, the juvenile court determined that Jones should be tried in adult court because he was unfit for juvenile treatment. Jones filed an habeas corpus arguing that he was subject to double jeopardy. His petition was denied by the trial, appellate, and Supreme Court of California. Jones was found guilty of robbery in the first degree. Jones filed an habeas corpus in federal court. The District Court denied the habeas corpus holding that the two systems are different, therefore, double jeopardy does not apply. The Court of Appeals for the Ninth Circuit reversed the District Court decision. The appellate court decision was stayed pending the Supreme Court decision. The Supreme Court held that trying Jones in both juvenile and adult courts is double jeopardy.

between the two systems. Extending the constitutional rights to minors can be beneficial meanwhile can also have adverse consequences. In a dissenting opinion in *In re Gault*, justice Stewart stated that extending due process to minors might have adverse consequences.¹²⁴ He further stated that before the nineteenth century, juveniles and adults received the same due process rights, which resulted to minors receiving the same treatment as adults.¹²⁵ He noted that the court decision moved the court backwards into the nineteenth century.¹²⁶ Although justice Stewart statement is partly true, withholding due process rights of the minors will not also serve justice. It will move the Court backwards during the time when minors were arbitrarily detained.

In *McKeiver*, the court refused to extend jury trial to minors stating that the juvenile justice system is not adversarial in nature.¹²⁷ The Supreme Court decision to extend certain constitutional rights to minors should not be taken as if the Supreme Court wants the juvenile court to operate as the criminal justice system. It, however, wants to assure that minors, before all, are humans and are entitled to the basic fairness provided by the Constitution. The Court decisions remind us that the juvenile justice system is a part of the American legal system – adversarial system. However, to accomplish the goals and objectives of the juvenile justice system, all the components of the adversarial system cannot apply to juvenile court proceedings. As stated in the National Criminal Justice Reference Service:

The impact of the Court's *Gault* and *Winship* decisions was to enhance the accuracy of the juvenile court process in the fact-finding stage. In *McKeiver*, the Court argued that juries are not known to be more accurate than judges in the adjudication stage and could be disruptive to the informal atmosphere of the juvenile court, tending to make it more adversarial.¹²⁸

The U.S. Supreme Court reasons to extend and withhold certain constitutional rights to minors are 1) to clarify that persons (either minor or adult) have inviolable constitutional rights, thus should not be subject to arbitrariness in a court of law; and 2) juvenile court is not adversarial in nature although it is a part of the adversarial legal system. It is informal and aims at rehabilitating rather than punishing. Lastly, “the juvenile court’s departure from strict adherence to due process has been upheld

¹²⁴ 387 U.S. at 80.

¹²⁵ *Id.*

¹²⁶ *Id.* at 79.

¹²⁷ 403 U.S. at 541.

¹²⁸ *Juvenile Justice: A Century of Change, U.S. Supreme Court cases have had an impact on the character and procedures of the juvenile justice system*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, https://www.ncjrs.gov/html/ojjdp/9912_2/juv2.html (last visited May 17, 2018).

on the grounds that it is a civil court which dispenses protective care to its wards rather than penal sanctions to criminals.”¹²⁹

A. Due process

The Due Process clause of the Fourteenth Amendment requires a state to hold a transfer hearing in which a minor is represented by a counsel before waiving or transferring him to adult court.¹³⁰ The criminal justice system and the juvenile justice system were created on two different and distinct philosophies. Raising a minor’s delinquent status to criminal status should not be a decision made by a prosecutor; it should be decided in a court of law by a juvenile court officer because that decision is critical, thus should not be a one-man-decision. Mandatory transfer laws disrupt the juvenile justice’s objectives and goals because it takes away its original jurisdiction over juvenile matters. Juvenile court has original jurisdiction over juvenile matters at the onset of the juvenile court. Taking that jurisdiction away should be in line with due process established by the Supreme Court in *Kent*.

After the decision of the Supreme Court in *Kent*, Congress amended the Juvenile Court Act to give full discretionary power to United States attorneys to bypass the juvenile court and directly file charges in adult courts against minors who commit certain crimes. The amendment of the Juvenile Court Act poses a legal question that the Supreme Court left unanswered by denying certiorari to *Bland v. United States*.¹³¹ In his dissenting opinion, justice Douglas reiterated that Congress has the power to vest power in jury and judges to decide on punishment that should be imposed in situations, but not to vest in prosecutors such power because judges and juries are prescribed to protect individual freedom. Moreover, their decisions are made after public trials in which a defendant has the right to be represented by an attorney.¹³²

In *In re Gault*, the Supreme Court of the United States stated that “neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”¹³³ Since mandatory transfer laws infringes on the constitution’s due process clause, they are unconstitutional. It should not be forgotten that minors are entitled to their due process right before being transferred

¹²⁹ MATZA, *supra* note 20, at 11.

¹³⁰ *Kent v. United States*, 383 U.S. 541, 554 (1966).

¹³¹ Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles Into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 780 (2014) (“The Supreme Court was asked to decide whether the due process protections announced in *Kent* were based on the statutory language of the Juvenile Court Act at the time, or whether juveniles have a basic liberty interest in those protections.”).

¹³² *Bland v. United States*, 412 U.S. 909, 911-12 (1973), (Douglas, J. dissenting).

¹³³ 387 U.S. at 13.

to adult court.¹³⁴ Although the *parens patriae* doctrine gives the states the power to act as the minors' parents, it "is not an invitation to procedural arbitrariness."¹³⁵ In *Aalim*,¹³⁶ the Supreme Court of Ohio recognized that mandatory transfer violates the due process clause of the Fourteenth Amendment, therefore unconstitutional. Unfortunately, it vacated its own decision after rehearing the case the following year.¹³⁷ The Supreme Court of Ohio, by vacating its own decision, displays the issues that the juvenile justice system is facing in the United States. In his dissenting opinion, O'Connor, C. J., stated that "the majority's decision today brings us one step closer to the anarchy about which Madison warned."¹³⁸ He further stated that the majority decision failed to bring justice to the minors who are the frailest among the citizens.

The issues facing the juvenile justice system is not only at the state's level, but at the federal level as well. In *Bland*, the U.S. Supreme Court denied certiorari after the United States Court of Appeals for the District of Columbia overturned the decision of the United States District Court for the District of Columbia which declared the amended portion of the Juvenile Justice Act unconstitutional.¹³⁹ The District Court, in declaring the amended statute unconstitutional, stated that the intention of Congress is to preserve a juvenile justice system that acts as *parens patriae* that can try to help and

[R]ehabilitate people under...eighteen. Congress created a system of rights and protection for those under eighteen but a system where some could be denied that assistance and those protections arbitrarily with no assurance that they were being excluded for the reasons intended by Congress...is invalid as violative of basic *due process*.¹⁴⁰

Mandatory transfer laws also violate the constitution because they ignore the individualized sentencing approach that the United States Supreme Court established.

¹³⁴ *Kent*, 383 U.S. at 545-46.

¹³⁵ *Id.* at 555.

¹³⁶ 150 Ohio St. 3d 463 (2016) (vacated); 150 Ohio St. 3d 489 (2017).

¹³⁷ *State v. Aalim*, 150 Ohio St. 3d 489 (2017).

¹³⁸ *Id.* at 506 (O'Connor, C. J., dissenting). Madison warned that:

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.

The Federalist No. 51, at 351 (James Madison) (Cooke Ed.1961).

¹³⁹ 401 U.S. 909 (1973).

¹⁴⁰ *United States v. Bland*, 330 F. Supp. 34, 37-38 (D.D.C. 1971) (quote omitted) (emphasis added).

They “[p]reclude juvenile court judge[s] from taking any individual circumstances into account before...sending a child...to adult court. This one-size-fits-all approach runs counter to the aims and goals of the juvenile system.”¹⁴¹ Moreover, they run counter to the proportionality principle of sentencing which requires that the offender’s characteristics be taken into account as well as the offense.

There can be serious due process concerns when a minor is exposed to a court system not designed for persons of his or her capacity.¹⁴² Holding a transfer hearing to decide whether the minor will be fit for the criminal justice system is ideal because the “[j]uvenile court judges are in the best position to evaluate each juvenile’s suitability for juvenile or adult court.”¹⁴³ Moreover, “[f]undamental fairness requires that juveniles have the opportunity to demonstrate a capacity to change and suitability to juvenile court, and an amenability hearing is accordingly necessary before juveniles are transferred.”¹⁴⁴

B. Rehabilitation

The Eighth Amendment of the United States, which was incorporated into the Bill of Rights in 1791, originated from the 1689 English Bill of Rights.¹⁴⁵ The purpose of the article within the English Bill of Rights was to eradicate the practice of executions and tortures.¹⁴⁶ During the Congressional debate on the Eighth Amendment, one of the Congressmen objected to the insertion of the term “cruel and unusual” as he deemed it was too indefinite.¹⁴⁷ However, the Court construes the Eighth Amendment to include the constitutionality of certain punishments, the administration of certain punishments, and punishments that are disproportionately imposed to the offenders.¹⁴⁸

The interpretation of “cruel and unusual” has evolved throughout the American history and the Supreme Court has used several tests to determine whether a punishment is cruel and unusual.¹⁴⁹ In 1988, the Supreme Court vacated the death sentence of William Wayne Thompson stating that the punishment was

¹⁴¹ *Aalim*, 150 Ohio St. 3d at 471.

¹⁴² Jarod K. Hofacket, *Justice or Vengeance: How Young is Too Young for a Child to be Tried and Punished as an Adult?*, 34 TEX. TECH L. REV. 159, 162 (2002).

¹⁴³ *Aalim*, 150 Ohio St. 3d at 469 (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ Ronald H. Rosenberg, *Constitutional Law - The Eighth Amendment and Prison Reform*, THE WOLF LAW LIBRARY, <http://scholarship.law.wm.edu/facpubs/670> (last visited May 24, 2018).

¹⁴⁶ *Id.*

¹⁴⁷ *Eight Amendment: Further Guarantees in Criminal Cases*, AUTHENTICATED U.S. GOVERNMENT INFORMATION, <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-9.pdf>, at 1570 (last visited May 17, 2018).

¹⁴⁸ Arya, *supra* note 116, at 110.

¹⁴⁹ Rosenberg, *supra* note 145, at 1540.

unconstitutional because it is “cruel and unusual” to sentence to death a person who was under sixteen years of age at the time of the commission of the crime.¹⁵⁰ In its decision, the plurality clarified that “[t]he normal [*person of sixteen years of age*] is not prepared to assume the full responsibilities of an adult.”¹⁵¹ In its reasoning, the Court referenced the American Bar Association and the American Law Institute which oppose the death sentence of any person under the age of eighteen.¹⁵² In this case, the “Supreme Court planted the seeds for its eventual conclusion that minors, specifically adolescents, are a categorically distinct class from adults for purposes of the Cruel and Unusual Punishments Clause of the Eighth Amendment.”¹⁵³ Indeed, seventeen years later, in *Roper v. Simmons*, the Supreme Court buried the imposition of death penalty sentencing on persons under the age of eighteen years.¹⁵⁴

Sixteen years after upholding the death penalty for persons sixteen and seventeen years of age,¹⁵⁵ the court overturned what we can consider as the last death sentence for persons under the age of eighteen.¹⁵⁶ The Court held that imposing the death penalty on persons under the age of eighteen when the offense was commissioned is cruel and unusual punishment, and therefore, unconstitutional. In *Graham and Miller*, the Court also overturned mandatory life without parole for minors. In *Miller*, the Court noted that “[t]he mandatory sentencing scheme violates this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.”¹⁵⁷ By banning Life WithOut Parole (LWOP) for minors, “the Court has now recognized that rather than enjoying a right to be punished, young people, specifically adolescents, instead uniquely possess the quite different-indeed in many ways antithetical-constitutional right to a meaningful opportunity to be rehabilitated.”¹⁵⁸

¹⁵⁰ *Thompson v. Oklahoma*, 487 U.S. 815 (1988). See Lawrence, *supra* note 13, at 34. (Discussing the issue of imposing death sentence to juveniles in the United States. United States is among the few industrialized and democratic countries that allow minors to be sentenced to death. From 1973-2004 (thirty-one years), 228 minors were sentenced to death. Among the 228 sentenced, twenty-two minors were executed and 134 were either reversed or commuted. The State of Texas alone is responsible for over half of the twenty-two executions. Seven thousand death sentences have been imposed in the United States since 1973. Three percent (two thirds of the death sentences were imposed on seventeen-year-olds and one third were imposed on fifteen and sixteen-year olds) of that number are juveniles. By the end of 2005, twenty states authorized the execution of minors. (Nine states set the minimum age at sixteen and under, five states set the minimum age at seventeen, and six states had no age minimum).

¹⁵¹ *Thompson*, 487 U.S. at 825.

¹⁵² *Id.* at 830.

¹⁵³ Gardner, *supra* note 39, at 481.

¹⁵⁴ *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

¹⁵⁵ *Stanford v. Kentucky*, 492 U.S. 361 (1989) (abrogated by *Roper v. Simmons*, 543 U.S. at 551).

¹⁵⁶ *Roper*, 543 U.S. at 551.

¹⁵⁷ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

¹⁵⁸ Gardner, *supra* note 39, at 459.

The United States Supreme Court has made it clear that when a court is deciding on the fate of youthful offenders, there is a need to determine whether the offenders are incorrigible. However, the Court recognizes that “incorrigibility is inconsistent with youth”¹⁵⁹ because they lack maturity, are vulnerable to peer influences, impulsive, etc....¹⁶⁰ It violates the eighth amendment, from the start, to decide that youth offenders are not fit to reenter society.¹⁶¹ The Supreme Court also recognizes that “the objectives [of a statute creating a juvenile court] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt, and punishment.”¹⁶²

The Court’s decision in *Graham* recognizes that youth offenders are entitled to rehabilitation. Not giving minors the possibility for rehabilitation violates their Eighth Amendment right because it presumes that minors are incorrigible.¹⁶³ In the event a minor and an adult commit the same crime, “less culpability should attach to [the] juvenile offender than to [the] adult offender.”¹⁶⁴

V. Mandatory transfer

Every jurisdiction in the United States including the federal government allow for the transfer of persons under the age of eighteen to adult court under some circumstances through certain transfer mechanisms.¹⁶⁵ These transfer mechanisms drastically increase the number of minors who are transferred to adult court. For instance, “between 1990 and 2010 the number of juveniles in adult jails went up by nearly 230%.”¹⁶⁶ Moreover, “nearly 200,000 youth enter the adult criminal-justice system each year, most for non-violent crimes.”¹⁶⁷ These minors who are transferred to adult court have been exposed to abuse by both inmates and prison staff.

Transferring and trying juveniles in adult courts exposes them to great danger because adult courts are not set up to take into consideration the minors’ well-beings.¹⁶⁸ It exposes them to a system not designed to consider their best interest

¹⁵⁹ *Miller*, 567 U.S. at 473 (quoting *Graham v. Florida* 560 U.S. 48, 72–73 (2011)); *see also* *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)).

¹⁶⁰ *Id.* at 472.

¹⁶¹ *Graham*, 560 U.S. at 75.

¹⁶² *Kent v. United States*, 383 U.S. 541, 554 (1966) (emphasis added).

¹⁶³ *Graham*, 560 U.S. at 71.

¹⁶⁴ Dominic J. Ricotta, *Eighth Amendment--The Death Penalty for Juveniles: A State's Right or a Child's Injustice*, 79 J. CRIM. L. & CRIMINOLOGY 921, 928 (1988).

¹⁶⁵ *See* discussion, *infra* note 174.

¹⁶⁶ *Children in Adult Jails: Treating Young Offenders Like Grown-ups Makes Little Sense*, THE ECONOMIST (March 28, 2015), <https://www.economist.com/news/united-states/21647347-treating-young-offenders-grown-ups-makes-little-sense-children-adult-jails>.

¹⁶⁷ Lahey, *infra* note 194.

¹⁶⁸ Ziedenberg, *supra* note 114, at 2.

or their mental and physical developments when deciding on their fates. Mandatory transfer gives no juvenile court officer the chance “to assess the rehabilitative needs of [the] youth, and to consider individualized factors to determine whether the severe consequence of treating a youth as an adult is appropriate.”¹⁶⁹ Although the Supreme Court in *Miller* clarifies that if the States fail to consider the youths’ ages and characteristics before imposing sentence on them, the law or statute will be flawed,¹⁷⁰ states have continued to transfer juveniles to adult court without considering their ages and characteristics. For instance, in 2007, fourteen states excluded minors under the age of eighteen from juvenile jurisdiction solely because of their age. In 2017, seventeen-year-olds were automatically excluded from the juvenile court in five states – Georgia, Michigan, Missouri, Texas, and Wisconsin.¹⁷¹ In some other states, for instance, New York and North Carolina, minors as young as sixteen years old are adults for certain criminal conducts.¹⁷²

In 1970, only eight states had statutorily excluded juveniles from the jurisdiction of the juvenile courts for certain crimes.¹⁷³ Now, every single one of the fifty states and the District of Columbia have at least one form of transfer mechanisms¹⁷⁴ that

¹⁶⁹ *The Impact of Mandatory Transfer Statutes*, CAMPAIGN FOR YOUTH JUSTICE (Nov. 29, 2016), http://www.campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet_FINAL_1_1.pdf.

¹⁷⁰ *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

¹⁷¹ Jeree Thomas, *Raising the Bar: State trends in keeping youth out of adult courts 2015-2017*, CAMPAIGN FOR YOUTH JUSTICE, http://cfyj.org/images/StateTrends_Repot_FINAL.pdf (last visited May 24, 2018).

¹⁷² Ziedenberg, *supra* note 114, at 4.

¹⁷³ Thomas, *supra* note 171.

¹⁷⁴ See Appendix: Summary of Transfer Laws, OFFICE OF JUSTICE PROGRAMS, <https://www.ojjdp.gov/pubs/tryingjuvasadult/appendix.html> (last visited May 17, 2018). Defining the different transfer mechanisms. *Discretionary Waiver* – the discretionary power of a juvenile judge possesses whether to waive the juvenile court jurisdiction over a case involving a minor to allow prosecution in adult court. Under the discretionary waiver, the prosecutor has the burden of proof; however, some states allow this burden to be shifted to the child under certain circumstances. *Mandatory Waiver* – states required waiver under certain circumstances by juvenile courts to allow the prosecution of juveniles in adult court. Under mandatory transfer, the juvenile court must transfer a case to adult court if the offender commits a specific offense, meets certain age requirement, and other criteria. Under this circumstance, the juvenile court has no role beside confirming that the statute requirement has met to waive the case to adult court. *Presumptive Waiver* – “If the State designates a category of cases in which waiver to criminal court is rebuttably presumed to be appropriate, a description of the pertinent law is included under Presumptive Waiver.” Under the presumptive waiver, the rebuttable presumption applies if the juvenile meets the statutory criteria that qualifies the case for presumptive waiver treatment. Presumptive waiver falls into three categories: 1) some jurisdiction gives the most weight to the current offense; 2) minors who are older are targeted. Their offenses trigger a presumption even if the offenses which they are accused of would not have otherwise triggered a presumption if they were younger; and 3) some jurisdictions prioritize a minor’s prior offense history over other factors. *Direct File* – the power states give to prosecutors to choose either to file a petition in juvenile courts or charges in criminal court against minors. *Statutory Exclusion* – the exclusion of certain crimes from

allow for young offenders to be prosecuted in adult courts.¹⁷⁵ As of 2016, forty-six states have discretionary waiver, twelve have presumptive waiver, thirteen have mandatory waiver, twenty-eight have statutory exclusion/direct filing, thirty-five have “once and adult, always an adult”, fourteen have prosecution discretion.¹⁷⁶

A. Case against mandatory transfer

The mandatory transfer of juveniles to adult court makes it impossible for juveniles to benefit from the rehabilitative programs they are entitled to. It violates their Eighth Amendment right to rehabilitation by exposing them to the same penalties and treatments as adults,¹⁷⁷ which the designers¹⁷⁸ of the juvenile justice system were trying to avoid by designing a different court for minors.¹⁷⁹ It is excessive punishment under the Eighth Amendment of the United States Constitution for a state to mandatorily transfer a minor to adult court.¹⁸⁰ Determining cruel and unusual punishment is not solely based on extreme cruelty but rather on moral judgement.¹⁸¹ Although the Supreme Court has long held that for a punishment to be cruel and unusual it should be disproportionate to the crime,¹⁸² it has also considered, “[w]hether the challenged sentencing practice serves legitimate penological goals.”¹⁸³

One purpose of the juvenile justice system is to “guide a juvenile offender toward life as a responsible, law-abiding adult.”¹⁸⁴ To achieve such goal, the juvenile justice

juvenile court jurisdictions. A case must be filed in adult court under the statutory exclusion if the minor meets the minimum age requirement and commits at least one of the crimes that are statutorily excluded. *Once an Adult/Always* – the power states have to terminate the juvenile courts jurisdictions over minors who have been prosecuted as adults.

¹⁷⁵ Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws* (April 17, 2017), NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.

¹⁷⁶ *Jurisdictional Boundaries*, JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS, <http://www.jjgps.org/jurisdictional-boundaries> (last visited May 17, 2018).

¹⁷⁷ *Juvenile Transfer to Criminal Court*, OFFICE OF JUSTICE PROGRAMS, https://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited May 17, 2018).

¹⁷⁸ See *The context of Juvenile Justice: Defining Basic Concepts and Examining Public Perceptions of Juvenile Crimes*, *supra* note 113. (The Progressists designed the juvenile justice system as a response to the social problems cities were facing during the industrialized era. During that time, minors were exposed to dangerous work and inhuman living conditions. The progressists got involved to lead the minors away from a life of crime. The Child Savers, a group of middle class women, were the first to lobby, on behalf of the youths, for a separate court, law and correctional system for these minors.)

¹⁷⁹ *Id.*

¹⁸⁰ *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

¹⁸¹ *Graham v. Florida*, 560 U.S. 48, 58 (2010).

¹⁸² *Roper*, 543 U.S. at 561.

¹⁸³ *Graham*, 560 U.S. at 67 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008)).

¹⁸⁴ *The History of Juvenile Justice*, *supra* note 5.

system operates as a non-criminal court,¹⁸⁵ and as a non-adversarial system.¹⁸⁶ The juvenile justice system emphasizes on an informal court process, non-adversarial, and flexible approach.¹⁸⁷ This approach gives the juvenile court judges the flexibility to make decisions in the best interest of the minors. When a minor is transferred to adult court, he has become an adult; therefore, he or she risks losing the benefit of the rehabilitative programs for people of his or her age. In some jurisdictions, once transferred to adult court, they become adults for any future crimes. For someone to be accountable for a crime, the person must: 1) have a vicious will to commit the act and 2) actually commit such crime.¹⁸⁸ Absence of the former can negate the latter.¹⁸⁹ Minors rarely have the vicious will to commit crimes although they often engage in criminal acts.¹⁹⁰ When a minor commits a criminal act, the juvenile court is there to decide on the most beneficial program that can rehabilitate the minor.¹⁹¹ When a minor is tried and sentenced in adult court, it might have an adverse consequence. For instance, a study by the Campaign for an Effective Crime Policy [hereinafter *CECP*] found that juveniles prosecuted as adults in Florida are more likely to commit more crimes and serious offenses upon their releases into the community than minors whose cases were adjudicated in juvenile courts.¹⁹² And when sentenced in adult court, minors often lose the opportunities they would otherwise enjoy if they were adjudicated in juvenile court. For instance, in some states, minors convicted of a felony crime are not eligible for federal or state student loans or housing loans.¹⁹³ Furthermore, “they lose out on the educational and psychological benefits offered by juvenile-detention facilities. Worse, they are much more likely to suffer sexual abuse and violence at the hands of other inmates and prison staff.”¹⁹⁴

¹⁸⁵ *Id.*

¹⁸⁶ Lawrence, *supra* note 13, at 29.

¹⁸⁷ *The History of Juvenile Justice*, *supra* note 5.

¹⁸⁸ Lawrence, *supra* note 13, at 28.

¹⁸⁹ *Id.*

¹⁹⁰ *The History of Juvenile Justice*, *supra* note 5.

¹⁹¹ *Id.*

¹⁹² *Juvenile Transfer to Criminal Court*, *supra* note 177.

¹⁹³ *Adjudication of Youths as Adults in the Criminal Justice System*, *supra* note 89.

¹⁹⁴ Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, *THE ATLANTIC*, (Jan. 8 2016), <https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/>. (There are approximately 1,200 juveniles in federal and state prisons within the United States. These minors have been sexually abused by other inmates. The National Inmate Survey (NIS) reported that 1.8 percent of sixteen and seventeen-year olds who are imprisoned with adults experienced sexual abuse. Juveniles who are housed with adults are thirty-six times more likely to commit suicide than the ones who are housed separately from adults. Juveniles who are housed with adults are thirty-four times more likely to recidivate than the ones house separately.). See also, Edward P. Mulvey and Carol A. Schuber, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, U.S. DEPARTMENT OF JUSTICE (Dec. 2012), <https://www.ojjdp.gov/pubs/232932.pdf>. (Juveniles who are housed with adults are five times more likely to be sexually assaulted and two times more

The United States Supreme Court in *Miller* reasoned that mandatory life without parole violates minors' Eighth Amendment right.¹⁹⁵ Although the Court's decision is based on mandatory life without parole, it does not declare life without parole unconstitutional, but "mandatory" life without parole. The Court believed that the minors should not be mandatorily sentenced because mandatory sentencing fails to consider the minors' characteristics, thus bypassing the individualized sentencing for juveniles. This decision should also be interpreted to convey the message that "mandatory" transfers should not be imposed on juveniles because it fails to consider the minors' individual characteristics. There should be an individualized evaluation of the minors' characteristics before a juvenile court officer who would decide on the appropriateness of such transfer.

Mandatory transfers of minors to adult courts violates "[t]he basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense."¹⁹⁶ Even in the context of when a minor has committed a heinous crime, the state must consider the minor's "attributes" before transferring him or her to adult court.¹⁹⁷ This decision should be made by a juvenile court officer after conducting a transfer hearing on the appropriateness of transferring the minor to adult court.¹⁹⁸

The main goals of trying juveniles in adult courts are deterrence, lowering the recidivism rate, and community safety.¹⁹⁹ However, this process has failed to accomplish said goals. Instead, it greatly affects the youths' well-beings and disrupts their family ties.²⁰⁰ When their cases are waived to adult courts, juvenile offenders are most likely to reoffend after serving their terms.²⁰¹ Youths who are prosecuted in adult courts are thirty-four percent more likely to commit more violent offenses after their releases.²⁰² Mandatory transfer laws are "[f]lawed because [they] give no significance to the character and record of the individual offender or the circumstances of the offense and excludes from consideration the possibility of compassionate or mitigating factors."²⁰³

likely to be physically abused by prison staff. In 2005, twenty-one percent of inmate-on-inmate sexual violence involved a minor under the age of eighteen. Moreover, minors who are transferred to adult courts and incarcerated with adults can experience developmental issues, in addition to the physical and psychological abuses, that are harmful to their well-beings.)

¹⁹⁵ *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

¹⁹⁶ *Id.* at 469 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

¹⁹⁷ *Graham v. Florida*, 560 U.S. 48, 58 (2010).

¹⁹⁸ *Juvenile Transfer to Criminal Court*, *supra* note 176.

¹⁹⁹ *Adjudication of Youths as Adults in the Criminal Justice System*, *supra* note 89.

²⁰⁰ *Id.*

²⁰¹ *Ascani*, *supra* note 115.

²⁰² *The Impact of Mandatory Transfer Statutes*, *supra* note 169.

²⁰³ *Miller v. Alabama*, 567 U.S. 460, 475 (2012) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

Instead of trying minors in adult courts, states should create a more balanced juvenile justice system in which minors are fairly punished for their crimes – that is recognizing that the minors are immature, impulsive, and easily influenced by peers – while focusing on rehabilitation and considering public safety. A more balanced system can help the states deal with violent youth offenders without subjecting them to adult treatment or transferring them to adult courts. Mandatory transfers expose minors to the adversarial system which is detrimental to their well-beings. They lose the identity protection given to minors as well as their ability to build a new life.²⁰⁴

B. Minors are different

Minors, unlike adults, are “considered less mature and less aware of the consequences of their actions.”²⁰⁵ They are “incapable of being fully responsible for antisocial and criminal behavior;”²⁰⁶ “particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.”²⁰⁷ Minors are “malleable and more capable of rehabilitation than adults, and that treatment rather than punishment should be the focus of the juvenile justice system.”²⁰⁸

The Supreme Court draws a line between adolescence and adulthood. It has “solidified age 18 as the defining line between childhood and adulthood.”²⁰⁹ It should not be an assumption that minors are adults when they attain eighteen years of age, but when they actually become adults.²¹⁰ People’s brains do not mysteriously transform on their eighteenth birthdays.²¹¹ It is a process for the brain to mature. During the adolescent stage, a person’s ability to judge, a person’s identity and physical body change so much that it makes it difficult for others to comprehend those changes.²¹² For instance, scientists have discovered that teenage brains overproduce

²⁰⁴ Rachel Jacobs, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 991 (2013).

²⁰⁵ Lawrence, *supra* note 13, at 24.

²⁰⁶ Hoover, *supra* note 26, at 16.

²⁰⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

²⁰⁸ Hoover, *supra* note 26, at 16.

²⁰⁹ Arya, *supra* note 116, at 150.

²¹⁰ Tim Requarth, *Neuroscience Is Changing the Debate Over What Role Age Should Play in the Courts*, NEWSWEEK (April 18, 2016, 10:01 AM), <http://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html>.

²¹¹ *Id.*

²¹² Adam Ortiz, *Adolescence, Brain Development and Legal Culpability*, Juvenile Justice Center, (Jan. 2004), file:///I:/Law%20Review/Research%20for%20article%20on%20Juvenile/crimjust_juvjus_Adolescence.authcheckdam.pdf.

gray matter,²¹³ then there is a pruning period which accompanied by “myelination, a process in which *white matter*²¹⁴ develops that balance the brain’s functions,” which allows the minors to make better and more balanced decisions.²¹⁵

The distinction between adulthood and adolescence is not “simply one of age, but one of motivation, impulse control, judgment, culpability and physiological maturation.”²¹⁶ Because the frontal regions of the minors’ brains are not fully developed, unlike adults, adolescents rely on the emotional part of the brain when making decisions.²¹⁷ This reliance might be the reason minors often engage in dangerous and criminal behaviors. As Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania stated,

The frontal lobe is involved in behavioral facets germane to many aspects of criminal culpability. Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses.... If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.²¹⁸

Minors, unlike adults, are not mature, therefore they deserve to be treated differently than adults. The different treatment that they deserve is not limited to housing them in separate facilities [from adults]. Their characteristics need to be considered when being sentenced because “[p]unishment for crime should be graduated and proportioned to both the offender and the offense”²¹⁹ in order to pass

²¹³ Gray matter – the brain tissue that does the “thinking”.

²¹⁴ White matter – is fatty tissue that serves as insulation for the brain’s circuitry, making the brain’s operation more precise and efficient.

²¹⁵ Ortiz, *supra* note 212.

²¹⁶ Coalition for Juvenile Justice Emerging Concepts Brief, *What Are the Implications of Adolescent Brain Development for Juvenile Justice?*, file:///I:/Law%20Review/Research%20for%20article%20on%20Juvenile/what%20are%20the%20implications%20of%20the%20adolescent%20brain%20development.pdf, at 2 (last visited May 17, 2018).

²¹⁷ *Id.* See also Ortiz, *supra* note 212. Describing the frontal lobe:

The largest part of the brain is the frontal lobe. A small area of the frontal lobe located behind the forehead, called the prefrontal cortex, controls the brain’s most advanced functions. This part, often referred to as the “CEO” of the body, provides humans with advanced cognition. It allows us to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses.

Id.

²¹⁸ Ortiz, *supra* note 212.

²¹⁹ *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Weems v. United States*, 217 U.S. 439, 367 (1910)).

the Eighth Amendment “cruel and unusual” test.²²⁰ This principle of proportionality cannot be taken into account without giving juvenile court officers the chance to decide whether the minors are fit to stand trial in adult courts. It is concluded that mandatory transfer of minors to adult courts without a hearing before a juvenile court officer is unconstitutional because it is not proportioned to the offender, although it might be proportioned to the offense.

VI. Recommendations

A categorical ban on transfers of juveniles to adult courts can be counterproductive. A balanced model which considers the minors’ mental and intellectual development and community safety should be applied when dealing with youth offenders. Some states have already implemented such model. A categorical ban on transfer laws can also negatively affect the individualized sentencing scheme that juvenile advocates have been supporting since the progressive era. The categorical ban will likely fail to consider the community safety.

As an alternative to a categorical ban on transfer laws, states should make it mandatory to have a transfer hearing to assess the minor’s social background, intellectual capacity, family circumstances, ties to the community, mental and physical condition, and determine whether the minor understands the legal consequences of his or her actions along other factors that might be deemed important. It will serve the interest of justice to use the individualized sentencing when adjudicating minors to decide whether they are likely to be rehabilitated. This can be done only in juvenile court by a juvenile court officer and through the juvenile justice system. States should raise the age for juvenile jurisdiction from eighteen to twenty-three for rehabilitative purposes. Raising the age for juvenile jurisdiction will give the states enough time to work with juvenile offenders who are sixteen or seventeen years of age. More importantly, the states can adequately address their needs during their “dramatic hormonal and emotional changes.”²²¹ Some states have raised the ages of juvenile jurisdictions from eighteen to twenty or twenty-one. For instance, in Connecticut, Illinois, Massachusetts and Vermont legislators have proposed bills to expand the juvenile justice’s jurisdiction to persons under the ages of twenty-one or twenty-two.²²² States should follow the Commonwealth of Puerto Rico’s lead and clearly stipulate in their constitutions that it is forbidden to keep a person under the age of sixteen in jail or prison.²²³ However, minors under sixteen who commit violent

²²⁰ *Id.* (quoting *Roper v. Simmons*, 53 U.S. 551, 560 (2005)).

²²¹ Ortiz, *supra* note 212.

²²² Thomas, *supra* note 171.

²²³ CONST. PR. art. II, § 15. (“The employment of children less than fourteen years of age in any occupation which is prejudicial to their health or morals or which places them in jeopardy of life or limb is prohibited. No child less than sixteen years of age shall be kept in custody in a jail or penitentiary.”).

crimes can be housed in rehab centers or educational program centers where they can be monitored and rehabilitated. Any person sixteen and older, after determining whether the person is incorrigible in a hearing before a juvenile court officer, should be transferred to adult court or kept under the juvenile jurisdiction for rehabilitation purposes.

The necessity to keep the community safe is as crucial as the need to rehabilitate the minors. The safety of the community should not be sacrificed the same way the need to rehabilitate the minors should not be sacrificed. Implementing a balanced approach which considers the victims, the community, and the minor is necessary. The juvenile justice is not built to punish minors but to rehabilitate them; however, the rehabilitation process and plan should include the safety of the community. That is said “on occasion it will be both in the best interest of the child and the best interest of public safety to transfer a juvenile into the adult criminal system.”²²⁴ But, that should always be the last resort.

It can be said that trying a case in juvenile court may be financially burdensome if the case will be tried again when it is transferred to adult court. The answer to that is, justice is priceless. Detaining a minor in juvenile court costs less than incarcerating a minor in jail with the adults. Furthermore, not only does housing minors in juvenile hall cost less than housing them in adult prisons, it costs way less to rehabilitate them than housing them in juvenile hall.²²⁵

Some States have already got rid of mandatory transfer laws. For instance, California, with the implementation of Prop 57, got rid of its mandatory transfer law.²²⁶ With the passage of Prop. 57, juvenile cases must go before a judicial officer who will decide whether the minor should be transferred to adult court. The minors are the most vulnerable in our society, so they should be led and guided. The process

²²⁴ Hamack, *supra* note 131, at 785.

²²⁵ The Act 4 Juvenile Justice affirms that:

Incarcerating young people in juvenile detention facilities costs between \$32,000 and \$65,000 per year and operating just one bed over a twenty-year period can cost between \$1.25 million and \$1.5 million. Alternatives to incarcerating youth not only reduce crime but save money. Research has shown that every dollar spent on evidence-based programs [e.g., Multidimensional Treatment Foster Care (MTFC), Multisystemic Therapy (MST), and Functional Family Therapy (FFT)] can yield up to \$13 in cost savings. Early interventions that prevent high-risk youth from engaging in repeat criminal offenses can save the public nearly \$5.7 million in costs over a lifetime.

Act 4 Juvenile Justice, *Youth In The Adult System*, ACT 4 JUVENILE JUSTICE, <https://www.act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Youth%20In%20Adult%20System%20Fact%20Sheet%20Aug%202014%20FINAL.pdf> (last visited April 6, 2018). See also National Conference of State Legislatures, *Cost-Benefit Analysis of Juvenile Justice Programs*, ncsf.org, <http://www.ncsl.org/documents/cj/jjguidebook-costbenefit.pdf> (last visited April 6, 2018) (discussing how different states have created rehabilitative programs that help them save money.).

will not be duplicated because the hearing before the juvenile officers will differ from the one in adult court. The former will be about the fitness of the minor to stand trial in adult court while the latter will be about the guilt, if the case is transferred.

VII. Conclusion

Mandatory transfers of juveniles to adult court violates the minors' right to rehabilitation because it fails to consider that the punishment should be "[g]raduated and proportioned to both the offender and the offense."²²⁷ Although "the United States Supreme Court has championed the creation of tangible differences between juveniles and adults in our legal system,"²²⁸ states continue to mandatorily transfer minors, disregarding the minors' "[l]ack of maturity and...underdeveloped sense of responsibility."²²⁹

Transferring a minor to adult court when it can be shown that the minor is fully mature and can appreciate the legal consequences of such action is constitutional. However, if it cannot be proven that the minor can appreciate the legal consequences, he should not be punished under the same standard as someone who fully understands and comprehends what he or she was doing. This does not mean a minor is "[n]ot absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult."²³⁰

Mandatory transfer of minors to adult court is unconstitutional because it violates the minor's Eighth amendment right of rehabilitation and due process rights. The states should hold a transfer hearing before a juvenile court judge who should decide on the appropriateness of transferring the minors to adult courts. In adult courts, the question is: are minors guilty or innocent? But, in juvenile court, the question would not be a matter of guilt or innocence but "how culpable are they, how do we punish them?"²³¹

There is a great need to incorporate science in the juvenile justice system. The implication of "science may also help us understand which juvenile offenders are

²²⁶ Prop. 57 was passed by the majority of California voters on November 8, 2016. It essentially requires that juvenile petitions be filed in all matters where a person under the age of eighteen and at least sixteen is alleged to have committed any felony, or a crime listed in 707(b) if the minor was fourteen or fifteen years of age at the time when the crime was committed. The District Attorney no longer has the discretion to directly file complaints in adult court and must file a motion to transfer the matter to adult court jurisdiction. Once a transfer motion has been filed, the juvenile court must make the determination which court should exercise jurisdiction over the minor's case.

²²⁷ *Miller v. Alabama*, 567 U.S. 460, 469 (2012).

²²⁸ Amanda Huston, *Jurisprudence vs. Judicial Practice: Diminishing Miller in the Struggle Over Juvenile Sentencing*, 92 DENV. U.L. REV. 561, 564 (2015).

²²⁹ *Graham v. Florida*, 560 U.S. 48, 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).

²³⁰ *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

²³¹ Requarth, *supra* note 210.

likely to commit future crimes and which may not.”²³² For instance, “neuroscience is improving our understanding of adolescents, and potentially, juvenile offenders.”²³³ With neuroscience, we can develop better preventive measures to guide the minors and create better plans to rehabilitate them.

The question becomes, how can and should common delinquency prevention and juvenile justice practices and laws change to incorporate a more sensible approach to addressing the needs of adolescents, while balancing them with community safety needs?²³⁴ The best approach is to make use of the individualized sentencing approach while integrating it into the balanced sentencing approach. The individualized sentencing approach, on one end, will allow the juvenile court to decide whether the minor is fit to stay in juvenile court or to go to adult court based on scientific research, the minor’s social background, family ties, educational background, mental health, physical development, along with the other factors. The balanced sentencing approach, on the other end, will consider the community safety, the victim, and the offender’s needs. At last, if the juvenile has not reached maturity to think and behave as an adult, the case should stay in juvenile court.

Mandatorily transferring minors to adult court on the basis that the juvenile justice system is too lenient is a misconception of the role of the juvenile justice system. The juvenile justice system punishes minors based on the minors’ capacities because “the offenses of juveniles, to begin with, are mitigated though not negated.”²³⁵ In mandatorily transferring the minors to adult courts, the court should ask “does the indulgence of the court in its sentencing outweigh the loss of protection inherent in the relative absence of due process?”²³⁶

Mandatorily transferring minors to the criminal justice system by bypassing the juvenile justice system violates their due process clause of the Fourteenth Amendment, violates their Eighth Amendment right to rehabilitation, and deviates from the purposes of the juvenile justice system; therefore, it is unconstitutional.

²³² Coalition for Juvenile Justice Emerging Concepts Brief, *supra* note 216, at 2.

²³³ *Juvenile Justice & the Adolescent Brain*, MASSACHUSETTS GENERAL HOSPITAL <http://clbb.mgh.harvard.edu/juvenilejustice/>, (last visited May 23, 2018).

²³⁴ Coalition for Juvenile Justice Emerging Concepts Brief, *supra* note 216.

²³⁵ MATZA, *supra* note 20, at 71.

²³⁶ *Id.*

