

10-18-2016

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### Repository Citation

Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 La. L. Rev. (2016)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol77/iss1/8>

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# The Right to Redemption: Juvenile Dispositions and Sentences

*Katherine Hunt Federle\**

## INTRODUCTION

The punishment of juveniles remains a troubling yet under-theorized aspect of the criminal and juvenile justice systems. These systems emphasize accountability, victim restoration, and retribution as reasons to punish underage offenders. In fact, American juvenile systems will remove the most egregious offenders to criminal courts for trial and sentencing. The United States Supreme Court in recent years, however, has issued a number of opinions emphasizing that the Eighth Amendment requires that the punishment of children must account for their lesser moral culpability, developmental immaturity, and potential for rehabilitation.<sup>1</sup> State courts also have begun to reconsider their own dispositional and sentencing schemes in light of the Supreme Court's jurisprudence.<sup>2</sup>

The reality of juveniles' immaturity militates in favor of a right to redemption. This Article begins by discussing the available data about the number and types of dispositions juveniles receive, waivers to criminal court, and the criminal sentences imposed. The analysis also considers the collateral consequences for minors who are adjudicated delinquent or who are criminally convicted. The discussion then turns to the effects of juvenile and criminal court involvement on children and the subsequent impact on life outcomes. The analysis considers theoretical, jurisprudential, and constitutional implications of juvenile sentencing with a special emphasis on the Supreme Court's recent decisions. This Article concludes with the proposal for the contours of a right to redemption and its implications for reform to the current system and suggests strategies for the individual defense lawyer.

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1. See *infra* notes 141–70 and accompanying text for a discussion of these cases.

2. See, e.g., *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) (rejecting mandatory minimum adult sentences imposed on juveniles); *Diatchenko v. Commonwealth*, 1 N.E.3d 270 (Mass. 2013) (abolishing life without parole for juveniles).

## I. THE PUNISHMENT OF JUVENILES

A. *Juvenile Court*

The empirical evidence suggests that young offenders—particularly those of color—remain at risk for harsh punishment. Despite significant declines in the number of cases and offenders handled by juvenile courts, disproportionality is evident at each decision-making point. Thus some youth of color are more likely to be court-involved and to receive the harshest dispositions than white youth. Moreover, more juveniles, especially minority youth, are being tried in criminal court as adults, thus bypassing the juvenile justice system entirely. As a consequence, more youth will experience criminal sanctions.

For example, the number of cases handled in juvenile courts has declined significantly in the past few decades. In 2013, juvenile courts handled 1,058,500 cases, 44% fewer than were handled in 1997 and 9% fewer than in 1985.<sup>3</sup> Nevertheless, the percentage of petitioned cases has increased. In 1985, 46% of delinquency cases were petitioned; by 1998, 57% of all delinquency cases were petitioned, before falling to 55% in 2013.<sup>4</sup> Furthermore, the likelihood of formal processing not only increased between 1985 and 2013 but also across all offense categories. The likelihood of formal case processing increased from 48% to 58% for public order cases, 43% to 53% for property offense cases, 43% to 49% for drug offense cases, and 53% to 57% for person offense cases.<sup>5</sup>

In 2013, 50% of all petitioned delinquency cases involved children under the age of 16. Of those children, 58% were white and 76% were male.<sup>6</sup> However, formal case processing was more likely for cases involving older youth; in 2013 the likelihood of formal case processing for teens 16 and older increased to 59%, up from 51% in 1985.<sup>7</sup> Moreover, although the likelihood of formal case processing increased across all racial groups, cases involving black youth were more likely to be formally processed than those involving white youth.<sup>8</sup> In 2013, 61% of all

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3. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., *JUVENILE COURT STATISTICS 2013*, at 6 (2015).

4. Julie Furdella & Charles Puzzanchera, *Delinquency Cases in Juvenile Court, 2013*, JUV. OFFENDERS AND VICTIMS NAT'L REP. SERIES FACT SHEET (Off. of Juv. Just. and Delinq. Prevention, Wash. D.C.) Oct. 2015, at 3.

5. HOCKENBERRY & PUZZANCHERA, *supra* note 3, at 36.

6. *Id.*

7. *Id.* at 37.

8. *Id.*

petitioned delinquency cases involved black youth compared to 52% for white youth.<sup>9</sup> Additionally, formal processing for blacks was substantially more likely than for whites across all offense categories.<sup>10</sup>

Of the 55% of cases processed formally, slightly more than half resulted in adjudication.<sup>11</sup> Stated differently, in 2013, 31% of all delinquency cases resulted in either adjudication of delinquency or waiver to criminal court, similar to the level reported in 1985.<sup>12</sup> Although the number of all adjudicated cases declined by 4% between 1985 and 2013, the number of adjudicated person offense cases and public order offense cases increased substantially, while the number of adjudicated property offense cases declined.<sup>13</sup> Youth under the age of 16 comprised 51% of all adjudicated delinquency cases, but 65% of all adjudicated forcible rape cases, 76% of other violent sex offenses, and 73% of all adjudicated arson cases.<sup>14</sup> Of adjudicated cases, 22% involved female offenders and 61% of adjudicated youth were white.<sup>15</sup>

Probation was the most frequently imposed disposition. In 2013, 64% of adjudicated youth received probation,<sup>16</sup> a 6% increase in the number of cases since 1985, although the actual number of youth on probation has declined.<sup>17</sup> Of adjudicated cases resulting in probation, 34% involved property offenses, 27% involved person offenses, 26% involved public order offenses, and 13% involved drug offenses.<sup>18</sup> Although the likelihood of being placed on probation has increased since 1985 for both older and younger children, children 15 and younger are more likely to be placed on probation than children 16 and older.<sup>19</sup> Of children 15 or younger, 67% received a disposition of probation in 2013, while 60% of children 16 and older received probation.<sup>20</sup> The likelihood of being placed on probation also increased for both males and females since 1985.<sup>21</sup>

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9. *Id.*

10. *Id.*

11. *Id.* at 42.

12. *Id.*

13. *Id.* at 43.

14. *Id.* at 42.

15. *Id.*

16. *Id.* at 50.

17. *Id.* at 49.

18. *Id.* at 50.

19. *Id.* at 51.

20. *Id.*

21. *Id.*

Although all racial groups saw an increase in the likelihood of being placed on probation,<sup>22</sup> important differences nevertheless exist across race. American-Indian youth, for example, saw a substantial increase in the likelihood of being placed on probation. In 1985, 40% of these youth received a disposition of probation compared to 61% in 2013.<sup>23</sup> For Asian youth, the likelihood of being placed on probation increased from 64% in 1985 to 74% in 2013, and for white youth the likelihood of receiving probation increased from 57% to 65%.<sup>24</sup> For black youth, however, the likelihood of being placed on probation increased only from 60% in 1985 to 61% in 2013.<sup>25</sup> Across specific offenses, white, black, and American-Indian youth were most likely to receive probation for drug offenses, while Asian youth were most likely to receive probation for public order offenses.<sup>26</sup> Asian youth, however, were far more likely to receive probation across all offense categories than any other racial group.<sup>27</sup>

Out-of-home placements were ordered in about one-fourth of all adjudicated cases in 2013, a decline from 1985 when out-of-home dispositions were ordered in 31% of the cases formally adjudicated.<sup>28</sup> Moreover, from 1985 to 2013, cases involving out-of-home placements decreased by 26% to its lowest level in 2013.<sup>29</sup> Nevertheless, the types of cases warranting placement outside the home have remained fairly consistent. In 2013, approximately one-third of all placements outside the

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* Juvenile courts ordered probation in 74% of the drug cases involving white youth, 69% of the cases involving black youth, and 72% of the cases involving American Indians. Juvenile courts ordered probation in 76% of the public order cases involving Asian youth compared to 57% for whites, 54% for blacks, and 60% for American Indians. *Id.*

27. *Id.* Juvenile courts placed Asian youth on probation in 75% of person offense cases, 71% of property offenses, and 76% of public order cases. No data is available for drug cases because of the small numbers of Asian youth adjudicated for these offenses. *Id.*

28. *Id.* at 47.

29. *Id.* at 46. Moreover, significant declines based on gender occurred. In 2013, 26% of adjudicated males and 19% of adjudicated females received a disposition of out-of-home placement compared to 32% and 27% respectively in 1985. Declines based on age also were evident. Of adjudicated juveniles 16 and older, 27% received a disposition of out-of-home placement in 2013 compared to 31% in 1985, while 21% of adjudicated juveniles 15 and younger were placed out of home in 2013 compared to 32% in 1985. *Id.* at 48.

home were for property offenses, although the proportion has declined since 1985, while 31% of placements outside the home involved public order offenses.<sup>30</sup> An additional 29% of out-of-home placements involved person offenses, while 8% involved drug cases.<sup>31</sup>

The likelihood of receiving an out-of-home placement declined across all racial groups between 1985 and 2013 with some groups experiencing significant decreases in the likelihood of out-of-home placement. In 2013, American-Indian juveniles were placed outside the home in 24% of the adjudicated cases compared to 41% of the cases in 1985.<sup>32</sup> Similarly, Asian youth received an out-of-home disposition in 18% of the adjudicated cases in 2013, but comprised 31% of such placements in 1985.<sup>33</sup> Declines were more modest but still significant for black and white youth. In 2013, black youth were placed out of the home in 27% of adjudicated cases compared to 34% of those cases in 1985, and white youth were placed outside the home in 23% of the adjudicated cases compared to 30% in 1985.<sup>34</sup>

Despite reductions in the use of out-of-home placements, notable race-based differences exist. Black children were more likely to be placed out of the home than any other racial group in 2013. Moreover, black youth were most likely to be placed out of the home in property, drug, and public order offense cases, while American-Indian youth were most likely to be placed outside the home in person offense cases. Black juveniles were involved in 27% of property, 21% of drug, and 27% of public order offense cases resulting in an out-of-home placement.<sup>35</sup> Of all adjudicated person offense cases resulting in an out-of-home placement, however, 31% involved American Indians compared to 29% involving blacks, 25% whites, and 20% Asians.<sup>36</sup>

The disproportionality evident at each decision-making point contributes to the overall disparity of the system. Although black youth comprised 16% of the youth population in the United States in 2013, they constituted 35% of all delinquency cases handled by the juvenile courts and were more than twice as likely to be referred to juvenile court as white

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30. *Id.* at 46.

31. *Id.* Public order offenses include escapes, weapons offenses, and probation and parole violations, which might explain the relatively high number of these cases resulting in out-of-home placements. *Id.*

32. *Id.* at 48.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

youth.<sup>37</sup> Furthermore, as cases involving black youth proceed through the juvenile system, the disproportionality becomes more pronounced and has more serious consequences. For example, the rate at which referred cases were formally processed was 20% greater for black youth than for white, and black youth comprised 42% of all person offense cases in juvenile courts.<sup>38</sup> Additionally, the rate at which black youth were ordered into residential placement after adjudication was 20% greater than for white youth, while white youth were more likely to receive a disposition of probation.<sup>39</sup> In sum, despite declining rates of juvenile offending, youth of color—and especially black youth—experience disproportionate court involvement and are more likely to receive harsher punishment.

### *B. Criminal Court*

A significant number of youth are denied even the limited benefit of juvenile court. In 2013, juvenile court judges sent 1%—approximately 4,000 cases—of all petitioned delinquency cases to criminal court for trial,<sup>40</sup> although the number of cases waived has declined by 31% since 1985.<sup>41</sup> Moreover, the type of case that juvenile court judges transfer also has changed substantially. Person offense cases comprised 33% of the waived caseload in 1985 but 50% of that caseload in 2013.<sup>42</sup> In contrast, property offense cases comprised 53% of waived cases in 1985 but declined to 31% of waived cases by 2013.<sup>43</sup> Drug offense cases, however, constituted 12% of the waived cases in 2013, compared to 5% in 1985, while public order offense cases comprised 6% of all judicially waived cases in 2013, down from 11% in 1985.<sup>44</sup>

Additionally, although the likelihood of waiver was lower across all racial groups in 2013 compared to 1985, black and American-Indian youth were nonetheless more likely to be waived to criminal court for trial than

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37. Furdella & Puzzanchera, *supra* note 4, at 2.

38. *Id.*

39. *Id.*

40. HOCKENBERRY & PUZZANCHERA, *supra* note 3, at 36.

41. *Id.* at 38. Despite the decline in the number of waived cases, some of the demographic characteristics of the waived juvenile remain remarkably similar. Although the percentage of cases involving juveniles over the age of 16 has declined since 1985, older juveniles still were more likely to be transferred to criminal court for trial across all offense categories than younger youth in 2013. *Id.* at 40.

42. *Id.* at 39.

43. *Id.*

44. *Id.*

white youth. For example, in 1985, black youth were more likely to be waived across all offense categories than white youth<sup>45</sup> and in 2004, were more likely to be transferred to criminal court for trial in person and drug cases than were white.<sup>46</sup> Compared to white youth, black youth were as likely to be waived for property and public order offenses but slightly more likely to be waived for cases involving person and drug crimes in 2013.<sup>47</sup> Nevertheless, the rate at which cases involving black youth were transferred was 30% greater than for cases involving white youth.<sup>48</sup> Similarly, cases involving American-Indian youth were more likely to be waived than cases involving white and black youth for public order offenses in 1985,<sup>49</sup> person offenses in 2004,<sup>50</sup> and property and drug offense cases in 2013.<sup>51</sup>

A closer examination of the data, however, reveals an even more dramatic increase and subsequent decline in the use of judicial waiver between 1985 and 2013. At its peak in 1994, the number of cases waived to criminal court was 124% greater than the number waived in 1985.<sup>52</sup> The increases were even more significant when examining the use of judicial waiver by offense type. For example, the number of person cases waived in 1994 was 191% greater than in 1985, while the number of drug offense cases increased by 452% between 1985 and 1995.<sup>53</sup> The use of judicial

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45. *Id.* at 40. In 1985, 2.1% of person offense, 1.1% of property offense, 1.5% of drug offense, and 0.9% of public order offense cases involving black youth were waived to criminal court. In contrast, 1.8% of person offense, 1.0% of property offense, 0.7% of drug offense, and 0.5% of public order offense cases involving white youth were transferred to criminal court. *Id.*

46. *Id.* In 2004, 1.2% of person offense cases involving black youth were waived compared to 1.0% of those cases involving white youth. Similarly, 1.1% of drug offense cases involving black youth were transferred but only 0.9% of drug offense cases involving white youth were waived. *Id.*

47. *Id.* In 2013, 1.4% of person offense cases involving black youth and 1.1% of person offense cases involving white youth were waived, and 0.8% of drug offense cases involving black youth and 0.6% involving white youth were waived. *Id.*

48. Furdella & Puzanchera, *supra* note 4, at 2.

49. HOCKENBERRY & PUZZANCHERA, *supra* note 3, at 40. In 1985, 2.1% of person offense, 1.0% of property offense, and 1.0% of public order offense cases involving American-Indian youth were waived to criminal court. *Id.*

50. *Id.* In 2004, 1.6% of person offense cases involving American Indians were waived compared to 1.2% for black and 1.0% for white youth. *Id.*

51. *Id.* Of property offense cases involving American-Indian youth, 1.1% were transferred to criminal court compared to 0.6% of those cases involving white and black children. Of the drug offense cases, 1.2% involving American Indians, 0.8% involving blacks, and 0.6% involving whites were waived. *Id.*

52. *Id.* at 38.

53. *Id.*

waiver then declined by 50% between 1994 and 2001, remained relatively stable until 2007, and declined by an additional 41% by 2013.<sup>54</sup>

This substantial decline in the use of judicial waiver might be attributable to changes in state legislation.<sup>55</sup> In response to the increase in juvenile crime, many jurisdictions enacted legislation that enabled states to try children in criminal courts without requiring juvenile court judges to make the transfer decision.<sup>56</sup> By redefining the parameters of juvenile court jurisdiction, states excluded certain juveniles from juvenile court based on their ages, prior offense histories, or the offenses alleged.<sup>57</sup> Other waiver mechanisms gave prosecutors the discretion to file in criminal court<sup>58</sup> or required juvenile courts to waive if certain criteria were met.<sup>59</sup> Consequently, although the use of judicial waiver declined, other transfer mechanisms may have supplanted the use of judicial waiver.

Unfortunately, no national data set exists as to the number of juveniles transferred to criminal court to stand trial through other waiver mechanisms.<sup>60</sup> Nevertheless, by some estimates as many as 250,000 children enter the criminal justice system each year.<sup>61</sup> Some data indicate that non-judicial waiver mechanisms send more children to criminal court than juvenile court judges' transfers. For example, between 2011 and 2014, the juvenile court in New Orleans waived only one case to criminal court for trial through a

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54. *Id.*

55. *Id.*

56. Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS AND VICTIMS NAT'L RPT. SERIES BULL. (Office of Juv. Just. and Delinq. Prevention, Wash. D.C.), Sept. 2011, at 9.

57. *Id.* at 2.

58. *Id.*

59. *Id.* at 4. Many jurisdictions have multiple transfer mechanisms. *Id.* at 4–5.

60. *Id.* at 1. In 2010, the Bureau of Justice Statistics of the United States Department of Justice solicited proposals for a survey of juveniles charged in adult courts. The grant was awarded to Westat, which hired the National Center for Juvenile Justice as a subcontractor. Although the data was supposed to be available in 2012, the Bureau of Justice Statistics expanded its survey of the data to include criminal court case processing. The data on juvenile transfer was expected in 2015. John Kelly, *Fed Study on Juveniles in Adult Court Delayed Until at Least 2015*, CHRON. OF SOC. CHANGE (July 29, 2013), <https://chronicleofsocialchange.org/featured/fed-study-on-juveniles-in-adult-court-delayed-until-at-least-2015/3639> [<https://perma.cc/9KEJ-NZLQ>]. However, no data has yet been released.

61. JASON ZIEDENBERG, NAT'L INST. OF CORR., *YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS* 3 (2011).

discretionary judicial waiver mechanism.<sup>62</sup> In comparison, the district attorney prosecuted 127 youth between the ages of 15 and 16—83% of the eligible minors—in criminal court through the use of prosecutorial discretion.<sup>63</sup>

State-level data indicates a similar trend. In Michigan, the juvenile court has no jurisdiction over 17-year-olds, who therefore are prosecuted as adults.<sup>64</sup> Of the over 20,000 youth convicted as adults between 2003 and 2013, 95% of those children were 17 years old at the time of the offense and therefore automatically excluded from the juvenile court.<sup>65</sup> In Florida, over 12,000 youth were tried as adults between 2009 and 2013.<sup>66</sup> However, over 97% of these children were tried in criminal court because of a state law permitting prosecutors to file charges directly without any hearing or procedure in juvenile court.<sup>67</sup>

Non-judicial waiver mechanisms accounted for over 90% of all juvenile transfers to criminal court for trial in Arizona between 2011 and

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62. S. POVERTY L. CTR., MORE HARM THAN GOOD: HOW CHILDREN ARE UNJUSTLY TRIED AS ADULTS IN NEW ORLEANS 11 (2016). Under state law, 17-year-olds are excluded from juvenile court jurisdiction. LA. CONST. ANN. art. V, § 19 (2011). Youth 15 and 16 years old charged with certain designated offenses will be tried in criminal court automatically if either a juvenile court judge or a grand jury finds probable cause for the minor's arrest. LA. CHILD. CODE ANN. art. 305(A) (2016). Moreover, the district attorney has the discretion to file in criminal court for other offenses that 15- and 16-year-olds allegedly committed upon a juvenile court judge's finding of probable cause or after obtaining a grand jury indictment. *Id.* art. 305(B).

63. S. POVERTY L. CTR., *supra* note 62, at 11. The district attorney filed charges in criminal court against 127 of the 154 youth eligible to be tried in criminal court. Moreover, the use of prosecutorial waiver in Orleans Parish far exceeds its use in other parishes. For example, Caddo Parish tried 39% of its eligible cases in criminal court, and Jefferson Parish tried 22%, while the rate of transfer in East Baton Rouge Parish was five times less than in Orleans. *Id.*

64. MICH. COMP. LAWS ANN. § 712A.2a (West 2016). A bill to raise the maximum age of juvenile court jurisdiction to 18 is pending in the state legislature. H.B. 4947, 98th Leg., Reg. Sess. (Mich. 2015).

65. MICHELLE WEEMHOFF & KRISTEN STALEY, MICH. COUNCIL ON CRIME & DELINQ., YOUTH BEHIND BARS 10 (2014).

66. HUMAN RIGHTS WATCH, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE 24 (2014). Approximately 0.6% of these children were transferred by a juvenile court judge after a hearing in juvenile court. *Id.* at 24 n.69.

67. *Id.* at 24.

2015.<sup>68</sup> Far more cases are filed directly in criminal court by prosecutors than are transferred by juvenile court judges.<sup>69</sup> The vast majority of these cases, however, are transferred under state statutes that require prosecutors to file charges directly in criminal court when the minor is a certain age and is charged with a specified violent offense, is a chronic offender, or has a designated felony conviction.<sup>70</sup> Thus, in 2015, almost 60% of the cases were automatically filed in criminal court.<sup>71</sup>

Similarly, more children in California are tried as adults through a direct-file mechanism than are waived to criminal court for trial. Between 2003 and 2014, juvenile courts transferred 3,193 children to criminal court, but prosecutors charged 7,162 youth directly in criminal court during the same time period.<sup>72</sup> In 2008, the number of all California cases

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68. JUV. JUST. SERVS. DIV., ARIZ. SUP. CT., ARIZONA'S JUVENILE COURT COUNTS: STATEWIDE STATISTICAL INFORMATION FY 2015, at 52 (2016).

69. In 2011, prosecutors exercised their discretion to file in criminal court in 42.03% of the transferred cases, while judicial waiver accounted for only 6.59% of these cases. JUV. JUST. SERVS. DIV., ARIZ. SUP. CT., ARIZONA'S JUVENILE COURT COUNTS: STATEWIDE STATISTICAL INFORMATION FY 2011, at 46 (2012). In 2012 and 2013, prosecutorial discretion was used in 37.91% of the cases and judicial waiver resulted in 6.5% of the cases waived to criminal court. JUV. JUST. SERVS. DIV., ARIZ. SUP. CT., ARIZONA'S JUVENILE COURT COUNTS: STATEWIDE STATISTICAL INFORMATION FY 2012, at 46 (2013); JUV. JUST. SERVS. DIV., ARIZ. SUP. CT., ARIZONA'S JUVENILE COURT COUNTS: STATEWIDE STATISTICAL INFORMATION FY 2013, at 46 (2014). In 2014, judicial waiver constituted 5.47% of all transferred cases, and prosecutorial discretion accounted for 27.73%. JUV. JUST. SERVS. DIV., ARIZ. SUP. CT., ARIZONA'S JUVENILE COURT COUNTS: STATEWIDE STATISTICAL INFORMATION FY 2014, at 46 (2015). Judicial waiver accounted for 5.36% of the transferred cases and prosecutorial discretion composed 35.27% of these cases in 2015. JUV. JUST. SERVS. DIV., FY 2015, *supra* note 68, at 46. In all years, the majority of cases are transferred pursuant to mandatory statutory waiver provisions requiring trial in juvenile court based on the age, offense, and/or prior record of the juvenile.

70. See ARIZ. REV. STAT. ANN. § 13-501(A) (2016) (criminal prosecution shall be brought against a 15-, 16-, or 17-year-old juvenile alleged to have committed a specified felony offense or who is a chronic felony offender in the same manner as an adult); *Id.* § 13-501(C) (criminal prosecution shall be brought against a juvenile in the same manner as an adult who has allegedly committed a criminal offense and who has an historical prior felony conviction).

71. JUV. JUST. SERVS. DIV., FY 2015, *supra* note 68, at 46.

72. In 2003, juvenile courts waived 404 juveniles, while prosecutors filed charges in 410 cases directly in criminal court. 2003 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. 6-7. Juvenile courts transferred 252 juveniles in 2004 and prosecutors directly filed charges in 283 cases. 2004 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. 6-7. In 2005, 318 youth were judicially transferred and 343 were

tried in criminal court peaked at 866 directly filed and 332 judicially waived cases<sup>73</sup> before declining in 2014 to 474 directly filed and 122 judicially waived cases.<sup>74</sup> Nevertheless, the proportion of cases directly filed in criminal court increased between 2009 and 2013 before declining in 2014. Thus, in 2009 more than twice as many cases were filed directly in criminal court than were judicially waived.<sup>75</sup> By 2013, more than five times as many cases involving juvenile defendants were filed by prosecutors in criminal court than were transferred by juvenile court judges.<sup>76</sup> Although the proportion of directly filed to judicially waived cases decreased in 2014, criminal courts heard almost four times as many directly filed cases than judicially waived cases that year.<sup>77</sup>

From this data, disproportionality clearly remains a hallmark of non-judicial waiver. Although black youth comprise only 18% of the youth

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charged directly in criminal court. 2005 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. 6–7. Juvenile courts waived 263 juveniles in 2006 and prosecutors filed charges against 654 youth directly in criminal court. 2006 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. 6, 40. In 2007, juvenile court judges transferred 401 youth to criminal court and 724 were charged in criminal court. 2007 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. 6, 40. In 2008, 332 youth were waived, but 866 were charged directly in criminal court. 2008 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv, 38. In 2009, prosecutors charged 769 youth directly in criminal court and judges transferred an additional 346 youth. 2009 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv, 38. Juvenile courts waived 260 children in 2010 and prosecutors charged 716 youth in criminal court. 2010 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv–v. In 2011, 227 juveniles were waived, but prosecutors charged 686 as adults in criminal court. 2011 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv, 40. Juvenile courts transferred 146 youth in 2012, but prosecutors filed charges against 604 youth directly in criminal court. 2012 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv–v. In 2013, 122 juveniles were waived but 633 were charged directly in criminal court. 2013 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv–v. Juvenile courts transferred 122 youth in 2014 and prosecutors filed charges against 474 teens in criminal court. 2014 CAL. DEP'T OF JUST. JUV. JUST. IN CAL. iv, 40.

73. 2008 CAL. DEP'T OF JUST., *supra* note 72.

74. 2014 CAL. DEP'T OF JUST., *supra* note 72.

75. In 2009, prosecutors charged 769 youth directly in criminal court, and judges transferred an additional 346 youth. 2009 CAL. DEP'T OF JUST., *supra* note 72. The rate of direct filing was more than twice that of judicial waiver.

76. In 2013, 122 juveniles were waived, but 633 were charged directly in criminal court. 2013 CAL. DEP'T OF JUST., *supra* note 72. The direct filing rate was more than five times that of waiver.

77. Juvenile courts transferred 122 youth in 2014, while prosecutors filed charges against 474 teens in criminal court. 2014 CAL. DEP'T OF JUST., *supra* note 72.

population in Michigan, they account for 59% of all youth tried as adults.<sup>78</sup> Moreover, 53% of all 17-year-olds under the jurisdiction of the Michigan Department of Corrections are youth of color.<sup>79</sup> In Florida, although black children constitute only 27.2% of all arrested youth, they comprise 51.4% of all cases transferred to criminal court, and white youth account for 28% of all arrests but only 24.4% of transfers.<sup>80</sup> Black teens also are more likely than whites to be transferred for felony drug or other violent offenses, although both groups have similar waiver rates for murder and property offenses.<sup>81</sup>

In Arizona and California, black and Hispanic youth are disproportionately represented among all youth tried in criminal courts as adults through non-judicial transfer mechanisms. Between 2011 and 2015, Hispanic youth comprised on average 60% of the youth tried because of direct filings in criminal courts,<sup>82</sup> although Hispanic youth between 14 and 17 constituted about 42% of the youth population.<sup>83</sup> Black youth comprised only 5% of the 14- to 17-year-old population in the state<sup>84</sup> but accounted for between 14% and

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78. WEEMHOFF & STALEY, *supra* note 65, at 11.

79. *Id.* at 10.

80. HUMAN RIGHTS WATCH, *supra* note 66, at 29.

81. *Id.* at 30–31.

82. In 2011, Hispanic youth composed 62.06% of all direct filings. JUV. JUST. SERVS. DIV., FY 2011, *supra* note 69, at 48. In 2012, Hispanic teens constituted 61% of direct filings, JUV. JUST. SERVS. DIV., FY 2012, *supra* note 69, at pg. 48, and in 2013, composed 56.42% of direct filings. JUV. JUST. SERVS. DIV., FY 2013, *supra* note 69, at 48. Hispanic youth accounted for 58.15% of these cases in 2014, JUV. JUST. SERVS. DIV., FY 2014, *supra* note 69, at 49, and 59.91% in 2015. JUV. JUST. SERVS. DIV., FY 2015, *supra* note 68, at 49. In contrast, white teens, who compose a greater proportion of the population than any other racial group, constituted a far smaller percentage of the direct filings. In 2011, cases involving white youth constituted 20% of the direct filings. JUV. JUST. SERVS. DIV., FY 2011, *supra* note 69, at 48. In 2012, 17.37% of the direct filings involved white youth. JUV. JUST. SERVS. DIV., FY 2012, *supra* note 69, at 48. In 2013, 19.84% of the filings involved whites. JUV. JUST. SERVS. DIV., FY 2013, *supra* note 69, at 48. In 2014, 22.47% of these cases involved white youth. JUV. JUST. SERVS. DIV., FY 2014, *supra* note 69, at 49. By 2015, the percentage of direct filings against white youth had declined to 14.62%. JUV. JUST. SERVS. DIV., FY 2015, *supra* note 68, at 49.

83. The population estimate was generated at Nat'l Ctr. For Juv. Just., *Easy Access to Juvenile Populations: 1990-2014*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, [http://www.ojjdp.gov/ojstatbb/ezapop/asp/profile\\_selection.asp](http://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_selection.asp) [<https://perma.cc/PAW9-R5BA>] (last updated Sept. 1, 2015).

84. *Id.*

21% of teens charged in criminal court.<sup>85</sup> In California, black teens made up about 7% of the 14- to 17-year-old population<sup>86</sup> but comprised 27% of the cases filed directly in criminal court in 2014.<sup>87</sup> Prosecutors filed approximately 58% of the cases against Hispanic youth,<sup>88</sup> who constituted about 50% of the relevant population.<sup>89</sup> White youth, in contrast, were charged in only 10% of the cases in 2014,<sup>90</sup> although they comprised about 30% of 14- to 17-year-olds.<sup>91</sup> Thus, although fewer juveniles are sent to criminal court by juvenile court judges, far more youth are tried as adults in criminal court as a result of non-judicial waiver mechanisms, and those juveniles are disproportionately youth of color.

### C. Consequences of Justice System Involvement

Although trying juveniles as adults may serve the retributive purposes of the criminal justice system, little evidence of a deterrent effect exists. Several methodologically sound studies have found that youth tried in criminal court have higher recidivism rates than those who were tried in juvenile court.<sup>92</sup> Moreover, incarceration in an adult facility seemingly does not consider the criminogenic effect of adult court processing, as youth who received even probationary sentences were more likely to reoffend compared to those tried in the juvenile justice system.<sup>93</sup>

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85. In 2011, black youth composed 14.12% of all direct filings. JUV. JUST. SERVS. DIV., FY 2011, *supra* note 69, at 48. In 2012, black teens constituted 16.99% of direct filings, JUV. JUST. SERVS. DIV., FY 2012, *supra* note 69, at 48, and in 2013, 20.62% of direct filings. JUV. JUST. SERVS. DIV., FY 2013, *supra* note 69, at 48. Blacks accounted for 14.54% of these cases in 2014, JUV. JUST. SERVS. DIV., FY 2014, *supra* note 69, at 49, and 20.28% in 2015. JUV. JUST. SERVS. DIV., FY 2015, *supra* note 68, at 49.

86. *See supra* note 83.

87. 2014 CAL. DEP'T OF JUST., *supra* note 72, at 27.

88. *Id.*

89. *See supra* note 83.

90. 2014 CAL. DEP'T OF JUST., *supra* note 72, at 27.

91. *See supra* note 83.

92. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Off. of Juv. Just. and Delinq. Prevention, Wash. D.C.) June 2010, at 6. Redding reviewed several large-scale studies funded by the Office of Juvenile Justice and Delinquency Prevention that examined the effect of waiver on recidivism among juvenile offenders. *Id.*

93. *Id.* For seven years researchers followed 2,382 youths, ages 15 and 16, from a large metropolitan area that covered several counties in New York and New Jersey. The researchers found that recidivism rates were unrelated to incarceration in adult institutions as compared to juvenile facilities. *Id.*

Additionally, although studies found a reduction in recidivism among transferred drug offenders, the effect on the recidivism rates of nonviolent property offenders was mixed.<sup>94</sup> Recidivism rates among violent and presumably the most serious juvenile offenders tried in criminal court, however, were higher than for youth who remained in the juvenile justice system.<sup>95</sup>

Paradoxically, rather than serving as a deterrent, transfer may increase crime and criminality.<sup>96</sup> Researchers have hypothesized that the labeling of a juvenile offender as a felon has stigmatizing consequences. For example, being labeled as a felon might significantly affect the youth's ability to obtain employment or be reintegrated into his community.<sup>97</sup> Other studies suggest that juveniles may resent the imposition of a sentence they perceive as unjust, impacting their self-worth, and thus they may defiantly reoffend.<sup>98</sup> In adult facilities, juveniles also learn criminal behavior from adult inmates to protect themselves from further victimization and consequently accept violence as a part of their daily routines.<sup>99</sup> Finally, the absence of developmentally appropriate rehabilitative services for juvenile offenders in adult facilities combined with the loss of family support increases the risk of repeat offending.<sup>100</sup>

Transfer laws also may fail to generally deter juveniles from committing crimes in the first place. Although evidence for a general deterrent effect

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94. *Id.* Two studies in the 1990s found that transfer had no effect on or that it reduced recidivism. Later studies in the same jurisdiction as the earlier studies, however, found that transfer did increase recidivism. *Id.*

95. *Id.* Six large-scale studies of youth in five different states with different types of transfer laws found that waiver increases recidivism among youth tried in criminal court. *Id.*

96. *Id.* at 4.

97. *Id.* at 7.

98. *Id.* "Many experience the court process . . . as a condemnation of them. . . . Far from viewing the criminal court . . . as legitimate, the juvenile offenders . . . saw . . . [it] as duplicitous and manipulative, malevolent in intent, and indifferent to their needs." *Id.* (quoting Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 227 (Jeffrey Fagan ed., 2000)).

99. *Id.* at 7–8. "[I]ncarceration in adult facilities may have brutalizing effects on juveniles, which may partly account for their increased recidivism. (The term 'brutalization effect' describes the finding that homicide rates in a State often increase after an execution . . . perhaps because executions model and communicate that violence is an acceptable . . . alternative.)" *Id.* at 8.

100. *Id.* at 7.

is not overwhelming,<sup>101</sup> general deterrence is clearly most successful when potential offenders believe that the chances of being apprehended are high and that they will receive a substantial sentence. But the deterrent effect is evident only when offenders actually consider the penalty before engaging in criminal conduct.<sup>102</sup> In one study, researchers found that despite an attempt to raise public awareness of transfer laws, few juveniles knew about the possibility of being tried as adults.<sup>103</sup> Those who did know did not anticipate that the law would be enforced against them or that they would receive a serious punishment.<sup>104</sup> The failure to appreciate the risk is consistent with the immaturity associated with adolescence. Risk-taking and the focus on short-term gains are consistent with a developing brain and thus make general deterrence less likely to be effective.<sup>105</sup>

Other negative effects of transfer to the criminal system exist. One obvious consequence is the imposition of harsher penalties and the acquisition of a criminal record with its associated collateral consequences.<sup>106</sup> Juveniles incarcerated in adult facilities also experience higher rates of physical and sexual abuse and victimization from other inmates as well as staff, perhaps because of their relative size or inexperience.<sup>107</sup> Furthermore, youth incarcerated in adult correctional facilities have higher rates of mental health symptoms, including depression, psychological distress and trauma, anxiety, and post-traumatic stress disorder.<sup>108</sup> Incarceration in adult facilities thus

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101. It is difficult to conclude if transfer laws have a generally deterrent effect because it is hard to estimate the amount of crime that might have occurred. Moreover, whether general deterrence might be attributable to waiver provisions is unclear. Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL. (Off. of Juv. Just. & Delinq. Prevention, Wash. D.C.) Dec. 2012, at 6.

102. Redding, *supra* note 92, at 4.

103. Richard E. Redding & Elizabeth J. Fuller, *What Do Juvenile Offenders Know About Being Tried as Adults? Implications for Deterrence*, 55 JUV. & FAM. CT. J. 35, 49 (Summer 2004).

104. *Id.*

105. Redding, *supra* note 92, at 4.

106. Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCHOL. REV. 448, 454 (2013). By some estimates, as many as 38,000 collateral consequences of a criminal conviction on the state and federal levels might exist. Christopher Gowen, Lisa Thurau, & Meghan Wood, *The ABA's Approach to Juvenile Justice Reform: Education, Eviction, and Employment: The Collateral Consequences of Juvenile Adjudication*, 3 DUKE F. FOR L. & SOC. CHANGE 187, 188 (2011).

107. Lambie & Randell, *supra* note 106, at 452.

108. *Id.* at 453.

may cause many of these problems or even exacerbate their symptoms for youth with preexisting mental conditions.<sup>109</sup>

Incarcerating juveniles in adult facilities may limit juveniles' future life prospects. Although strong evidence suggests that most juveniles will grow out of their criminal behavior, prison sentences may delay or impede that natural process.<sup>110</sup> While institutionalized, juveniles certainly engage with antisocial peers, and those interactions may reinforce criminal behavior.<sup>111</sup> The emphasis on punishment rather than rehabilitation in adult correctional facilities may preclude the provision of appropriate educational programs for juvenile offenders, including special education services.<sup>112</sup> The nutritional needs of juveniles often are unmet, and obesity resulting from their sedentary lifestyles is concerning.<sup>113</sup> Moreover, substance abuse and sexual activity that occur in prison could have long-term health effects for juveniles once they are released.<sup>114</sup> Finally, sufficient aftercare programming might not exist for juveniles after they are released from adult facilities, which cripples their ability to reintegrate into their communities.<sup>115</sup>

Nevertheless, although it is clear that juvenile facilities are preferable to adult prisons for youth, institutionalization has negative effects on youth. Although most juveniles age out of criminal offending as they become psychosocially mature,<sup>116</sup> institutionalization might delay

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109. *Id.*

110. *Id.* at 451. Several studies have found that although many juveniles engage in serious delinquent behavior, almost all naturally stop offending as they mature. For example, one study found that only a small percentage of juvenile offenders continued with their serious offending, and even those offenders reported a decrease in offenses as they aged. Edward P. Mulvey, *Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offending*, JUV. JUST. FACT SHEET (Off. of Juv. Just. and Delinq. Prevention, Wash. D.C.) Mar. 2011, at 3.

111. Lambie & Randell, *supra* note 106, at 451. *See also* Committee on Adolescence, American Academy of Pediatrics, *Health Care for Youth in the Juvenile Justice System*, 128 PEDIATRICS 1219, 1229 (2011) (“Juveniles in adult prisons report learning more about criminal behavior from adult inmates . . .”).

112. Lambie & Randell, *supra* note 106, at 454.

113. *Id.*

114. *Id.* Researchers hypothesize that increased risk-taking may lead adolescents to engage in unsafe sexual practices, substance abuse, and violence. *Id.*

115. *Id.* at 454–55.

116. Laurence Steinberg, Elizabeth Cauffman & Kathryn C. Monahan, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders* JUV. JUST. BULL. (Off. of Juv. Just. and Delinq. Prevention, Wash. D.C.) Mar. 2015, at 9. The researchers studied 1,300 juvenile offenders for

maturation by impeding the development of a pro-social lifestyle.<sup>117</sup> Certainly, as in adult facilities, juveniles are exposed to more antisocial peers,<sup>118</sup> may have less contact with family and community,<sup>119</sup> and may exhibit more aggressive behavior.<sup>120</sup> Further, other juveniles and staff physically and sexually victimize juveniles,<sup>121</sup> which may increase the risk of suicide or suicidal ideation.<sup>122</sup> Incarceration also disrupts educational achievement because juvenile facilities tend to provide an inferior educational experience for youth,<sup>123</sup> and their physical health may suffer because of risks associated with violence, substance abuse, sexual activity, or the more sedentary lifestyle experienced while institutionalized.<sup>124</sup>

Conditions of confinement in juvenile facilities also may contribute to the pain juveniles experience while incarcerated. Most juvenile offenders are held in public facilities<sup>125</sup> that overwhelmingly have one or more confinement features, such as fences or walls with razor wire, internal security doors, or secure day rooms for youth.<sup>126</sup> Staff often use mechanical restraints such as handcuffs, restraining chairs, strait jackets, leg cuffs, or leather straps.<sup>127</sup> They may rely on some type of isolation, often locking youth in their rooms for four or more hours, particularly in training schools, reception centers, and detention centers.<sup>128</sup> Despite a decline in both the

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seven years after conviction. Involvement in delinquent and criminal behavior increased through adolescence, peaking at about age 16 or 17. Although a small number continued to offend, the vast majority stopped engaging in criminal behavior as they became more psychosocially mature. *Id.* at 2.

117. Lambie & Randell, *supra* note 106, at 454–55.

118. *Id.* at 451.

119. *Id.* at 454.

120. *Id.* at 452.

121. *Id.* at 452–53.

122. *Id.* at 453–54.

123. *Id.* at 454.

124. *Id.*

125. Sarah Hockenberry, Melissa Sickmund & Anthony Sladky, *Juvenile Residential Facility Census, 2012: Selected Findings*, JUV. OFFENDERS AND VICTIMS NAT'L RPT. SERIES BULL. (Off. of Juv. Just. and Delinq. Prevention, Laurel, MD.), Mar. 2015, at 3.

126. *Id.* at 4.

127. *Id.* at 12. Mechanical restraints are used by 58% of training schools, 46% of reception centers, and 40% of detention centers. *Id.*

128. *Id.* Youth are locked in their rooms for four or more hours at 47% of training schools, 44% of detention centers, and 32% of reception centers. *Id.*

number of juvenile facilities and the number of offenders,<sup>129</sup> overcrowding remains a problem at one in five juvenile facilities.<sup>130</sup> Moreover, suicide was the most common cause of death among youth held in juvenile facilities<sup>131</sup> with most occurring weeks after admission.<sup>132</sup>

The collateral consequences of juvenile adjudications are extensive and could affect juveniles well into their adult lives. Juveniles might be suspended or expelled from school, thereby affecting their future educational and employment opportunities.<sup>133</sup> Their juvenile records could be made available to prospective employers who might be unwilling to hire youths with juvenile records.<sup>134</sup> Juveniles might be required to reveal their prior juvenile court involvement on college and graduate school applications or when applying for a professional license, which could result in the application's denial.<sup>135</sup> Sex offender registration laws might require juveniles to register well into adulthood and might trigger community-notification requirements that might affect juveniles' ability to remain in the neighborhood.<sup>136</sup> Both sex offender registration laws and drug-related convictions could result in an eviction from public housing of juveniles and their entire families, even if other family members were not at fault.<sup>137</sup> Although juveniles might not be deported based on delinquency adjudications, they can be deported

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129. *Id.* at 8. Between 2000 and 2012, the number of juvenile facilities declined 35% and the number of offenders declined 47%. *Id.*

130. *Id.* at 10. Facilities holding between 1 and 10 residents reported the highest rate of overcrowding at 24%, followed by facilities with 21 to 50 residents at 23%. *Id.*

131. *Id.* at 13. In the one-year reporting period between October 1, 2011 and September 30, 2012, 14 youth died in juvenile facilities. Five deaths were due to suicide, four were attributable to illness or natural causes, three were accidents, and two were due to homicide. The death rate was higher for private facilities. Most deaths occurred at detention facilities. *Id.*

132. *Id.* at 14. One suicide, however, did occur on the youth's first day of admission. *Id.*

133. Gowen et al., *supra* note 106, at 193–94.

134. RIYA SAHA SHAH & JEAN STOUT, JUV. LAW CTR., FUTURE INTERRUPTED: THE COLLATERAL DAMAGE CAUSED BY PROLIFERATION OF JUVENILE RECORDS 11 (Feb. 2016). One study found that black youth were more likely to be denied employment than white youth. *Id.* at 6.

135. *Id.* at 10; Gowen et al., *supra* note 106, at 194–96.

136. *See, e.g.*, KATHERINE HUNT FEDERLE, CHILDREN AND THE LAW: AN INTERDISCIPLINARY APPROACH WITH CASES, MATERIALS, AND COMMENTS 357 (2013).

137. Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L. & SOC. CHANGE 109, 112 (2011).

based on their bad acts.<sup>138</sup> Moreover, if the conviction relates to drug trafficking, the offender's age is irrelevant.<sup>139</sup> A juvenile might be unable to enlist in the military, could lose driving privileges,<sup>140</sup> or even be barred from obtaining federal financial aid for college.<sup>141</sup>

In summary, juvenile court involvement exposes children to consequences that could last a lifetime. Although evidence suggests that most youth grow out of juvenile offending, prolonged exposure to juvenile justice system mechanisms might delay or impede their maturation. In fact, juvenile court involvement could have iatrogenic effects.<sup>142</sup> Additionally, transferring juveniles to the adult system for prosecution and punishment has even more serious and long-lasting effects. The paradox is that justice system involvement may actually result in both more offenses and graver offenses.

## II. THE RIGHT TO REDEMPTION

### A. Supreme Court Jurisprudence

In a series of cases, the United States Supreme Court has held that children are constitutionally different from adults and that these differences require the singular treatment of children at sentencing.<sup>143</sup> First, because of their immaturity and impulsiveness, children are more likely to engage in behaviors and make decisions that are ill-considered.<sup>144</sup> Second, they are more likely to succumb to negative influences and peer pressure, and because they have less control over their environment, they cannot easily extricate themselves from these situations.<sup>145</sup> Finally, because children are

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138. Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 90 (2011).

139. *Id.* at 91.

140. SHAH & STOUT, *supra* note 134, at 9.

141. *Id.* at 11. Pell Grant funding will be denied to anyone incarcerated in any federal or state penal institution. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. (1994).

142. Lambie & Randell, *supra* note 106, at 452. Peer contagion could explain this effect; that is, youths' confinement with other, more antisocial youth might result in their further criminalization. *Id.*

143. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

144. *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569.

145. *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569.

less developed and their personality traits more mutable, they are less likely to be “irretrievably deprived.”<sup>146</sup>

Given these differences, the Court found that the justifications for punishment apply with less force to children. Children are not as morally culpable because of their immaturity and diminished sense of responsibility; thus retributivist justifications for punishment are not as great as for adults.<sup>147</sup> Moreover, the impetuosity of youth renders deterrence an unlikely and possibly unattainable goal because it is premised on the notion that the individual can and will engage in a cost-benefit analysis before offending.<sup>148</sup> Even the incapacitation of juveniles under certain conditions cannot be justified if the decision to imprison is made without consideration of their potential for growth and change.<sup>149</sup> Because children are still maturing and their characters still forming, the conclusion that they are beyond the reach of society is less supportable.<sup>150</sup>

The context in which these Supreme Court cases arose, however, is a relatively narrow one—the cases all involved children who had been transferred to criminal court to be tried as adults.<sup>151</sup> Furthermore, the sentences the Court considered are the harshest sentences that could be imposed in the criminal justice system: the death penalty and life without the possibility of parole.<sup>152</sup> The Court held that the imposition of the death

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146. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570; accord *Miller*, 132 S. Ct. at 2464.

147. *Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 71–72; *Roper*, 543 U.S. at 571.

148. *Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 72; *Roper*, 543 U.S. at 571–72.

149. *Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 73.

150. See *Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 74.

151. Christopher Simmons, who was 17 when he committed the offense, was tried automatically as an adult in a Missouri criminal court. *Roper*, 543 U.S. at 557. Terrance Graham was tried as an adult based on the prosecutor’s decision to file charges in criminal court. *Graham*, 560 U.S. at 53. The life sentence was imposed after Graham admitted to violating the terms of his probation by fleeing from police officers. *Id.* at 55–57. Evan Miller was 14 years old at the time of the crime. A juvenile court judge waived Miller to criminal court on the motion of the district attorney and after a hearing. *Miller*, 132 S. Ct. at 2462. In the companion case, Kuntrell Jackson, who also was 14 at the time of the offense, was charged as an adult under a statute that gave the prosecutor discretion to file in criminal court. *Id.* at 2461.

152. In *Roper*, Christopher Simmons was sentenced to death. 543 U.S. at 558. In *Graham*, Terrance Graham was sentenced to life without the possibility of parole for a non-homicide offense. 560 U.S. at 57. In *Miller*, both Evan Miller and Kuntrell Jackson received mandatory sentences of life without the possibility of parole for their homicide offenses. 132 S. Ct. 2461, 2463.

penalty on a juvenile who committed the crime before the age of 18 violated the Eighth Amendment because youth are “categorically less culpable,” thereby rendering a sentence of death disproportionate.<sup>153</sup> Similarly, life without the possibility of parole when the accused has not killed is categorically barred if the offender is under the age of 18 when the offense occurred.<sup>154</sup> Moreover, the Court concluded that a mandatory sentence of life without the possibility of parole when the minor does kill is unconstitutional in the absence of an individualized, yet “uncommon,” determination about the appropriateness of the sentence.<sup>155</sup> Thus life without the possibility of parole for a non-homicide offense and death for anyone under the age of 18 are categorically barred. Life without parole for a homicide offense, however, may be imposed but only after an individualized judicial determination about the appropriateness of such a sentence.

The Court also rejected the argument that the discretion exercised when transferring a juvenile to adult court for trial is the constitutional equivalent of the discretion exercised during post-trial sentencing in criminal court. Mandatory waiver provisions do not involve the exercise of discretion and thus cannot serve as a substitute for the type of individualized determinations the Court envisioned.<sup>156</sup> Nor is prosecutorial discretion satisfactory in the absence of judicial reevaluation or review.<sup>157</sup> Even a judge’s decision to transfer a minor to criminal court for trial is insufficient because of the paucity of information generally available to the court when the judge makes the transfer decision.<sup>158</sup> Furthermore, the decision to waive a minor to criminal court might stem from a judicial determination that the minor warrants more punishment than the juvenile court can mete out.<sup>159</sup> This determination, however, does not necessarily mean that life without the possibility of parole is warranted.<sup>160</sup>

There are a number of reforms suggested by the Supreme Court’s conclusion that children are constitutionally different. There are those directly mandated by the Court’s jurisprudence, such as no juvenile offender shall be executed for a crime committed under the age of 18 and no minor shall serve a mandatory life sentence in a non-homicide case

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153. *Roper*, 543 U.S. at 567.

154. *Graham*, 560 U.S. at 82.

155. *Miller*, 132 S. Ct. at 2469.

156. *Id.* at 2474.

157. *Id.*

158. *Id.*

159. *Id.* at 2475.

160. *Id.* at 2474–75.

without the possibility of parole. Moreover, a life sentence without the possibility of parole cannot be imposed without an individualized determination that the minor is one of the rare juveniles who warrants this punishment. Indeed, the various mechanisms by which juveniles are waived to criminal court are inadequate substitutes for the determination made by the judge that a juvenile should receive life without the possibility of parole.

Some commentators, however, suggest that these cases have a much broader reach. For example, some argue that the imposition of any mandatory sentence on a juvenile is unconstitutional because it precludes any individualized determination that the sentence is warranted.<sup>161</sup> Within such a framework, parole eligibility would be expanded and juveniles would be entitled to more frequent parole hearings.<sup>162</sup> Moreover, the collateral consequences of a criminal conviction, such as a criminal record or lifetime registration requirements for sex offenders, should be limited when the offender is a juvenile.<sup>163</sup> Even criminal sentencing enhancement provisions, which allow the court to consider a juvenile adjudication as a predicate offense, would run afoul of the Constitution under this view.<sup>164</sup>

Additionally, the Court's Eighth Amendment jurisprudence has applicability to other aspects of the juvenile justice system. For example, a juvenile court judge's decision to transfer a juvenile to criminal court for trial suggests nothing about the appropriateness of any criminal sentence he may receive. The Court's emphasis on the psychosocial development of children would militate in favor of a juvenile justice system that would retain jurisdiction over older teenage offenders.<sup>165</sup> Furthermore, programming should be rehabilitative to facilitate reform.<sup>166</sup> Similarly, the collateral consequences of juvenile adjudication, particularly those extending well into adulthood, should be reconsidered in light of the Court's emphasis on the lessened moral culpability of youth.<sup>167</sup>

Although juveniles obviously have an Eighth Amendment right, to what extent that right applies outside the limited context of the Supreme Court cases is unclear. For example, whether the right extends to the quasi-

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161. ELIZABETH SCOTT ET AL., *MODELS FOR CHANGE: SYSTEMS REFORM IN JUV. JUST., THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING* 26 (Sep. 2015).

162. *Id.* at 27–29.

163. *Id.* at 27.

164. *Id.*

165. *Id.* at 29.

166. *Id.*

167. *Id.* at 27.

criminal proceedings within the juvenile court itself is uncertain given that a juvenile court adjudication arguably provides a lesser and more proportional punishment than the punishment within the criminal justice system. Moreover, the Court did not preclude the imposition of life without the possibility of parole in a homicide case if an individualized determination that passes constitutional muster occurs.<sup>168</sup> The Court rejected a categorical bar on all sentences of life without parole albeit with the understanding that the sentencing party will consider all the circumstances of the juvenile offender and how those circumstances may warrant mitigation at sentencing.<sup>169</sup> Finally, the Court did recognize that some juveniles deserve severe punishment.<sup>170</sup>

Although the Court has recognized that children do have constitutional rights, many of those rights are analyzed within a framework applicable to all constitutional persons. In the Eighth Amendment context, the Court has applied a disproportionality analysis in determining whether juveniles may be executed or given a life sentence.<sup>171</sup> The offender's status as a child can bar the imposition of certain types of punishment, just as the offender's status as a mentally disabled offender would,<sup>172</sup> but the child's status as an offender does not prohibit the imposition of all criminal sanctions. Retribution, deterrence, and incarceration remain as valid state responses to juvenile offending. This jurisprudential narrative thus begins and ends with punishment.

### *B. The Right to Redemption*

Articulating a separate theoretical framework that applies to the rights of children is therefore critical. The law, however, emphasizes competence as a prerequisite to having and exercising rights; thus formulating a framework for children within such a construct has been difficult.<sup>173</sup>

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168. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (the Eighth Amendment does not require a categorical bar on the imposition of life without possibility for parole on juvenile offenders who kill, but the imposition of such a sentence will be uncommon).

169. *Id.*

170. *Graham v. Florida*, 560 U.S. 48, 73 (2010) (“Graham deserved to be separated from society for some time.”).

171. *Miller*, 132 S. Ct. at 2463; *Graham*, 560 U.S. at 59–62; *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

172. *Atkins v. Virginia*, 536 U.S. 304 (2002).

173. Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993).

Rather, a framework for children's rights should emphasize children's powerlessness. Children, because they are powerless, have rights claims against the more powerful.<sup>174</sup> In juvenile and criminal offending, therefore, children would have claims against the state because the state is obviously holding the balance of power; to put it succinctly, rights flow to the powerless.<sup>175</sup>

The child's claim of a right to redemption checks the state's exercise of power. That rights claim is more expansive than simply the right against cruel and unusual punishment embedded in the Eighth Amendment. The right to redemption looks beyond punishment and envisions the reintegration of the child into society as a fully functioning citizen. This right thus imposes on the state a correlative duty to provide the means by which the child may have that future. Framing the right in this way changes the narrative from what the state has the power to do to the child to one in which the child may claim state-created opportunities for rehabilitation and reform.

Although the right to redemption might seemingly be a radical departure from other rights that are accorded children, the framework for such a right is not new. Article 40(1) of the United Nations Convention on the Rights of the Child ("CRC") recognizes that when a child is accused of or has violated a State Party's penal law, the child has the right to be "treated in a manner consistent with the promotion of the child's sense of dignity and worth."<sup>176</sup> The State Party must take into account the child's age, the desirability of promoting the child's re-integration into society, and the child's assumption of a constructive role in society.<sup>177</sup> Moreover, Article 40(3) states that States Parties must create specialized procedures for juveniles accused of violating the law and resort to judicial proceedings only when appropriate.<sup>178</sup> Finally, Article 40(4) envisions treatment that is "appropriate to their well-being and proportionate both to their circumstances and the offence" as an alternative to treatment.<sup>179</sup>

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174. For a more complete discussion of the empowerment perspective, see Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT'L. J. CHILD. RTS. 343 (1994).

175. *Id.*

176. United Nations Convention on the Rights of the Child, art. 40(1), Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 56.

177. *Id.*

178. *Id.* at art. 40(3).

179. *Id.* at art. 40(4).

Although the United States is the only country that has not ratified the CRC,<sup>180</sup> the Supreme Court has found its provisions instructive in the Eighth Amendment context. In considering the constitutionality of the death penalty as applied to minors, for example, the Court noted that Article 37 of the CRC expressly prohibits capital punishment of offenders who committed their crimes when they were under 18.<sup>181</sup> In concluding that the Constitution categorically bars the imposition of life without the possibility of parole for non-homicide offenses that juveniles commit, the Supreme Court again referenced Article 37, which also prohibits “life imprisonment without the possibility of release . . . for offences [sic] committed by persons below eighteen years of age.”<sup>182</sup> In both cases, the Court stated with some dismay that “the United States now stands alone in a world that has turned its face against” these penalties for children.<sup>183</sup>

Additionally, the Court seemed to imply that a deeper and more meaningful right might exist. In discussing the application of the death penalty and life without the possibility of parole to offenders who committed their crimes before the age of 18, the Court’s language suggests that minors are not beyond redemption. The Court argued that “juveniles have a greater claim than adults to be *forgiven* for failing to escape negative influences in their whole environment”<sup>184</sup> and that “[f]rom a *moral* standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be *reformed*.”<sup>185</sup> The Court rejected the argument that juveniles are “*irretrievably* depraved”<sup>186</sup> and noted that these penalties are a “denial of *hope*.”<sup>187</sup> Finally, the Court expressly stated that “juvenile[s] should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”<sup>188</sup>

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180. *Committee on the Rights of the Child*, UNITED NATIONS OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> [<https://perma.cc/GLB2-34WQ>] (last visited Mar. 30, 2016).

181. *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

182. *Graham v. Florida*, 560 U.S. 48, 81 (2010).

183. *Id.*; *Roper*, 543 U.S. at 577.

184. *Roper*, 543 U.S. at 570 (emphasis added).

185. *Id.* (emphasis added).

186. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570; *accord* *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (emphasis added).

187. *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)) (emphasis added).

188. *Id.* at 79.

“[C]hildren are constitutionally different from adults”<sup>189</sup> is the Court’s most powerful articulation of a right to redemption. “Youth matters,”<sup>190</sup> the Court emphasized, because children lack maturity and are impulsive. Youth matters because children are subject to negative influences and have less control over their environments. Youth matters because children are capable of change. They are not simply “miniature adults”<sup>191</sup> but unique constitutional persons to whom special principles must apply. “Indeed, it is the odd legal rule that does *not* have some form of exception for children.”<sup>192</sup>

Furthermore, the Court’s acknowledgment that children are relatively powerless supports a right to redemption grounded in a jurisprudential framework in which rights flow to the less powerful. The Court noted that children are particularly vulnerable because they cannot easily escape the negative influences to which they might be subjected.<sup>193</sup> Moreover, the Court recognized that children remain vulnerable within the justice system itself because the procedures by which juveniles are tried in criminal court fail to protect them. When juveniles are transferred automatically, they receive no individualized determination of the appropriateness or suitability of the transfer.<sup>194</sup> But even when a court decides to transfer a minor, that exercise of judicial discretion often occurs in the absence of full information and may be driven by considerations other than the child’s immaturity.<sup>195</sup> Thus the Court’s imposition of categorical rules stems from the Court’s concern that assessments of culpability will be subjective and inaccurate.<sup>196</sup>

A right to redemption thus offers a way forward. By recognizing that children are different, a more coherent children’s rights theory that accommodates their inherent powerlessness may be formulated. The fact that the state has power is indisputable, and checking that power requires a right. Rights do more than simply allow the claimant to be heard: they command the attention and respect of the powerful and raise the claimants up so that they might be heard. In asserting a right to redemption, the

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189. *Miller*, 132 S. Ct. at 2464. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), confirmed that the Court was announcing a constitutional rule when the Court held that the rule articulated in *Miller* was a new substantive constitutional rule retroactive in cases on state collateral review.

190. *Miller*, 132 S. Ct. at 2465.

191. *Id.* at 2470.

192. *Id.*

193. *Graham*, 560 U.S. at 68; *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

194. *Miller*, 132 S. Ct. at 2474.

195. *Id.*

196. *See Graham*, 560 U.S. at 76–78.

conversation changes from a discussion about punishment to one about reformation and respect and ultimately to the recognition that children have special rights that consider their vulnerabilities and powerlessness.

#### CONCLUSION

While it is clear that fewer juveniles are offending, youth of color remain disproportionately involved with the juvenile and criminal justice systems. For these youth, the emphasis often remains on punishment and accountability rather than reformation. But if we begin from the premise that children have a right to redemption—a right suggested by the Supreme Court’s recent Eighth Amendment jurisprudence—then we may begin to understand the promise of children’s rights.

