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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

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ABSTRACT

Over the past decade, the United States Supreme Court increasingly recognized that juvenile offenders deserve more individualized constitutional protections within the criminal justice system. In Roper, Graham, *and* Miller, *the Court held that juveniles are different than adults in maturity, susceptibility to outside pressures, and potential for reform. Therefore, constitutionally under the Eighth Amendment, juvenile offenders cannot be punished in the same manner as adult offenders. In* J.D.B., *the Court went beyond the Eighth Amendment and held that increased vulnerability to outside pressures merits granting juveniles greater Fifth Amendment protections during*

* 2014 Graduate Criminal Justice Fellow at Santa Clara University School of Law; Northern California Civil Rights Coordinator at the Council on American-Islamic Relations (CAIR). I am blessed to have been surrounded by so many supportive and inspiring people in my lifetime to whom I owe more gratitude than an author's note will provide. I first want to thank my mother, who in the process of raising three children on her own demonstrated to me what it means to be a truly responsible and caring person in this world. I also want to thank the attorneys and staff at the juvenile division of the Snohomish County Prosecuting Attorney's Office for putting up with all my curiosity and eagerness, trusting me with a heavy and complex workload, and treating me like family. I also owe a great deal of gratitude to the editing staff at the *Wyoming Law Review* for putting up with my hectic schedule and really helping me grow as a writer. Finally, I want to extend a great deal of gratitude to Professor W. David Ball for his guidance and feedback on this paper, and for entertaining all my lingering curiosities over the past four years. Thank you for all the opportunities and guidance you have provided me. Know that I will endeavor to carry with me your rare combination of humanity, integrity, curiosity, and intellect, and pass it on wherever I may go in this life.

governmental interrogations. These holdings came at the tail end of the "get tough" on crime era, a period in which states turned towards punishing juveniles, and away from rehabilitating them.

One policy trend during that era, employed by California and dozens of other states, was enacting statutes either sending juvenile cases directly to the adult criminal system or allowing prosecutors to directly file juvenile cases in the adult criminal system via prosecutorial waiver. Both routes deprive juveniles of a fitness hearing before a judicial officer. A fitness hearing allows the juvenile to present evidence supporting whether refuge in juvenile court is proper or whether they must be siphoned into the adult criminal system.

Existing scholarship on the juvenile to adult court waiver process focuses on punishment and rehabilitation theories in the juvenile context. These theories only hint at policy directions criminal justice systems should follow without coming right out and saying it—transferring a juvenile into the adult criminal system without a fitness hearing violates the juvenile's basic due process rights. Part I of this article discusses a brief history of the juvenile court system, its foundation on rehabilitative principles, its movement towards punishment, and describes the current adult court transfer procedures. Part II discusses the recent United States Supreme Court holdings mentioned earlier and presents further scientific research on the distinction between juveniles and adults. Finally, Part III argues that the holdings of the Supreme Court and the bodies of scientific research they rest upon, considered against the structure and purpose of the juvenile court system, validate the liberty interest of juveniles in juvenile court adjudication. Based on this liberty interest, the Supreme Court should do what it had the opportunity to do forty years ago: hold that juveniles suffer such a grievous loss when transferred to the adult criminal system, that doing so without proper protection violates due process.

TABLE OF CONTENTS

INTRODUCTION 777
I. FROM REHABILITATION TO PUNISHMENT: HOW WE CAME TO FEAR OUR YOUTH 782
A. *The Juvenile Court* 783
B. *Realizing Some Juveniles are Unfit* 785
C. *The "Get Tough" Era* 787
1. *Legislative Waiver* 788
2. *Mandatory Judicial Waiver* 789
3. *Prosecutorial Waiver* 790
II. JUVENILES ARE DIFFERENT 791
A. *What Makes a Juvenile Different:* Roper v. Simmons 792
1. *The Immaturity of Juveniles* 793
2. *Susceptibility to Outside Influences* 794
3. *The Transitory and Unformed Character of Juveniles* 795

B. *Juveniles and the Penological Theories of Sentencing:* Graham v. Florida 796
C. *Extending the Juvenile Distinction Beyond the Eighth Amendment:* J.D.B. v. North Carolina 799
D. *Focus on the Juvenile, Not the Crime:* Miller v. Alabama 801
E. *A Lingering Question: When does a Juvenile Stop Being a Juvenile* 804
III. A VIOLATION OF BASIC DUE PROCESS RIGHTS 805
A. *When Due Process Protections Apply* 806
B. *A Juvenile's Liberty Interest in the Juvenile Court, and the Grievous Loss Suffered when Transferred* 807
1. *A Statutorily Created Liberty Interest.* 808
2. *Liberty Interest Arising from the Constitution* 809
a. *Stigmatization* 810
b. *Liberty Constraints* 812
3. *Transfer to the Adult Criminal System Condemns Juveniles to Suffer a Grievous Loss* 815
a. *Adult Proceedings, Dispositions, and Collateral Consequences* 815
b. *Deprivation of the Opportunity to Rehabilitate* 817
C. *Due Process Demands a Full Fitness Hearing Before Transfer to Adult Criminal Systems* 818
1. *The Juvenile's Interest in Juvenile Court Adjudication* 818
2. *The Necessity of a Fitness Hearing* 820
3. *The Interests of the State* 821
a. *The Penological Interests of the State* 821
b. *The Administrative and Fiscal Burdens* 824
c. *Transfers Absent a Fitness Hearing are Contrary to the State's Interest in Public Safety* 825
4. *The Public Interest* 826
CONCLUSION 827

INTRODUCTION

> "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[1]

The United States juvenile court system focuses primarily on rehabilitation and controlling the stigmatization and liberty constraints accompanying criminal adjudications,[2] a focus lacking in the adult criminal system.[3] Currently, after a

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[1] *In re* Gault, 387 U.S. 1, 18 (1967).

[2] *See infra* Part I.A.

[3] *See infra* Part III.B.4.

juvenile is charged with a crime, his case can be transferred out of the juvenile courts and into the adult criminal justice system through either judicial waiver, legislative waiver, mandatory judicial waiver, or prosecutorial waiver.[4] Only judicial waiver, however, allows the juvenile an opportunity to be heard on the issue of transfer.[5] As such, only this method complies with the United States Constitution's Due Process Clause.[6] The other methods fail to adequately protect a juvenile's liberty interest in juvenile court adjudication, and thus violate his procedural due process rights.[7]

This article develops this argument in three parts. Part I discusses a brief history of the juvenile court system, its foundation on rehabilitative principles and movement towards punishment, then concludes by describing the current adult court transfer procedures.[8] Part II then elaborates on the recent Supreme Court holdings validating the differences between juvenile and adult offenders, and the scientific studies they rest upon.[9] Finally, Part III argues that these Supreme Court holdings and the bodies of scientific research they rest upon, considered against the structure and purpose of the juvenile court system, validate the liberty interest of juveniles in juvenile court adjudications.[10] Based on this liberty interest, the Supreme Court should do what it had the opportunity to do forty years ago: hold that juveniles suffer such a grievous loss when transferred to the adult criminal system, that doing so without proper protection violates due process. To provide some history and background on the issue, however, this article begins with the latest United States Supreme Court decision directly addressing the issue, and the story of Morris A. Kent.

* * *

Kent was sixteen years old in 1961 when he was arrested for suspicion of burglary and rape, and subsequently confessed after approximately seven hours of interrogation.[11] Due to his age, the District of Columbia's Juvenile Court Act granted the Juvenile Court "exclusive jurisdiction."[12] Kent was held in a receiving

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[4] *See infra* Parts I.B–C.

[5] *See infra* Parts I.B–C.

[6] *See infra* Part III.

[7] *See infra* Part III.

[8] *See infra* Part I.

[9] *See infra* Part II.

[10] *See infra* Part III.

[11] *See* Kent v. United States, 383 U.S. 541, 544 (1966).

[12] In 1961, the District of Columbia's Juvenile Court Act stated:

> Children,—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings: (a). Concerning any child coming within the terms and provisions of this subchapter. (b). Concerning any person under

home for children for almost a week without an arraignment or probable cause hearing.[13] At the time, the District of Columbia's Juvenile Court Act provided that the juvenile court could only waive its exclusive jurisdiction over a child and transfer jurisdiction to the District Court after a judge conducted a "full investigation."[14] Kent's attorney informed the Juvenile Court of his opposition to any such waiver.[15]

Without holding a hearing or ruling on any motions submitted by Kent, the juvenile court judge "entered an order reciting that after 'full investigation, I do hereby waive' jurisdiction of petitioner and directing that he be 'held for trial for (the alleged) offenses under the regular procedure of the U.S. District Court for the District of Columbia.'"[16] The juvenile court judge made no findings and recited no reasons for his decision waiving jurisdiction.[17] Following trial, Kent was sentenced to prison for thirty to ninety years.[18]

The United States Supreme Court held that the full investigation requirement of the statute "does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the '*critically important*' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act."[19] The Court stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel,

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> 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation . . . .

D.C. CODE § 11-907 (1961).

[13] *See Kent*, 383 U.S. at 544–45.

[14] In 1961, the District of Columbia's Juvenile Court Act stated:

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, *after full investigation*, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the Juvenile court in this subchapter in conducting and disposing of such cases.

D.C. CODE § 11-914 (1961) (emphasis added). In 1959, the District of Columbia United States Court of Appeals held that a "full investigation" required at minimum an informal hearing. *See* United States v. Dickerson, 271 F.2d 487, 491 (D.C. Cir. 1959).

[15] *See Kent*, 383 U.S. at 544.

[16] *Id.* at 546.

[17] *Id.*

[18] *Id.* at 550.

[19] *Id.* at 553 (emphasis added).

without a statement of reasons."[20] Furthermore, "[i]t would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure."[21]

Following the *Kent* decision Congress amended the Juvenile Court Act. The amendment empowered United States Attorneys to waive certain juvenile cases out of the juvenile court without a full investigation by filing certain cases directly with the District Court.[22] Shortly thereafter, in *Bland v. United States*, 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.[23] The Court, however, left these questions unanswered.[24]

On February 8, 1971, a mere week after the amended version of the Juvenile Court Act took effect, sixteen-year-old Jerome T. Bland was arrested for armed robbery.[25] Due to his age and the nature of the alleged offense, Bland was excluded from juvenile court jurisdiction under the automatic exemption provisions of the newly amended Juvenile Court Act.[26] As The Honorable Aubrey E. Robinson of the District of Columbia pointed out,

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[20] *Id.* at 554. The Court elaborated that:

> Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

Id. at 561.

[21] *Id.* at 554.

[22] The Juvenile Court Act of the District of Columbia, as amended in 1970, read:

> (3) The term "child" means an individual who is under 18 years of age, except that the term "child" does not include an individual who is sixteen years of age or older and-(A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense.

D.C. CODE § 16-2301(3) (1970).

[23] Bland v. United States, *cert. denied*, 412 U.S. 909 (1973).

[24] *See id.*

[25] United States v. Bland, 330 F. Supp. 34, 34 (1971).

[26] *See* D.C. CODE § 16-2301(3)(A) (1970).

> [h]ad this sixteen-year-old been arrested for this offense prior to February 1, 1971, he would have received the full panoply of protections of the District of Columbia Juvenile Court system, and that system could have waived jurisdiction resulting in his trial as an adult only after a hearing with effective assistance of counsel and a statement of reasons specific enough to permit this Court to review the decision to waive jurisdiction.[27]

Judge Robinson struck down the amended portion of the Act, emphatically declaring it a violation of Bland's due process rights. Robinson stated that the "adult-or-child decision" is "'critically important[,]' whether the decision is made by the Family Division or by the United States Attorney . . . . The determination that a child should be tried as an adult cannot be made without the safeguard of basic due process."[28]

The United States Court of Appeals for the District of Columbia overturned Judge Robinson's decision by a two-to-one vote.[29] Justice Wilkey's majority opinion emphasized deference to the legislative process and the importance of prosecutorial discretion.[30] Justice Skelly Wright authored a scathing dissent harshly criticizing the manner in which Congress deprived juveniles of their liberty interest in juvenile court adjudication.[31] Justice Wright argued that the Supreme Court in *Kent* had in fact established that children under eighteen have a constitutional right to basic due process requirements before being tried in adult court, and Congress was "running roughshod over those rights in a manner which is unlikely to encourage those of us still committed to constitutionalism and the rule of law."[32]

Bland filed a petition for a writ of certiorari with the United States Supreme Court, but the Court denied the petition by a narrow margin.[33] Joined by Justices Brennan and Marshall, Justice Douglas wrote an opinion dissenting to denial

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[27] S*ee Bland*, 330 F. Supp. at 34–35 (citing Kent v. United States 383 U.S. 541, 553 (1966)).

[28] *Id.* at 38.

[29] *See* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972).

[30] *Id.*

[31] *Id.* (Wright, J., dissenting).

[32] Justice Wright continued:

> As one who has long believed that our Constitution prohibits abrogations of due process 'whether accomplished ingeniously or ingenuously,' I react with a good deal of skepticism to an argument which supposes that 'the essence of justice' can be defeated by a juggling of the definition of juvenile or a minor modification of Family Court jurisdiction.

Id. at 1342 (internal citation omitted).

[33] *See* Bland v. United States, 412 U.S. 909, 909 (1973).

of certiorari.[34] Douglas stated that the situation presented a rather large and "substantial constitutional" question: when Congress places juveniles in a more protected position than an adult through creation of the Juvenile Court system, can they then make it so that, "on the whim or caprice of a prosecutor," a juvenile can "be put in the class of the run-of-the-mill criminal defendants;" a placement made "without any hearing, without any chance to be heard, without any opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment than others in his group?"[35]

The question remained unanswered. For the next thirty years violent crime escalated across the United States and concern for protecting the constitutional rights of juvenile offenders faded into the background. State policy makers followed Congress' lead as fear grew amongst the public that violent juveniles were no different than violent adults.[36] States removed more and more juvenile offenders from the jurisdiction and rehabilitative programs of the juvenile courts, placing them in the adult criminal justice system without any hearing or investigation.[37]

At the beginning of the 21st century, the Supreme Court once again took a strong stance on the issue. The Court acknowledged an ever-growing body of scientific research showing distinct differences between the culpability of juvenile and adult offenders, laying down a series of rulings further legitimizing these studies.[38] In doing so, the Court recognized that due to the distinction between juvenile and adult offenders, juveniles deserve increased constitutional protections within the United States criminal justice system.[39]

I. FROM REHABILITATION TO PUNISHMENT: HOW WE CAME TO FEAR OUR YOUTH

Before engaging in a detailed discussion of how recent Supreme Court decisions validate a juvenile's liberty interest in juvenile court adjudication, one must first understand the history of the juvenile court system and its status in today's legal landscape. This section starts by providing a brief overview of the beginnings of the United States juvenile court system, including the rationale behind its creation.[40] It then introduces the judicial waiver scheme,[41] before

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[34] *Id.*

[35] *Id.* at 911.

[36] For a brief history of the juvenile court system and the "get tough" era's impact on it, see *infra* Part I.

[37] For a discussion of the current adult court transfer procedures, see *infra* Part I.C.

[38] For an analysis of these studies and rulings, see *infra* Part II.

[39] *See infra* Part II.

[40] *See infra* Part I.A.

[41] *See infra* Part I.B.

discussing several new transfer mechanisms used to send juveniles to the adult criminal system.[42]

A. *The Juvenile Court*

The juvenile court system first appeared in the United States in Illinois at the end of the nineteenth century.[43] It was the creation of progressive reformers who believed children were passive and innocent, and thus incapable of possessing criminal intent.[44] These progressive reformers were "appalled by adult procedures and penalties" as applied to juveniles, including juveniles serving long prison sentences alongside hardened criminals.[45] In response, reformers developed a juvenile court providing a specialized system for adjudicating juveniles; a system focused on the offender's individualized needs regardless of the severity of the alleged offense,[46] operating under the penological goal of rehabilitation instead of punishment.[47] By 1945, all states and federal jurisdictions enacted legislation establishing separate juvenile court systems for juvenile offenders.[48]

At the heart of the United States juvenile court system is the concept of *parens patriae*; when parents are unable to properly care for and discipline their child, the burden falls on the state to protect the child and the general public.[49] In line with this concept, legislatures empowered states to intervene and take over care of juveniles, based on the premise that juveniles are "dependent upon adults; are developing emotionally, morally, and cognitively and, therefore, are psychologically impressionable and behaviorally malleable; and have different, less competent, levels of understanding and collateral mental functioning than adults."[50]

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[42] *See infra* Part I.C.

[43] The court was created under the Illinois Juvenile Court Act of 1899. *See* Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 533 (1998).

[44] Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 334 (1997).

[45] Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 376 (1998).

[46] Prior to the creation of the juvenile court, juveniles were subject to the same criminal proceedings and penalties as adults; such proceedings were concerned more with the offense than the offender. *See* Yeckel, *supra* note 44, at 334–35.

[47] *Id.* at 335.

[48] *Id.*

[49] *See* Schwartz, *supra* note 43, at 535.

[50] *Id.*

In accordance with the penological underpinnings of rehabilitation and individualized treatment, juvenile court hearings are viewed as civil rather than criminal proceedings.[51] This distinction is apparent from several procedural aspects of traditional juvenile court adjudications. First, children are commonly not found "guilty" of committing a crime by a jury, but are instead deemed a "ward of the court," in need of help by a juvenile court judge who finds the juvenile culpable following a showing of evidence.[52] Second, the juvenile is "delinquent," as opposed to "criminal."[53] Third, to prevent juveniles from carrying the stigma associated with criminal proceedings, juvenile proceedings are commonly closed to the general public,[54] and upon reaching a delineated age, a juvenile's delinquent record is easily sealed and expunged.[55] Finally, juvenile court proceedings lack the adversarial nature of their adult counterpart; all parties appear to determine "the best interest of the child," not to place the juvenile's life or liberty in jeopardy.[56]

The United States Supreme Court greatly altered the initial makeup of juvenile court proceedings with several decisions in the 1960s and 1970s by bringing due process protections into the juvenile courtroom. In *In re Gault*, the Court held that juveniles in juvenile court proceedings have the right to notice of the charges against them, to counsel, to confront and cross-examine witnesses, and to invoke the privilege against self-incrimination.[57] In *In re Winship*, the Court held that for a juvenile court to find a juvenile "delinquent," it must do so "beyond a reasonable doubt."[58]

While the holdings of *In re Gault* and *In re Winship* increased the adversarial nature of juvenile court proceedings, juvenile courts are still distinct from their adult counterparts due to their primary focus on rehabilitation and treatment over retribution and incapacitation.[59] Moreover, while the interest of public safety plays a bigger role in today's juvenile courts than at their inception, the foundation of most juvenile adjudications is still to reach an outcome that is in

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[51] Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1259 (1996).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* Yeckel, *supra* note 44, at 335.

[56] Cintron, *supra* note 51, at 1259.

[57] *See In re* Gault, 387 U.S. 1, 31–42.

[58] *In re* Winship, 397 U.S. 358, 368 (1970). While the standard of proof for a juvenile court hearing is now the same as adult proceedings, the finding is still made by a judge as opposed to a jury. The Court refused to extend the right to a jury trial to juveniles in juvenile court proceedings just a year after *In re Winship*. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[59] *See, e.g.*, CAL. WELF. & INST. CODE § 202(b) (West 2013).

the best interest of the child. With that 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.

B. Realizing Some Juveniles are Unfit

While many juveniles are amenable to the juvenile court's rehabilitative programs and services, there is always the chance some will be unfit for such programs, thus necessitating and requiring adjudication in adult courts. Therefore some fitness determination must be made before transfer. This fitness determination is a crucial point in the juvenile offender's criminal process as it carries the grievous consequence of ultimate adjudication and disposition in the adult criminal system. The importance of this fitness finding process cannot be over-emphasized. Because the juvenile court system operates with the express understanding that the adult criminal system is inadequate for juvenile offenders, a juvenile should be denied access to the juvenile courts only when he or she is clearly beyond rehabilitation.

Originally, transferring a juvenile to the adult criminal system occurred only in "exceptional cases."[60] Such rarity in transfers was based on the theory that whenever possible, children "should be protected and rehabilitated rather than subjected to the harshness of the criminal system," and that "children, all children, are worth redeeming."[61] To effectuate transfer of juveniles into the adult criminal system, legislatures developed the judicial waiver scheme.[62]

Judicial waiver of a juvenile to the adult court system is most often initiated by a prosecutor filing a motion with the juvenile court.[63] The juvenile court then holds a fitness hearing to determine whether the juvenile is amenable to the juvenile court's treatment and services.[64] Prior to the hearing, a probation officer typically prepares an investigatory report on the juvenile's behavioral issues and background, presenting the findings to the presiding judge.[65] At the hearing, the party bearing the burden of proof, usually the state, presents evidence on the

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[60] *See* Cintron, *supra* note 51, at 1261.

[61] *Id.*

[62] *See* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 82–83 (1995).

[63] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(1) (West 2013). Again, based upon my ultimate argument in this article, judicial waiver is currently the only adult court transfer scheme providing juveniles proper due process protections.

[64] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(1) (West 2013).

[65] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(1) (West 2013).

issue of fitness, followed by a presentation of evidence from the opposing party.[66] In a majority of states, the state bears the initial burden to prove the juvenile is not amenable to the juvenile court's services.[67] In fifteen states however, if certain criteria are satisfied,[68] the presumption shifts in favor of transfer, then requires the juvenile to prove he is amenable to the juvenile court's services in order to avoid transfer.[69]

Following the hearing, the presiding judge makes a finding of fitness and issues a written order including a statement of reasons for his decision.[70] In *Kent*, the Court delineated a list of factors a judge should consider when reaching a finding of fitness.[71] The list included: (1) the seriousness of the alleged offense and "whether the protection of the community requires waiver"; (2) whether the alleged offense was "aggressive, violent, premeditated or willful"; (3) "whether the alleged offense was against persons or against property"; (4) the strength of prosecution's case against the juvenile; (5) whether the juvenile has adult co-defendants; (6) "the sophistication and maturity of the juvenile," considering his "home, environmental situation, emotional attitude and pattern of living"; (7) the juvenile's previous contacts with the juvenile and adult criminal justice systems; and (8) "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile" by use of juvenile court "procedures, services, and facilities."[72]

If the judge finds the juvenile unfit, the judge orders the case transferred to the adult criminal system.[73] As of 2009, forty-four states and the District of Columbia allow for transfer of juvenile cases to the adult criminal system through judicial waiver.[74] Most of these states provide their juvenile court judges with a

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[66] *See* Socrates Peter Manoukian, *Distinguishing Starfish from Cobras: The Importance of Discretion for the Juvenile Judge in Fitness Hearings*, 23 PEPP. L. REV. 805, 812 (1996).

[67] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(1) (West 2013).

[68] This burden shift is most always based on the age of the juvenile offender at the time of the offense, and the offenses he is alleged to have committed. *See* Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 3–5 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[69] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(2)(B) (West 2013).

[70] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a)(1) (West 2013).

[71] *See* Kent v. United States, 383 U.S. 541, 566–67 (1966).

[72] *Id.*

[73] *See, e.g.*, CAL. WELF. & INST. CODE § 707 (2014).

[74] *See* Griffin et al., *supra* note 68, at 3. The six states that do not provide for traditional judicial waiver are Connecticut, Massachusetts, Montana, Nebraska, New Mexico, and New York.

set of criteria to consider in reaching their conclusion.[75] Very few states, however, include all of the criteria laid out in *Kent*.[76]

Providing established procedures to guide judicial officers in the transfer process, including enumerated criteria to consider when establishing fitness for the juvenile court's programs and services, is critical. This is because the role of adult transfer fitness hearings in criminal procedure is *not* to determine whether the juvenile committed the alleged offense. Instead, their sole purpose, in theory, is determining whether the juvenile is amenable to the rehabilitative services of the juvenile court system, or whether he is incapable of rehabilitation in the juvenile courts and should be adjudicated in the adult courts.[77] This finding should be based on the juvenile's individual degree of culpability, his background, and his potential for reform. However, during the "get tough" era, juveniles found themselves appearing in the adult criminal system not based on individualized consideration of their capability to reform, but because of their age and the severity of their alleged offense.[78]

C. The "Get Tough" Era

Serious and violent crime began escalating across the United States in the late 1970s, trailing into the 1990s.[79] The public responded by exerting strong pressure on politicians to "get tough on crime" and enact legislation exacting harsher punishments on offenders.[80] During that time, the public perceived juveniles as increasingly violent, and no less dangerous or culpable than adult offenders.[81]

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[75] The State of California, for example, provides that:

> the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria: (A) The degree of criminal sophistication exhibited by the minor. (B) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. (C) The minor's previous delinquent history. (D) Success of previous attempts by the juvenile court to rehabilitate the minor. (E) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

CAL. WELF. & INST. CODE § 707(a)(1) (West 2013).

[76] *See* Royce Scott Buckingham, *The Erosion of Juvenile Court Judge Discretion in the Transfer Decision Nationwide and in Oregon*, 29 WILLAMETTE L. REV. 689, 694 (1993). Most states amended their transfer statutes to include more objective requirements. *Id.*

[77] *See* Manoukian, *supra* note 66, at 813.

[78] *See infra* Part I.C.

[79] *See* U.S. Department of Justice: Federal Bureau of Investigation UNIFORM CRIME REPORTING STATISTICS, (Mar. 29, 2010), *available at* http://www.ucrdatatool.gov.

[80] *See* Malika T. Djafar, *Dehumanizing Youth: when California gave up on its Children*, 3 WHITTIER J. CHILD & FAM. ADVOC. 151, 159–60 (2003).

[81] *See* Yeckel, *supra* note 44, at 345–46; *see also* Schwartz et al., *supra* note 43, at 544.

The "get tough" mentality of the era spilled over into the juvenile court system, shifting the focus away from rehabilitation and towards punishment, and leading to the development of laws allowing transfer of juveniles into the adult criminal system at an increased rate and with less difficulty.[82] States rewrote their legislation to create legislative waivers excluding juveniles from the juvenile courts through statutory definition, mandatory judicial waivers requiring judges to transfer juveniles based on statutorily enumerated criteria, and prosecutorial waivers placing the decision to transfer solely in the hands of the prosecutor.[83]

1. Legislative Waiver

A legislative waiver operates to statutorily exclude a category of juveniles from juvenile court jurisdiction, thereby requiring direct filing of their case in adult court.[84] This is commonly accomplished in the same manner as the District of Columbia's Juvenile Court Act in *Bland*, where the statutory code section defining juvenile court jurisdiction states only "children" or "juveniles" are subject to its jurisdiction.[85] The legislature then defines "child" or "juvenile" to exclude persons of a certain age alleged to have committed certain offenses, and/or persons previously found delinquent by the juvenile court.[86]

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[82] In his dissent, Justice Wright examined the legislative process of the recent Juvenile Court Act amendment:

> The Committee Report explains 16 D.C. CODE § 2301(3)(A) as follows:
>
> > Because of the great increase in the number of serious felonies committed by juveniles and because of the *substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law*, provisions are made in this subchapter for a better mechanism for separation of the violent youthful offender and recidivist from the rest of the juvenile community.
>
> H.R. Rep. No. 91-907, at 50 (1970). (Emphasis added.) While the surface veneer of legalese which encrusts this explanation need fool no one, a simultaneous translation into ordinary English might, perhaps, prove helpful. The 'substantial difficulties under present law' to which the Committee coyly refers are, of course, none other than the constitutional rights explicated in the *Kent* decision.

See United States v. Bland 472 F.2d 1329, 1341 (1972) (Wright, J., dissenting).

[83] Before 1970, only eight states had automatic transfer laws; that number jumped to 38 by the year 2000. Similarly, only one state had a prosecutorial waiver scheme in its legislation before 1970, that number was fifteen by the year 2000. *See* Griffin et al., *supra* note 68, at 8–9.

[84] The Washington State legislature adopted the following definition:

> 'Juvenile,' 'youth,' and 'child' mean any individual who is under the chronological age of eighteen years and who has not been previously transferred to adult court pursuant to RCW 13.40.110, unless the individual was convicted of a lesser charge or acquitted of the charge for which he or she was previously transferred pursuant to RCW 13.40.110 or who is not otherwise under adult court jurisdiction . . . .

See, e.g., WASH. REV. CODE § 13.40.020 (2013).

[85] *See* Bland v. United States, 412 U.S. 909, 910 (1973).

[86] *See, e.g.*, WASH. REV. CODE § 13.40.020 (2013).

As of 2009, twenty-nine states enacted legislative waiver statutes.[87] In these states, a juvenile is almost always deemed unfit for the juvenile courts based purely on his age and the allegedly committed crime.[88] Because the case against the juvenile is filed directly in adult court by operation of law, he is subjected to the adult criminal justice system without a single opportunity to be heard by *anyone* as to his individual circumstances. He is denied the opportunity to state why he should be considered fit for the juvenile court's rehabilitative services.

2. *Mandatory Judicial Waiver*

On its face, mandatory judicial waiver appears similar to legislative waiver, in that if certain elements are met—charged offense, age, delinquency history, etc.—then the juvenile court judge is required by law to transfer the case to the adult criminal justice system.[89] Mandatory judicial waiver is unique, however, in that the case is first filed in juvenile court for the sole purpose of having a juvenile court judge determine the statutory elements are met, and that probable cause on the allegations exists before transferring the juvenile to adult court.[90] This mandatory transfer is also triggered by motion of the state prosecutor once the case is originally filed in juvenile court, with similar judicial fact-finding procedures on the merits of the charge and the transfer statute following such motion.[91]

As of 2009, fifteen states enacted mandatory judicial waiver schemes.[92] Juveniles have a slight benefit under mandatory judicial waiver over legislative

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[87] The following states have enacted legislative waiver statues: Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin. *See* Griffin et al., *supra* note 68, at 3.

[88] *See, e.g.*, CAL. WELF. & INST. CODE § 602(b) (2013) ("Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction . . . .").

[89] *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-805(1)(c) (West 2013) ("If a petition alleges commission by a minor 15 years of age or older of: (i) an act that constitutes an offense enumerated in the presumptive transfer provisions of subsection (2); and (ii) the minor has previously been adjudicated delinquent or found guilty of a forcible felony, the Juvenile Judge designated to hear and determine those motions shall, upon determining that there is probable cause that both allegations are true, enter an order permitting prosecution under the criminal laws of Illinois.").

[90] *Id.*

[91] *See, e.g.*, IND. CODE ANN. § 31-30-3-6 (West 2013) ("Upon motion by the prosecuting attorney, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act which would be a felony if committed by an adult; and (2) the child has previously been convicted of a felony or a nontraffic misdemeanor."). Compare to legislative waiver schemes which require prosecutors to file case directly into the adult court system.

[92] The states that have enacted mandatory judicial waiver schemes include: Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, and West Virginia. *See* Griffin et al., *supra* note 68, at 3.

waiver schemes. Under mandatory judicial waiver, the juvenile court judge may—before he is required to transfer the juvenile to adult court jurisdiction—at a minimum handle preliminary matters such as appointment of counsel and pre-trial detention decisions.[93] This allows the juvenile some interaction with attorneys and court personnel more accustomed to dealing with juveniles and understanding of their unique needs. Nevertheless, as with legislative waivers, even if all parties involved feel the juvenile would be better served in juvenile court, transfer is eventually made by operation of law.

3. Prosecutorial Waiver

Some states place a category of juveniles under concurrent jurisdiction. Based on the age of the juvenile, charges against him, and/or his prior delinquent history, a juvenile is subject to the jurisdiction of both the juvenile and adult court systems simultaneously.[94] In these instances, a prosecutor may file the case either initially in juvenile court or directly in the adult criminal system.[95] Prosecutorial waiver schemes rarely require the prosecutor to use any criteria in his decision-making, leaving the decision instead to his sole discretion.[96] As of 2009, fourteen states and the District of Columbia enacted statutes allowing prosecutorial waiver of juveniles into the adult criminal system.[97]

* * *

In taking the focus away from the individualized needs and circumstances of the juvenile, legislative, mandatory judicial, and prosecutorial waivers not only

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[93] *Id.* at 4.

[94] *See, e.g.*, WYO. STAT. ANN. § 14-6-203(f) (West 2013) ("The district attorney shall serve as the single point of entry for all minors alleged to have committed a crime. . . . The following cases, excluding status offenses, may be originally commenced either in the juvenile court or in the district court or inferior court having jurisdiction . . . .").

[95] *Id.*

[96] In fact, "[n]o situation exists in the criminal system analogous to the unfettered discretion many prosecutors enjoy in choosing the forum in which to try a juvenile." Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2447 (1996).

[97] The states that have enacted statutes allowing for prosecutorial waivers of juveniles into the adult criminal system include: Arizona, Arkansas, California, Colorado, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming. *See* Griffin et al., *supra* note 68, at 3.

It should be noted that the prosecutor's unfettered charging discretion is almost always the initial discretionary decision for a juvenile's case being transferred into the adult criminal system, even under legislature and mandatory judicial waiver schemes. This is because waiver under those schemes is usually triggered by the specific charges against the juvenile. Furthermore, even if a prosecutor files a case initially in juvenile court, he can still file a motion to move the case to the adult criminal system, triggering the traditional judicial waiver scheme. The initial filing in juvenile court never removes from the prosecutor his discretion to file a case in adult court upon further investigation into the culpability of the juvenile at issue.

go against the foundational purposes of the juvenile court system, but also the Court's recent holdings regarding juveniles in the criminal justice system. These holdings elaborate on the unique characteristics and traits of juvenile offenders and the unique constitutional protections they demand.[98] Because these waiver schemes trigger transfer based on the charged offense and the juvenile's age, they fail to focus on the individualized needs of the juvenile over the offense allegedly committed, thus failing to value rehabilitation over punishment.

The policies at the heart of the juvenile court system—rehabilitation over punishment, and recognition of the developmental and cognitive deficiencies of juveniles—are present in the original adult court transfer mechanism, the judicial waiver scheme. Under this scheme, a fitness hearing is held, taking the focus away from the charged crime and placing it back on the juvenile himself and his ability to reform.[99] In providing such a hearing before the juvenile is potentially cast off into the adult criminal system, judicial waiver schemes comply with Constitutional due process protections by giving the juvenile a meaningful opportunity to be heard before potentially suffering a grievous loss.

II. JUVENILES ARE DIFFERENT

When *Kent* and *Bland* were decided, studies on the cognitive differences between juvenile and adult offenders were still in their infancy. But over the last several decades, an increasing number of studies analyzed these differences.[100] The United States Supreme Court noticed and used this vast new well of information in crafting its recent decisions concerning juveniles in the criminal justice system.[101]

The Court in *Roper v. Simmons* delineated three major cognitive and developmental characteristics unique to juveniles that make them generally less culpable than their adult counterparts.[102] The Court built upon these unique, juvenile characteristics in *Graham v. Florida*, stating that the main penological theories of punishment are not as applicable to juveniles.[103] Following *Roper* and

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[98] *See infra* Part II.

[99] *See supra* Part I.B.

[100] *See infra* Parts II.A.1–3.

[101] *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Miller v. Alabama, 132 S. Ct. 2455 (2012).

[102] The Court emphasized that allowing juries and judges to even consider the death penalty for juveniles creates an "unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 572–73.

[103] *Graham*, 560 U.S. at 74. ("[P]enological theory," the Court stated, "is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual.").

Graham, the Court decided *J.D.B. v. North Carolina*.[104] In *J.D.B.*, the Court held that the unique cognitive and developmental characteristics of juveniles not only demonstrate decreased culpability, but also signal a need to provide increased constitutional protections for juveniles in a highly confusing, complex, and pressure-filled criminal justice system.[105] Finally in 2012, the Court decided *Miller v. Alabama*.[106] The Court in *Miller* initiated a seismic shift in juvenile adjudication by holding that judges must take the unique developmental and cognitive characteristics of juveniles into account when imposing certain sentences, instead of focusing solely on the statutory violation at the heart of the conviction.[107]

A. *What Makes a Juvenile Different:* Roper v. Simmons

Christopher Simmons was seventeen years old when, together with some friends, he broke into the home of a woman, then kidnapped and murdered her.[108] Simmons convinced his friends to aid him in this atrocious crime by assuring them that "they could 'get away with it' because they were minors."[109] Simmons was subsequently charged with, among other things, first-degree murder.[110] Due to his age and the charges against him, Simmons was automatically excluded from Missouri's juvenile court jurisdiction.[111] Following a jury trial, Simmons was found guilty of murder and ultimately sentenced to death.[112]

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[104] J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[105] The Court stressed that:

> in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age. . . . Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

J.D.B., 131 S. Ct. at 2405.

[106] Miller v. Alabama, 132 S. Ct. 2455 (2012).

[107] The Court stated that a mandatory sentencing scheme "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes," violates the Eighth Amendment's ban on cruel and unusual punishment. *Miller*, 132 S. Ct. at 2475.

[108] The Court stated that:

> [u]sing duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

Roper v. Simmons, 543 U.S. 551, 556–57 (2005).

[109] *Id.* at 556.

[110] *Id.* at 557.

[111] *Id.*

[112] *Id.* at 558.

After Simmons exhausted his direct appeals of the conviction, the United States Supreme Court decided *Atkins v. Virginia*.[113] In *Atkins*, the Court held that the Eighth and Fourteenth Amendments prohibited execution of mentally retarded persons due to their reduced culpability.[114] Simmons filed a petition with the Missouri Supreme Court seeking post-conviction relief on the grounds that, just as the Constitution prohibits execution of mentally retarded persons, it likewise prohibits execution of a juvenile who was under the age of eighteen when the crime occurred.[115] Both the Missouri Supreme Court and United States Supreme Court agreed with Simmons.[116]

The United States Supreme Court found that society draws the line between childhood and adulthood at age eighteen, and this is likewise where the Constitution draws the line between allowing and disallowing a death sentence.[117] The Court stressed that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[118] The Court relied heavily on a series of scientific studies regarding the physiological and psychological developmental differences between juveniles and adults.[119] The Court used these studies to delineate three distinct traits that demonstrate decreased culpability in juvenile offenders compared to their adult counterparts: (1) the immaturity of the juvenile, (2) the juvenile's increased susceptibility to outside influences, and (3) the transitory and unformed character of juveniles.

1. The Immaturity of Juveniles

The Court first emphasized a juvenile's immaturity and "underdeveloped sense of responsibility," which often results in "impetuous and ill-considered actions and decisions."[120] This immaturity is demonstrated in one study finding statistical overrepresentation of juveniles "in virtually every category of reckless behavior."[121] The Court further found that almost every state recognizes the immaturity and irresponsibility of juveniles—demonstrated by prohibiting juveniles under eighteen from "voting, serving on juries, or marrying without parental consent."[122]

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[113] *See* Atkins v. Virginia, 536 U.S. 304 (2002).

[114] *Id.*

[115] *See Roper*, 543 U.S. at 559.

[116] *See* State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (2003) (en banc).

[117] *See Roper*, 543 U.S. at 574.

[118] *Id.* at 572–73.

[119] *Id.* at 569–70.

[120] *Id.* at 569 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[121] *Id.* (citing Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

[122] *Id.*

The Court's emphasis on juvenile immaturity is further supported by both the scientific community and the general public, where it is well understood that reasoning capabilities improve throughout adolescence.[123] These improvements result from a juvenile's increase in specific and general knowledge as he gains an education and experiences life first-hand.[124] A juvenile's improved reasoning capabilities also develop through increases in "information-processing skills, including attention, short- and long-term memory, and organization."[125]

A series of studies conducted between 1995 and 2003 demonstrate the extent of a juvenile's immaturity.[126] In these studies, juveniles were presented with hypothetical dilemmas and then asked to make and explain their decisions.[127] Juveniles tended to discount future effects of their actions much more than adults.[128] The studies also found juveniles far more likely to place greater weight on rewards than risks in a risk-reward analysis.[129] Finally, the studies demonstrated that juveniles are much more likely than adults to engage in impulsive behavior without even going through a risk-reward analysis.[130] These studies show just how greatly juveniles disregard the potential risks and consequences of their actions, and just how immature the average juvenile offender really is.

2. *Susceptibility to Outside Influences*

The Court next found that increased susceptibility of juveniles to outside negative influences, including peer pressure, makes them less culpable overall

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[123] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003).

[124] *Id.*

[125] *Id.*

[126] *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: why Adolescents may be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2000); Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Laurence Steinberg, *Is Decision-Making the Right Framework for the Study of Adolescent Risk-Taking?*, REDUCING ADOLESCENT RISK: TOWARD AN INTEGRATE APPROACH 18–24 (Daniel Romer ed., 2003); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249 (1996).

[127] *See supra* note 126 and accompanying text. Steinberg and Scott emphasize that "[i]n the real world, and especially in situations in which crimes are committed, however, adolescents' decisions are not hypothetical, they are generally made under conditions of emotional arousal . . . and they usually are made in groups." *See* Steinberg & Scott, *supra* note 123, at 1012.

[128] This is most likely due to the cognitive limitations of juveniles; a result of their inability to fully comprehend events that have not yet occurred and their lack of life experiences. *See* Steinberg & Scott, *supra* note 123, at 1012.

[129] For example, when posed with a hypothetical about whether or not to engage in the use of experimental drugs; adults tended to consider the risky consequences more than juveniles. Steinberg & Scott, *supra* note 123, at 1012.

[130] *Id.*

than adult offenders.[131] As the Court stressed, juveniles have comparatively less control over their environment than adults.[132] Combined with their psychological vulnerability, juveniles have "a greater claim than adults to be forgiven for failing to escape negative influences."[133]

Scientific studies confirm the Court's observations, showing that due to the developmental immaturity of the average juvenile, he is more likely to respond adversely to external pressures than an adult in the same circumstance.[134] Considering juveniles are generally more impulsive than adults, a lesser perceived threat would more readily invoke a violent response from a juvenile than from an adult.[135] Moreover, due to a juvenile's inability to properly consider future consequences of his actions, "the same level of duress may have a more disruptive impact on [his] decision making" than on adults.[136]

3. The Transitory and Unformed Character of Juveniles

Finally, the Court recognized that the character of a juvenile is not fully formed, and is much more transitory than that of an adult.[137] Because juveniles "still struggle to define their identity," 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."[138]

Juvenile character deficiencies can be reformed because the juvenile slowly pieces together his identity throughout adolescence while engaging in wide ranging exploration and experimentation.[139] Unfortunately for the juvenile and society, "this experimentation [often] involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior."[140] Fortunately, however, only a small percentage of adolescents engaging in risky, dangerous, and illegal behavior develop "entrenched patterns of problem behavior that persists

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[131] *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

[132] *Id.* at 570.

[133] *Id.*

[134] *See* Steinberg & Scott, *supra* note 123, at 1014. ("If adolescents are more susceptible to *hypothetical* peer pressure than are adults . . . it stands to reason that age differences in susceptibility to *real* peer pressure will be even more considerable.").

[135] *Id.*

[136] *Id.*

[137] *See Roper*, 543 U.S. at 570 (citing E. Erikson, IDENTITY: YOUTH AND CRISIS (1968)).

[138] *Id.*

[139] *See* Steinberg & Scott, *supra* note 123, at 1014.

[140] *Id.*

into adulthood."[141] Thus, juvenile offender's decisions to engage in criminal activity result from developmental forces inherent in adolescence, and do not necessarily express a manifestation of bad moral character.[142] In contrast, many adult offenders engage in criminal activity due to choices based on entrenched preferences and values,[143] and are therefore justifiably charged for deficient moral character by the state.[144]

The Court in *Roper* recognized this distinction, and held that a juvenile offender's bad character is most often transitory and shaped by external influences outside his control.[145] In line with this recognition, the Court pointed out fundamental flaws within our criminal justice system when we treat juveniles the same as adults, and that these flawed procedures have constitutional ramifications.[146]

B. Juveniles and the Penological Theories of Sentencing: Graham v. Florida

In *Graham*, the Court continued analyzing the differences between juveniles and adults under the Eighth Amendment, focusing more heavily on the theories behind sentencing in general.[147] The Court used the three main developmental characteristics of juvenile offenders outlined in *Roper* to prevent certain juvenile offenders from receiving the second most severe penalty our criminal justice system offers: life without the possibility of parole (LWOPP).[148] In doing so, the

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[141] *Id.* at 1014–15 (citing M. Tonry & N. Morris, CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189–217 (University of Chicago Press, 1986); T. Moffit, *Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy*, 100 PSYCH. REV. 674–701 (1993)). "At least until late adolescence, individuals' values, attitudes, beliefs, and plans are likely to be tentative and exploratory expressions rather than enduring representations of personhood." *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See Roper*, 543 U.S. at 569–72.

[146] The Court stated that:

> Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. . . . Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' . . . Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.

Id. at 568–69 (internal citations omitted).

[147] *See* Graham v. Florida, 560 U.S. 48 (2010).

[148] The Court held that:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Id. at 82.

Court determined that penological theories do not apply to juvenile offenders such as Terrance Graham—the juvenile offender who was the subject of the case—the same as they do to adult offenders.[149]

Terrance Graham's parents were addicted to crack cocaine, and he was diagnosed with attention deficit hyperactivity disorder while in elementary school.[150] At nine years old he began smoking cigarettes and drinking alcohol, and at thirteen years old began experimenting with recreational drugs.[151] At seventeen, Graham was arrested and charged as an adult for armed burglary and armed robbery.[152] He was found guilty of both charges and sentenced to LWOPP.[153]

Graham appealed his sentence, claiming it violated his Eighth Amendment rights.[154] The First District Court of Appeals of Florida affirmed the sentence, holding that it was not grossly disproportionate to his crimes.[155] After the Florida Supreme Court denied review,[156] the United States Supreme Court granted certiorari, ultimately holding that Graham's sentence violated the Eighth Amendment.[157]

Building on the categorical distinction between juvenile and adult offenders it recognized in *Roper*, the Court held that offenders under the age of eighteen who commit non-homicide crimes may not be sentenced to LWOPP.[158] The Court emphasized the importance of allowing juvenile offenders the possibility of release, stating that "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[159] The Court added that the

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[149] *Id.* at 71–74.

[150] *Id.* at 53.

[151] *Id.*

[152] *Id.*

[153] The Court stated that:

> [The sentencing judge] sentenced [Graham] to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, see Fla. Stat. § 921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

Id. at 57. During Graham's sentencing, the judge stated, "[g]iven your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*

[154] *Id.* at 58.

[155] *See* Graham v. State, 982 So.2d 43 (Fla. Dist. Ct. App. 2008).

[156] *See* Graham v. State, 990 So.2d 1058 (Fla. 2008).

[157] *See* Graham v. Florida, 560 U.S. 48 (2010).

[158] *Id.* at 74–75 (citing Roper v. Simmons, 543 U.S. 551, 574 (2005)).

[159] *Id.* at 79.

penological justifications for a LWOPP sentence—retribution, incapacitation, deterrence, and rehabilitation—do not apply to juveniles charged with non-homicide crimes.[160]

The Court did not, however, impede on society's right to impose retributive punishment on juvenile non-homicide offenders to "express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense."[161] But the Court emphasized that this entitlement must be balanced against the fact that the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[162] Considering the reduced culpability of juveniles, retribution does not justify imposing LWOPP on juveniles guilty of non-homicide crimes.[163]

The Court then recognized that while the harshness of a LWOPP sentence may strongly deter adults, juveniles are less susceptible to such deterrence.[164] Due to the juvenile's lack of maturity and underdeveloped sense of responsibility, he is less likely than an adult to consider potential consequences and punishment when making decisions.[165] When considering a juvenile's "diminished moral responsibility, any limited deterrent effect provided by [LWOPP] is not enough to justify the sentence['s]" imposition.[166]

The Court further held that the penological goal of incapacitation fails to justify imposing LWOPP on juveniles convicted of non-homicide crimes.[167] The main incapacitation justification behind a LWOPP sentence—that the offender will forever be a danger to society—goes against the very characteristics that make a juvenile a juvenile: their immaturity, susceptibility to outside influences, and transitory and unformed character.[168] Simply put, "incorrigibility is inconsistent with youth."[169] The Court concluded by pointing out the obvious: rehabilitation is an inapplicable justification, as LWOPP "forswears altogether the rehabilitative ideal."[170] The sentence reflects "an irrevocable judgment about [a juvenile's] value and place in society," a judgment at odds with his capacity for change.[171]

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[160] *Id.* at 71–73.

[161] *Id.* at 71.

[162] *Id.* (citing Tison v. Arizona, 481 U.S. 137, 149 (1987)).

[163] *Id.*

[164] *Id.* at 71–72.

[165] *Id.*

[166] *Id.* at 72.

[167] *Id.*

[168] *Id.* at 72–73.

[169] *Id.* at 73 (citing Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).

[170] *Id.* at 74.

[171] *Id.*

In analyzing the penological interests behind imposing a LWOPP sentence on juvenile offenders, the *Graham* Court built upon its delineation of a juvenile's decreased criminal culpability first established in *Roper*.[172] Because of this decreased culpability, the theories and interests behind the adult criminal justice system do not apply equally to juveniles.[173] These two holdings made the Court's position clear: juvenile offenders are different, both scientifically and constitutionally. With the road paved by *Roper* and *Graham*, the Court in *J.D.B.* began honing in on the constitutional differences, ultimately granting individualized constitutional procedural protections to juvenile offenders.[174]

C. *Extending the Juvenile Distinction Beyond the Eighth Amendment:* J.D.B. v. North Carolina

In *Roper* and *Graham* the Court applied its "juvenile offenders are different" framework only within the confines of the Eighth Amendment.[175] *J.D.B. v. North Carolina* took that framework and extended its application to the Fifth Amendment.[176] In doing so, the Court held that the unique developmental and cognitive characteristics of juveniles should be considered throughout the entire criminal justice process, including the focus of *J.D.B.*—pre-adjudication procedures such as police interrogations.[177]

Thirteen-year-old J.D.B. was at Smith Middle School in North Carolina when a uniformed police officer walked into his classroom and escorted him to a closed-door conference room.[178] Waiting in the room was another police officer, J.D.B.'s assistant principal, and an administrative intern.[179] Without reading J.D.B. his *Miranda* warnings, police and school officials questioned him for thirty to forty-five minutes regarding a series of recent break-ins.[180] J.D.B. was

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[172] *See* Graham v. Florida, 560 U.S. 48 (2010).

[173] *Id.* at 62–67.

[174] *See* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[175] *See* Roper v. Simmons, 543 U.S. 551, 555–56 (2005); *Graham*, 560 U.S. at 52.

[176] *See J.D.B.*, 131 S. Ct. at 2398–99.

[177] *Id.* at 2407–08.

[178] *Id.* at 2399.

[179] *Id.*

[180] *Id.* at 2399; *see also* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.").

not allowed to speak with his guardian, nor was he informed that he was free to leave the room.[181] J.D.B. eventually confessed that he and another youth were responsible for the break-ins.[182]

Prosecutors subsequently filed two petitions in juvenile court charging J.D.B. with breaking and entering and larceny.[183] J.D.B.'s attorney motioned the court to suppress the statements made during the interrogation, arguing that they were obtained without adequate *Miranda* warnings and in violation of J.D.B.'s Fifth Amendment rights.[184] The juvenile court denied the motion, and subsequently adjudicated J.D.B. a delinquent youth.[185] The North Carolina Court of Appeals affirmed the juvenile court's decision,[186] as did the North Carolina Supreme Court.[187] The United States Supreme Court granted certiorari, and ultimately held that an individual's age does play a role in determining whether someone is "in custody" for *Miranda* purposes.[188]

In reaching its conclusion, the Court stated that the inherently compelling pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes they never committed,"[189] the risk being even more acute and troubling when the subject is a juvenile.[190] When asking whether a "reasonable person would feel free to leave," there will be circumstances where the juvenile's age affects his perception due to his increased susceptibility to external influences, as outlined in *Roper*.[191] Where a reasonable adult might feel free to

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[181] *J.D.B.*, 131 S. Ct. at 2399.

[182] *Id.* at 2400.

[183] *Id.*

[184] *Id.*

[185] *Id.* Most juvenile courts across the country adjudicate juvenile offenders in order to determine whether they are delinquent, as opposed to adjudicating them to determine whether they are guilty of committing a crime. Once a juvenile is found to be delinquent the juvenile court then has authority to place the juvenile on probation, in rehabilitative services and programs, or in detention if needed. *See infra* Part III.B.

[186] *See In re* J.D.B., 674 S.E.2d 795 (2009).

[187] The North Carolina Supreme Court held that J.D.B. was not in custody at the time of the interrogation—one of the requirements for *Miranda* protections to apply—and further refused to extend the custody analysis to include consideration of the age of the individual being interrogated. *See In re* J.D.B., 686 S.E.2d 135, 140 (2009).

[188] The Court noted, "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." *J.D.B.*, 131 S. Ct. at 2398–99.

[189] *Id.* at 2401.

[190] *Id.*

[191] *Id.* at 2402–03.

leave, a reasonable juvenile in the same situation almost certainly would not,[192] which is "self-evident to anyone who was a child once himself . . . ."[193]

The Court concluded by pointing out that our history is "'replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.'"[194] When reviewing the effects of an interrogation on a juvenile interrogatee, it would be absurd to disregard the age of the interrogatee when the objective factors making up the court's analysis are viewed through the eyes of a juvenile at the time of the interrogation. Due to the differing effects interrogations have on juveniles and adults, there may be times when a juvenile is found to be "in custody" when an adult would not be, even though the objective factors making up the review are the same.

The Court in *J.D.B.* recognized that juveniles require individualized consideration of their age to ensure adequate protection of their constitutional rights within the criminal justice system.[195] It made clear that juveniles deserve increased procedural protections at the front end of the criminal justice process when dealing with law enforcement officers in interrogation settings.[196] In *Miller v. Alabama*, the Court made clear that juveniles deserve increased procedural protections at the back end as well.

D. *Focus on the Juvenile, Not the Crime:* Miller v. Alabama

In *Miller v. Alabama*, the Court revisited the Eighth Amendment.[197] The *Miller* Court announced that statutory schemes imposing mandatory LWOPP sentences on juveniles are unconstitutional, even for commission of the most heinous crimes; and that the sentencing judge must take into account the

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[192] The Court elaborated that:

> Time and again, this Court has drawn these common-sense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," [*Eddings v. Oklahoma*, 455 U. S. 104, 115–116 (1982)]; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U. S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, [*Roper v. Simmons*, 543 U.S. 551, 569 (2005)]; and so on.

Id. at 2403.

[193] *Id.*

[194] *Id.* at 2404 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[195] *Id.*

[196] *Id.*

[197] *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).

individual characteristics of the youth before he can impose a LWOPP sentence.[198] In the case of Evan Miller, instead of sentencing him to LWOPP following a finding of guilt for murder, the sentencing judge was ordered to take into account the disturbingly unique characteristics of Miller's life and the crime itself before determining whether he truly deserved such punishment.[199]

Miller spent most of his life in and out of foster care as his mother was an alcoholic drug user and his stepfather abused him.[200] Early in life, Miller began using drugs and alcohol, and attempted suicide four times.[201] In 2003, fourteen-year-old Miller, along with a friend, attempted to rob his mother's neighbor while asleep in his trailer.[202] The neighbor awoke in the middle of the robbery and began choking Miller.[203] After Miller's friend used a bat to break Miller free, Miller grabbed the bat and used it to repeatedly beat the neighbor.[204] Miller and his friend then lit the trailer on fire to destroy the evidence.[205] The neighbor died due to smoke inhalation and the injuries inflicted by Miller.[206]

Prosecutors charged Miller in the adult criminal system with murder in the course of arson—a charge carrying a mandatory minimum punishment

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[198] *Id.* at 2460. At this point, a discussion of the strong and well-written dissenting opinions of Chief Justice Roberts and Justice Thomas in *Miller* is necessary. The dissenting opinion of Chief Justice Roberts focuses on the Court using its Eighth Amendment jurisprudence to take over the legislative process and repeatedly draw—and subsequently erase when it feels ready—lines between what is cruel and unusual and what is not, using the "proportionality test" as its pencil and eraser. *See id.* at 2477–83 (Roberts, J., dissenting). The dissenting opinion of Justice Thomas focuses on his opinion that there is no "proportionality test" for non-capital sentences, and that the court inappropriately applied such a proportionality test in striking down mandatory LWOPP sentences for juveniles. *See id.* at 2483–87 (Thomas, J., dissenting).

The opinions of Chief Justice Roberts and Justice Thomas are highly persuasive. But the argument presented here—that due process demands a fitness hearing for juveniles before being transferred to the adult criminal system—is founded not in the application of the Eighth Amendment proportionality analysis to non-capital sentences, but more so on the underlying reasons as to why the Court felt compelled to engage in the proportionality analysis to begin with. It is not the fact that the Court found LWOPP to be "cruel and unusual" for juvenile offenders that drives the argument here, it is the Court's finding that "juveniles are different." Even if juvenile offenders could be subjected to LWOPP sentences under the Eighth Amendment, it would not change the fact that their developmental and cognitive limitations make them generally less culpable than their adult offender counterparts.

[199] *Miller*, 132 S. Ct. at 2475. ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

[200] *Id.* at 2462.

[201] His first suicide attempt being at age six. *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

of LWOPP.[207] Following a jury trial, Miller was found guilty and sentenced to LWOPP.[208] Miller appealed and the Alabama Court of Criminal Appeals affirmed—ruling that the sentence was not overly harsh compared to the crime and that there was nothing impermissible about the mandatory sentencing scheme.[209] The United States Supreme Court disagreed, holding that the "Eighth Amendment forbids a sentencing scheme that mandates LWOPP for juvenile offenders."[210]

The Court reemphasized the rationale behind its holdings in *Roper* and *Graham*: "children are constitutionally different from adults for purposes of sentencing."[211] These differences stem from the distinctive and transitory mental traits and environmental vulnerabilities of children.[212] Moreover, these traits and vulnerabilities are not crime-specific, but instead evidence decreased culpability "in the same way, and to the same degree, when . . . a botched robbery turns into a killing."[213]

In criticizing mandatory LWOPP sentences for juveniles, the Court made a significant statement:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[214]

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[207] *Id.*

[208] *Id.*

[209] *See* Miller v. State, 63 So.3d 676, 690 (Ala. Crim. App. 2010).

[210] *Miller*, 132 S. Ct. at 2469. Even states that upheld such sentencing schemes under their State Constitutions were forced by the Court to reevaluate such schemes in light of *Miller*. *See, e.g.*, Bear Cloud v. State, 294 P.3d 36, 48 (Wyo. 2013).

[211] *Miller*, 132 S. Ct. at 2464.

[212] *See supra* notes 120–44 and accompanying text.

[213] *Miller*, 132 S. Ct. at 2465.

[214] *Id.* at 2468.

The Court's holding in *Miller* is the culmination of a series of cases, starting with *Roper*, making clear the Court's stance: juvenile offenders are different than their adult counterparts, and juveniles, accordingly, deserve increased individualized protections when placed in the criminal justice system.[215] These protections are founded in both public policy and the United States Constitution.[216] At the same time, however, one of the most important procedural protections we provide juveniles in our society—a full fitness hearing prior to an adult court transfer—is slowly eroding.[217] The original adult court transfer scheme, one requiring a full fitness hearing, is becoming less and less utilized across the United States in favor of transfer schemes that make no attempt to understand the individualized circumstances of juvenile offenders.[218] If juvenile offenders are truly different from their adult counterparts due to their unique traits and vulnerabilities—a conclusion supported by the Supreme Court's holdings and numerous scientific studies—then it is crucial that procedures are in place to ensure treatment of juvenile offenders according to their age and capabilities, and not according to the crime they allegedly committed.

E. A Lingering Question: When does a Juvenile Stop Being a Juvenile

Depending on the state, the upper age of juvenile court jurisdiction varies from fifteen to seventeen years of age.[219] But for the limited purpose of this article, the cut-off for a juvenile's liberty interest in juvenile court adjudication is the day he turns eighteen.[220] This is based on numerous factors, including the line drawn by the *Roper* Court for death penalty eligibility,[221] the line drawn by the *Graham* Court for LWOPP eligibility for non-homicide crimes,[222] and the *Miller* Court forbidding LWOPP sentences for juveniles under age eighteen convicted of homicide offenses without proper individualized considerations by the sentencing court.[223] Furthermore, eighteen is where society draws the line for

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[215] *See infra* Parts II.A–C.

[216] *See supra* Parts I–II.

[217] *See supra* Part I.C.

[218] *See supra* Part I.C.

[219] *See* Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book: Upper age of original juvenile court jurisdiction, 2011*, (Dec. 17, 2012), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp.

[220] Almost 75% of states and the federal jurisdiction allow juveniles up until their eighteenth birthday to be adjudicated under the jurisdiction of their juvenile courts. *Id.* The upper age of juvenile court jurisdiction is seventeen in thirty-seven states and the federal jurisdiction, sixteen in eleven states, and fifteen in two states. *Id.*

[221] *See* Roper v. Simmons, 543 U.S. 551 (2005).

[222] *See* Graham v. Florida, 560 U.S. 48 (2010).

[223] *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).

many purposes related to a juvenile's immaturity and decreased decision-making capacity, including eligibility for voting, marrying without parental consent, and serving on a jury.[224]

The upper age of juvenile court jurisdiction is important because, just as the unique characteristics of a juvenile do not disappear when a botched robbery turns into a homicide, they do not magically disappear the day he turns eighteen. Such an important topic however requires far more in-depth discussion than the scope of this paper allows. But even if it is unclear where the line lies—if one exists at all—the Court has recognized that there is a difference between juvenile and adult offenders, and this recognition cannot be ignored. Moreover, it is precisely this recognition that reveals the liberty interest of juveniles that requires Due Process Clause protection.

III. A VIOLATION OF BASIC DUE PROCESS RIGHTS

The *Miller* Court's disapproval of the automatic application of LWOPP sentences for juvenile offenders represents a seismic shift in how our judicial system should analyze adjudication procedures for juvenile offenders. The categorization of juveniles based solely on the crime they allegedly committed skirts the limits of the Constitution. When the categorization carries with it grievous consequences for the juvenile, it violates those limits. Just as the automatic application of LWOPP sentences forbidden in *Miller* preclude "consideration of [the juvenile's] chronological age and its hallmark features—among them immaturity, impetuosity, and failure to appreciate risks and consequences,"[225]—so to do automatic transfer and prosecutorial waiver laws that deprive juveniles of fitness hearings. These laws prevent the court from "taking into account the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[226] They neglect analyzing the circumstances surrounding the alleged offense, "including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him."[227] Furthermore, they ignore the possibility that the juvenile may have been charged with a lesser offense "if not for incompetencies associated with youth—for example, his inability to deal with police officers . . . ."[228] Finally, and most significantly, laws transferring juveniles to the adult court system absent fitness hearings disregard the possibility of rehabilitation, even when a juvenile's circumstances and background indicate a high probability of success if he were to engage in the juvenile court's programs and services.

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[224] *See Roper*, 543 U.S. at 569.

[225] *Miller*, 132 S. Ct. at 2468.

[226] *Id.*

[227] *Id.*

[228] *Id.*

The United States Supreme Court's decisions in *Kent*, *In re Gault*, and *In re Winship* provided juveniles with increased due process protections in juvenile court proceedings.[229] This trend came to a halt with the "get tough" era.[230] Thirty years later, with its holdings in *Roper*, *Graham*, *J.D.B.*, and *Miller*, the Court once again recognized juveniles deserved increased constitutional protections within the criminal justice system.[231] Now is the time for the Court to make the statement it should have made forty years ago in *Bland*: hold that juveniles suffer such a grievous loss when transferred to the adult criminal system, that doing so without proper protection violates due process.

This position is mandated by the Court's recent holdings, the scientific research they rest upon, and the foundational purposes of juvenile courts. This section first provides a foundation for this position by giving an overview of the Due Process Clause of the United States Constitution.[232] It then argues that under the Due Process Clause juveniles have a liberty interest in adjudication within the juvenile court system.[233] Finally, it concludes by arguing that to adequately protect this liberty interest, the Due Process Clause demands a full fitness hearing before a juvenile is transferred to the adult criminal system—a hearing similar to those utilized in traditional judicial waiver schemes.[234]

A. When Due Process Protections Apply

Procedural due process protections are found in the Fifth and Fourteenth Amendments of the Constitution.[235] They provide that no person shall be deprived of "life, liberty, or property, without due process of law."[236] In *Mathews v. Eldridge*, the United States Supreme Court developed a balancing test to determine when procedural due process protections are implicated, and if so, how much procedural due process a person is entitled.[237] The Court explained that procedural due process protections are implicated whenever a person is

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[229] *See supra* notes 19–21, 57–58 and accompanying text.

[230] *See supra* Part I.C.

[231] *See supra* Part II.

[232] *See infra* Part III.A.

[233] *See infra* Part III.B.

[234] *See infra* Part III.C.

[235] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[236] The Fifth Amendment provides that "No person shall . . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V (providing due process protections as against the federal government); "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 (providing due process protections as against the state).

[237] 424 U.S. 319 (1976). The Court held that qualified individuals have a property right in social security benefits, and that terminating those benefits is a grievous loss, requiring due process protections, but not enough to require a pre-termination hearing. *Id.*

"condemned to suffer a grievous loss of *any* kind."[238] When the loss is grievous, due process fundamentally requires an individual be provided an opportunity to be heard, "at a meaningful time and in a meaningful manner" before such loss occurs.[239]

It is important to note that due process is not a rigid concept, but is instead "flexible and calls for such procedural protections as the particular situation demands."[240] To determine what procedural protections are due such that they provide a meaningful opportunity to be heard, the Court requires consideration of three distinct factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[241] The public interest must also be considered in addition to these three factors in reaching an appropriate due process balance.[242]

B. *A Juvenile's Liberty Interest in the Juvenile Court, and the Grievous Loss Suffered when Transferred*

When determining whether an individual suffers a grievous loss, courts do not simply examine the severity of the interest at stake, but also consider "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the [due process clause]."[243] While a liberty interest can "arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" it can also arise "from an expectation or interest created by state laws or policies."[244] This section elaborates on how a juvenile's liberty interest in juvenile court adjudication arises under both contexts,[245] and how depriving a juvenile of this liberty interest condemns him to suffer a grievous loss.[246]

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[238] *Id.* at 333 (citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (emphasis added).

[239] *Id.* (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[240] *Id.* at 321 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[241] *Id.* at 335.

[242] The public interest "includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing . . . ." *Id.* at 347.

[243] *Morrissey*, 408 U.S. at 481.

[244] Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

[245] *See infra* Parts III.B.2–3.

[246] *See infra* Part III.B.4.

1. A Statutorily Created Liberty Interest.

Through creation of statutory expectations, governing bodies create within their residents certain liberty interests. The United States Supreme Court found such a statutorily created liberty interest regarding good-time credits for persons incarcerated in Nebraska state prisons.[247] The Court in *Wolff v. McDonnell* acknowledged that "the Constitution itself does not guarantee good-time credits for satisfactory behavior while in prison," but that the State "not only provided a statutory right to good time" for Nebraska prisoners, it also specified "that it is to be forfeited only for serious misbehavior."[248] The Court held that:

> [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.[249]

The Court emphasized that the "touchstone of due process is protection of the individual against arbitrary action of government."[250] Since Nebraska prisoners could "only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."[251] Determining whether a juvenile is unfit for the juvenile courts is similarly "critical," and thus "the minimum requirements of procedural due process appropriate for the circumstances must be observed."[252]

Similar to the liberty interest of Nebraska prisoners in good-time credits arising out of state statutes and regulations, the liberty interest of juveniles in juvenile court adjudication arises primarily from society's creation of the juvenile court system and adult court transfer schemes aimed only at the most serious and violent offenders. The United States and each of the states within it developed an entirely separate court system for adjudicating juveniles, including a unique system of probation, detention, and disposition.[253] It then developed adult court transfer schemes aimed at removing from the juvenile courts only the

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[247] *See* Wolff v. McDonnell, 418 U.S. 539 (1978).

[248] *Id.* at 557.

[249] *Id.*

[250] *Id.* at 558 (citing Dent v. West Virginia, 129 U.S. 114. 123 (1889)).

[251] *Id.*

[252] *See id.*

[253] *See supra* Part I.A.

most serious and violent juvenile offenders who are incapable of rehabilitation under the juvenile court's services and programs.[254] In doing so, society created in juveniles "an expectation or interest" for adjudication in juvenile court—an interest that "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [them] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."[255] But unlike the Nebraska prisoners seeking good-time credits, the liberty interest of juveniles in juvenile court adjudication also arises from the Constitution itself.

2. *Liberty Interest Arising from the Constitution*

The juvenile's liberty interest arising from the Constitution comes from the increased stigmatization and constraint on freedom he suffers when adjudicated and sentenced in the adult courts as opposed to the juvenile courts. The Supreme Court found a similar liberty interest in prisoners when transferred to mental illness facilities.[256] In *Vitek v. Jones*, the Court held that a prisoner has a constitutional liberty interest, implicit in the guarantees of the word "liberty," to avoid involuntary transfer to a mental institution.[257] The Court found that commitment to a mental institution amplifies the stigma attached to the prisoner, greatly increases the limitations on the prisoner's freedom of movement in confinement, and subjects the prisoner to behavioral modification programs.[258] If the state attempts to condemn an ordinary citizen to such a grievous loss of liberty, due process protections are undoubtedly required.[259] The Court recognized that "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement," but even a convicted felon is "entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital."[260]

Similarly, when a law enforcement or judicial officer finds probable cause to believe a juvenile committed a crime, the juvenile will often be placed under arrest, held in confinement for some period of time, required to appear in court, etc. As such, the juvenile undoubtedly loses some of his liberty interest in being free from governmental restraints on his freedom and intrusions on his privacy. Nevertheless, he is still "entitled to the benefit of procedures appropriate in the

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[254] *See supra* Part I.B.

[255] *Wolff*, 418 U.S. at 557.

[256] *See* Vitek v. Jones, 445 U.S. 480 (1980).

[257] *Id.* at 488.

[258] *Id.* at 491–93.

[259] *Id.* at 491.

[260] *Id.* at 493.

circumstances" before being found culpable as an adult offender, and subjected to an adult court system that will greatly stigmatize him and significantly increase his liberty constraints.

a. Stigmatization

Professor W. David Ball discussed the significance of stigma avoidance as a liberty interest and its proper Due Process Clause protection.[261] Ball defines stigma using a "modified labeling theory," suggesting that once labeled an adult criminal deviant, a juvenile's desire to manage this shame leads him to "follow strategies such as withdrawal and secrecy, and it is these reactions which generate 'secondary deviance.'"[262] Secondary deviance thus occurs "[w]hen a person begins to employ his deviant behavior or a role based upon it as a means of defense, attack, or adjustment to the overt and covert problems created by the consequent societal reaction to him."[263] For example, a juvenile labeled by society as dangerous and incapable of rehabilitation in the juvenile courts will take on that label as a key aspect of his identity and exhibit behavior in accordance with that label. The avoidance of secondary deviant behavior—which follows upon the labeling, stereotyping, separation, status loss, and discrimination arising from classification as an incurable adult criminal deviant[264]—is a significant liberty

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[261] *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011). W. David Ball is a Professor of Law at Santa Clara University School of Law.

[262] *Id.* at 146 (citing Terri A. Winnick & Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to be Labeled "Ex-Con"*, 29 DEVIANT BEHAV. 295, 299–300 (2008)).

[263] EDWIN M. LEMERT., SOCIAL PATHOLOGY: SYSTEMATIC APPROACHES TO THE STUDY OF SOCIOPATHIC BEHAVIOR 76 (McGraw-Hill 1951).

[264] Professor Ball elaborates on the stigmatization process for juveniles convicted of crimes:

> The first, labeling, refers to the ways in which salient differences are identified (e.g., 'that person is a sex offender'). Link and Phelan use the word 'label' rather than 'attribute' because these categories are socially constructed. That is, the word 'attribute' (perhaps subtly) connotes a quality in the person; a label is something others attach to the person. The second factor describes how these labels are associated with negative stereotypes (e.g., 'sex offenders are incorrigible'). Stereotypes need not fit the label exactly, nor need they be empirically valid. Invoking a negative set of characteristics is enough. Third, the stigmatized person is separated, becoming a 'them' distinct from 'us,' and, in extreme cases, 'the stigmatized person is thought to be so different from 'us' as to be not really human' (e.g., 'sex offenders are so incorrigible that they cannot be reintegrated into society'). Fourth, the now-isolated person suffers status loss, which refers to changes in life outcomes 'like income, education, psychological well-being, housing status, medical treatment, and health' (e.g., 'sex offenders are so incorrigible and incapable of reentry that they cannot live near parks and schools'). The final component is discrimination, where 'successful negative labeling and stereotyping [results in] a general downward placement of a person in a status hierarchy' (e.g., 'sex offenders living under freeway overpasses'). Again, the stigmatized person is not merely spoken of poorly—she does not and cannot participate meaningfully in society.

See Ball, *supra* note 261, at 146–47 (internal citations omitted).

interest demanding due process protection.[265] Adjudication in a juvenile court provides this required protection as it carries less stigmatization for juveniles.

Juvenile courts accomplish this feat through implementing several procedural protections. In most jurisdictions, juvenile courts close their courtrooms to the public and the juvenile's identity is almost never released.[266] In contrast, adult court proceedings are frequently open to the public who can hear every intimate detail about the defendant's alleged offense and troubled past. Furthermore, the defendant's identifying information in an adult proceeding is available to anyone willing to exert minimal effort to find it through the court or clerk's office.[267]

The procedural protections of the juvenile courts are crucial as the life-long societal stigma attached to an adult felony conviction in the adult criminal system carries consequences even beyond secondary deviance, consequences such as disenfranchisement, diminished employment opportunities, and decreased public benefits eligibility.[268] To protect against these consequences, some states developed automatic sealing and expungement laws following juvenile court convictions.[269] While not automatic, other states crafted more relaxed sealing and expungement laws for juvenile offenders than laws controlling adult court records.[270]

This avoidance of stigmatization has not only played a role in state legislatures crafting sealing and expungement laws, but also in past United States Supreme Court decisions. Avoiding the heavy stigma of a criminal conviction was a foundational underpinning for the Court's holding in *In re Winship*.[271] The Court in *In re Winship* held that all criminal adjudications, including juvenile court trials, must operate under the "beyond a reasonable doubt standard."[272]

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[265] Professor Ball further explains that "[j]uvenile delinquents are more comfortable among similarly stigmatized people away from the 'righteous gaze' of parents, and they structure their lives to avoid the uneasiness, embarrassment, and ambiguity of interactions with non-delinquents; interactions that require 'intense efforts at impression management.'" *Id.* at 147 (internal citations omitted).

[266] *See* Yeckel, *supra* note 44, at 335.

[267] *See, e.g.*, The Superior Court of California: Cnty. of Santa Clara, *Criminal Case Records*, (last visited May 2, 2014), *available at* http://www.scscourt.org/self_help/criminal/viewing_crim_records.shtml.

[268] *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1789 (2012).

[269] *See, e.g.*, NEV. REV. STAT. § 62H.140 (West 2013) (stating "[e]xcept as otherwise provided in NRS 62H.150, when a child reaches 21 years of age, all records relating to the child must be sealed automatically.").

[270] *See, e.g.*, WASH. REV. CODE § 13.50.050 (West 2013).

[271] *In re* Winship, 397 U.S. 358, 367 (1970).

[272] *Id.* at 363.

Recognizing just how devastating stigmatization attached to a conviction is, the Supreme Court hedged against wrongful convictions using the highest burden of proof it could impose on trial courts, ensuring the accompanying stigmatization is attached only when a heavy evidentiary showing is made.[273]

These procedures, statutes, and holdings all indicate just how critical stigma management is for juveniles within the criminal justice system. Such recognition leads logically to the conclusion that stigma avoidance is indeed a significant liberty interest for all juveniles in our criminal justice system. Thus, when transferring juveniles into the adult court system—a procedure greatly increasing their chances of lifelong stigmatization—due process protections are required to protect that interest.

b. Liberty Constraints

A person's liberty is, in essence, a person's freedom to control his or her own actions. Liberty constraints on juveniles during proceedings and after dispositions in juvenile court are greatly relaxed and geared toward increased social and family interaction, education, and rehabilitation. An individual adjudicated in the adult criminal justice system is not so fortunate, as he will be met with exponentially larger bail amounts and greater incarceration exposure in over-crowded and under-serviced facilities.

Juvenile courts generally place few constraints on a juvenile's liberty while under the court's jurisdiction relative to the restraints placed on defendants in the adult court system. After an initial post-arrest hearing, instead of being held in confinement, a juvenile will most likely be released into the custody of his parent or guardian under conditions of release (*e.g.*, perfect school attendance, obeying house rules, counseling, community service, restitution, etc.).[274] To hold a minor in detention, a judge often must find, among other things, that confinement is immediately necessary for the protection of the juvenile or the public, or that there is sufficient reason to believe the juvenile will not appear at future court hearings.[275] Some states, Washington for example, allow judges to place low bail amounts on juveniles, amounts easily affordable to the juvenile's parents or guardian.[276]

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[273] *Id.* at 367.

[274] *See* KING COUNTY JUVENILE COURT: JUVENILE JUSTICE 101, KING COUNTY JUVENILE JUSTICE RESOURCE BOOKLET 25, *available at* http://www.kingcounty.gov/~/media/courts/JuvenileCourt/documents/JJ101Book.ashx.

[275] *See, e.g.*, CAL. WELF. & INST. CODE §§ 628(a), 635 (West 2013); *see also* WASH. REV. CODE § 13.40.040(2)(a)(ii)-(iii) (West 2013).

[276] WASH. REV. CODE § 13.40.040(5) (West 2013).

The relaxed constraints on juveniles also extend to the disposition phase. Once a juvenile court finds a juvenile delinquent, the juvenile is most often placed on probation with conditions of release similar to those placed on him in the pre-disposition phase,[277] with added requirements such as community service hours and orders of restitution.[278] In only about one of every four cases will the juvenile be placed in an out-of-home facility such as a foster home, group home, residential treatment facility, or detention center.[279]

The chance a juvenile ends up in secured detention is rare; only about 30% of the facilities used to house out-of-home placements of juveniles are secured detention centers.[280] And unless a juvenile is a serial recidivist or committed a serious or violent crime, sentences to such facilities are often for relatively short durations.[281] Moreover, while confined, juveniles spend most of the day outside their cell interacting with others, participating in rehabilitation programs, and attending classes.[282] Because a vast majority of juvenile confinement facilities

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[277] In 2009, a national study found that 60% of juveniles who had been adjudicated as delinquents were placed on some form of probation. *See* THE NAT'L CENTER FOR JUV. JUST. JUVENILE COURT STATISTICS 2009, 55 (2012), *available at* http://www.ncjj.org/pdf/jcsreports/jcs2009.pdf.

[278] *See, e.g.*, CAL. WELF. & INST. CODE § 202(e)-(f) (West 2013) ("As used in this chapter, 'punishment' means the imposition of sanctions. It does not include retribution and shall not include a court order to place a child in foster care as defined by Section 727.3. Permissible sanctions may include any of the following: (1) Payment of a fine by the minor. (2) Rendering of compulsory service without compensation performed for the benefit of the community by the minor. (3) Limitations on the minor's liberty imposed as a condition of probation or parole. (4) Commitment of the minor to a local detention or treatment facility, such as a juvenile hall, camp, or ranch. (5) Commitment of the minor to the Division of Juvenile Facilities, Department of Corrections and Rehabilitation . . . the juvenile court may, as appropriate, direct the offender to complete a victim impact class, participate in victim offender conferencing subject to the victim's consent, pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold the offender accountable or restore the victim or community.").

[279] In 2009, Courts ordered out-of-home placements in only 27% of cases where a juvenile had been adjudicated as a delinquent. *See* JUVENILE COURT STATISTICS 2009, *supra* note 277, at 51.

[280] A national study conducted in 2008 found that only 734 out of a total of 2,458 juvenile housing facilities—about 30%—were considered secure detention centers. The rest were classified as shelters, reception/diagnostic centers, group homes, ranch/wilderness camps, training schools, and residential treatment centers. *See* Sarah Hockenberry, et al, *Juvenile Residential Facility Census, 2008: Selected Findings*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 3 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/231683.pdf.

[281] *See, e.g.*, WASH. REV. CODE § 13.40.0357 (2013). In King County, Washington, the average length of stay for all juvenile offenders in secured confinement was five to ten days in 2013, for adult offenders it was over twenty days. *See* KING COUNTY DEP'T OF ADULT AND JUVENILE DETENTION, *Detention and Alternatives Report*, (Dec. 2013), *available at* http://www.kingcounty.gov/~/media/courts/detention/documents/KC_DAR_12_2013.ashx.

[282] While juveniles are detained, they receive

> medical and mental health services, and are provided education through Seattle Public Schools, which maintains two school programs at the Youth Service Center. There is also a library on site that is maintained and staff through contracts with the King

operate within their capacity, juveniles are provided sufficient access to education, medical staff, and confinement within uncrowded living quarters.[283]

In contrast, defendants in the adult criminal courts are routinely confined to crowded county jail facilities,[284] and held on bail amounts reaching into the hundreds of thousands of dollars which greatly reduces the possibility of release.[285] Following conviction in an adult court, a juvenile is often confined either in county jail or state prison depending on the crime and sentence length.[286] In either case, the juvenile can expect to spend copious amounts of time in his cell and should expect very little, if anything, in the way of rehabilitative programs, counseling sessions, or educational opportunities.[287] Furthermore, in many cases, the conditions of county jails and state prisons have deteriorated significantly due to massive overcrowding and budget shortfalls.[288] The California prison system, for example, was held unconstitutional for subjecting its inmates to cruel and unusual punishment in violation of the Eight Amendment due to issues stemming from overcrowding.[289]

Along with the statutorily created liberty interest in juveniles of juvenile court adjudication, the great increase in stigmatization and restraint on freedom when transferred to the adult courts create a similar liberty interest arising from the Constitution itself under the Fifth and Fourteenth Amendments by reason of guarantees implicit in the word "liberty." Because the juvenile suffers such a

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> County Library System. Youth are scheduled in the library on a regular basis. Youth also have the option of participating in other regularly scheduled programs such as AA and NA meetings, Powerful Voices, and other special programs.

KING CNTY DEP'T. OF ADULT AND JUVENILE DETENTION, *King Cnty. Juvenile Detention* (Feb. 13, 2013), *available at* http://www.kingcounty.gov/courts/detention/juvenile_detention.aspx.

[283] Only 6% of private and public juvenile confinement facilities in 2008 reported operating in excess of their bed capacity. *See* Hockenberry et al., *supra* note 280, at 7.

[284] *See generally* Todd D. Minton, *Jail Inmates at Midyear 2011—Statistical Tables*, UNITED STATES DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS (April 2012), *available at* http://bjs.gov/content/pub/pdf/jim11st.pdf.

[285] *See, e.g.*, SUPERIOR COURT OF CALIFORNIA, CNTY. OF ORANGE, UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR) (2013), *available at* http://www.occourts.org/directory/criminal/felonybailsched.pdf.

[286] Kimberly Burke, *All Grown Up: Juveniles Incarcerated in Adult Facilities*, 25 J. JUV. L. 69, 71 (2005).

[287] J.M. Kirby, *Graham, Miller, & the Right to Hope*, 15 CUNY L. REV. 149, 161–62 (2011). ("In the years following the loss of Pell grants, a significant number of other rehabilitative and educational programs in prisons were cut, including vocational and technical training and even some secondary schools as imprisonment increased and state and federal funding decreased.").

[288] *See, e.g.*, Arnold Schwarzenegger, Governor of California, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), *available at* http://gov.ca.gov/news.php?id=4278.

[289] *See generally* Brown v. Plata, 131 S. Ct. 1910 (2011).

grievous loss when the government deprives him of this constitutionally protected liberty interest, due process protections are required to guard against arbitrary and erroneous deprivation.

3. Transfer to the Adult Criminal System Condemns Juveniles to Suffer a Grievous Loss

The loss a juvenile suffers when deprived of his liberty interest in juvenile court adjudication is epitomized when the requirements and consequences of juvenile court adjudication are contrasted against those of adult court adjudication. Adult court adjudication subjects juveniles to a great risk of secured confinement, immense psychological pressures, and devastating direct and collateral consequences. In comparison, the juvenile courts feature rehabilitative and uniquely juvenile focused procedures and dispositions geared towards their unique characteristics and traits. The disastrous change in circumstances when a juvenile is transferred into the adult courts can only be categorized as a grievous loss,[290] a consequence appropriately described by the California Supreme Court as "the worst punishment the juvenile system is empowered to inflict."[291]

a. Adult Proceedings, Dispositions, and Collateral Consequences

As previously discussed, adult criminal proceedings and dispositions feature very little, if any, of the rehabilitative focused programs and services offered in the juvenile court system.[292] What they feature instead is an increase in confinement, collateral consequences, and psychological pressures.

Just as juveniles are more susceptible to the increased pressures of custodial interrogations, as recognized in *J.D.B.*,[293] they are much more susceptible to the authoritative pressures of adult criminal proceedings. The judicial/legal culture of adult court proceedings—already confusing for the majority of adults who undergo them—are much more incomprehensible to juveniles than juvenile court

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[290] The Court found a similar grievous loss when a parolee has his parole revoked under certain statutory schemes. In *Morrissey v. Brewer*, the Court found that under a statutory scheme giving a presumption of parole, only to be revoked on a fact-finding, a parolee has a state created liberty interest in being on parole, and suffers a grievous loss when his parole is revoked. The Court recognized that parole was a state created system for prisoners who demonstrate certain qualities which qualify them to undergo parole supervision free from prison confinement. Even though the state subjects a parolee to many restrictions not applicable to other citizens due to his criminal conviction, he still enjoys conditions of liberty very different from that of a prisoner in confinement. 408 U.S. 471, 480 (1972).

[291] Ramona R. v. Superior Court, 37 Cal.3d 802, 810 (2011).

[292] *See supra* Part III.B.3.b.

[293] *See* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2012).

proceedings.[294] Juveniles have a relatively poor understanding of the trial process, such as differentiating between arraignment, pre-trial motion and bail hearings, and trial; have difficulty grasping abstract legal concepts and terminology such as "proof beyond a reasonable doubt" and "self-incrimination"; have trouble separating the functions of their defense attorney from the authority of the court; and have a lesser capability to properly comprehend the consequences of decisions such as pleading guilty and choosing to testify.[295] To combat this problem, many juvenile court judges, prosecutors, public defenders, and probation officers dealing with juvenile defendants on a daily basis receive special training geared toward the specialized needs of juvenile offenders, and further grow accustomed to the unique traits and characteristics of juveniles through their continuous work within the juvenile courts.[296] Moreover, while juvenile court proceedings are fashioned as civil in nature with all parties working together to achieve the best interest of the juvenile, adult court proceedings are known for their combative and adversarial nature.[297] Adult court proceedings lack a juvenile court judge more "vigilant in protecting juveniles from the retributionist leanings of prosecutors."[298]

Not only are the psychological pressures greater, but the potential for pre-trial detention, as well as the length and conditions of confinement, are far more severe for juveniles in the adult court system. Almost half the juveniles transferred into the adult courts are held in pre-trial detention.[299] Following their criminal proceedings, 72% of juveniles convicted of violent offenses end up in adult

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[294] *See* Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 222 (1997). Irene Rosenberg, Professor of Law, Emeritus at the University of Houston Law center, stated that she could not "believe that the proverbial visitor from Mars, if plunked down in the juvenile courts and the criminal courts, and asked to determine which would be better in terms of protecting children, would not conclude that the juvenile courts were far superior." Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 185 n.66 (1993).

[295] Geraghty, *supra* note 294, at 222, 226–27. While the Constitution would require the appointment of counsel for any juvenile placed in adult criminal proceedings, see *Gideon v. Wainright*, 372 U.S. 335 (1963), even adults who have the assistance of counsel find the adult criminal justice system incredibly confusing and intimidating, undoubtedly a juvenile would find the system daunting.

[296] *See, e.g.*, GA R UNIF JUV CT Rule 1.5 (West 2014) ("Each person serving as juvenile court judge or associate juvenile court judge shall attend a new judge orientation program established by the Council of Juvenile Court Judges . . . and presented in conjunction with the Institute of Continuing Judicial Education."); NC R CATAWBA CTY JUV Rule 5 (West 2014) ("The Chief District Court Judge shall from time to time arrange for and schedule training sessions for judges, court counselors, attorneys, social workers, guardians ad litem and other professionals who participate on a regular basis in juvenile court matters.").

[297] Geraghty, *supra* note 294, at 225.

[298] *Id.*

[299] *See* Gerard A. Rainville, Steven K. Smith, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS, UNITED STATES DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS 3 (May 2003), *available at* http://bjs.gov/content/pub/pdf/jfdcc98.pdf.

incarceration, with non-violent offenses carrying incarceration rates from 47 to 60%.[300] Regardless of the offense classification, juveniles convicted of felonies in the adult criminal system usually receive sentences of seven to eight years.[301]

The increased physical and psychological pressures of adult confinement, combined with a much more violent and abusive atmosphere, create devastating consequences on juveniles. Juveniles confined in county jails and state prisons face a high risk of physical and sexual abuse by both inmates and guards,[302] and commit suicide at a much greater rate than those in juvenile detention facilities.[303] "Given their incomplete development, juveniles are *significantly impacted* by the lack of appropriate services and care in adult facilities."[304] In contrast, juvenile detention facilities are much better equipped "to provide developmentally appropriate healthcare, rehabilitative services, and programming" than adult facilities.[305] But even more devastating than what the juvenile is subjected to in the adult criminal justice system, is what he is forced to give up.

b. Deprivation of the Opportunity to Rehabilitate

A juvenile transferred to the adult court system is deprived of the rehabilitative services and programs offered by the juvenile court system—programs and services designed specifically for juveniles like him. He is instead shoehorned into an already overcrowded adult criminal system where the focus is almost solely on the charged crime, instead of the individual standing before the court.[306] "Grievous loss" is the only appropriate description for the impact on juveniles denied adjudication in the juvenile courts and transferred into adult criminal justice systems.[307] When a juvenile is deprived of his liberty interest, he suffers

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[300] Property offenses: 59 percent; drug offenses: 47.3 percent; public-order offenses: 58.9 percent; and misdemeanors: 59.8 percent. *Id.* at 9.

[301] *Id.* at 6.

[302] *See* Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1450 (2012).

[303] "One study indicates that a juvenile housed in an adult jail is five times more likely to commit suicide than is a juvenile in the general population and eight times more likely to commit suicide than is a juvenile housed in a juvenile facility." *Id.* at 1454.

[304] *Id.* at 1455 (emphasis added).

[305] *Id.* Andrea Wood elaborates further:

> Adult facilities may fail to provide juveniles with the appropriate nutrition or dental and vision care, which are especially critical for developing adolescents. Staff members at juvenile facilities typically receive special training to work with juveniles not generally received by the staff at adult facilities. Many adult facilities fail to provide juveniles with even basic services, including prison-survival skills and counseling.

Id.

[306] *See supra* Part I.C.

[307] *See supra* notes 252–95 and accompanying text.

a grievous loss, and thus deserves the full protections of the Constitution's Due Process Clause.

C. Due Process Demands a Full Fitness Hearing Before Transfer to Adult Criminal Systems

Because juveniles have a liberty interest in juvenile court adjudication and deprivation of that interest causes them to suffer a grievous loss, due process protections are required. Forty years ago in his dissent to denying certiorari in *Bland*, Justice Douglas mulled over the question of what protections are due before the state can constitutionally deprive a juvenile of this liberty interest: "A juvenile or 'child' is placed in a more protected position than an adult, not by the Constitution but by [the laws and policies of the jurisdiction]. In that category he is theoretically subject to rehabilitative treatment."[308] Following a juvenile's placement in a more protected position, "[c]an he [then] be put in the class of the run-of-the-mill criminal defendant, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment than others in his group?"[309]

The *Eldridge* factors provide a guide for answering this question.[310] These factors, as applied to juveniles, are (1) the juvenile's interest in being adjudicated in the juvenile courts; (2) the necessity of a fitness hearing; and (3) the interests of the state and the public. Upon consideration of these factors, Justice Douglas's question has only one logical answer, and the Court already answered it in *Kent*: "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[311]

1. The Juvenile's Interest in Juvenile Court Adjudication

The first *Eldridge* factor is "the private interest that will be affected by the official action."[312] A juvenile's private interest is clear: to be adjudicated in the rehabilitative focused juvenile courts where he can reform through programs and services catered to his developing character,[313] instead of the adult courts where he will be subjected to increased stigmatization, constraints on his freedom,

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[308] Bland v. United States, *cert. denied*, 412 U.S. 909, 911 (1973) (Douglas, J., dissenting).

[309] *Id.*

[310] *See supra* Part III.A.1.

[311] Kent v. United States, 383 U.S. 541, 554 (1966).

[312] Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[313] *See supra* Parts III.B.1-2.

and direct and collateral consequences.[314] A juvenile's private interest further incorporates being heard as to why he is amenable to the juvenile court's programs and services, before being labeled incapable of rehabilitation and transferred into the adult criminal justice system.

While the "get tough" era allowed the concept of punishment to creep into the juvenile court system, the system's overarching purpose, whenever possible, remains rehabilitating delinquents.[315] When a juvenile court punishes a juvenile, many state legislatures limit punishments to sanctions,[316] or allow punishment only after weighing the potential punishment against multiple other important considerations—taking into account all the individual and unique characteristics of the juvenile.[317] A juvenile retains a significant interest in being adjudicated within the juvenile justice system even with its current deficiencies; especially when the alternative is an adult criminal system focusing almost exclusively on punishment and incapacitation.

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[314] *See supra* Part III.B.

[315] *See, e.g.*, CAL. WELF. & INST. CODE § 202(b) (West 2013) ("Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public. Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. If a minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct when those goals are consistent with his or her best interests and the best interests of the public. When the minor is no longer a ward of the juvenile court, the guidance he or she received should enable him or her to be a law-abiding and productive member of his or her family and the community.").

[316] *See, e.g.*, CAL. WELF. & INST. CODE § 202(e) (West 2013) ("As used in this chapter, 'punishment' means the imposition of sanctions. It does not include retribution . . . .").

[317] *See, e.g.,* WASH. REV. CODE. § 13.40.010(2) (West 2013) ("It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter: (a) Protect the citizenry from criminal behavior; (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter; (c) Make the juvenile offender accountable for his or her criminal behavior; (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender; (e) Provide due process for juveniles alleged to have committed an offense; (f) Provide necessary treatment, supervision, and custody for juvenile offenders; (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety; (h) Provide for restitution to victims of crime . . . .").

2. *The Necessity of a Fitness Hearing*

The second *Eldridge* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]"[318] As the Court explained in *Roper*, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[319] It is impossible to estimate just how many juveniles are automatically waived into the adult criminal system without any opportunity to be heard who are otherwise capable of successful rehabilitation within the juvenile court system.

Proper due process protections are required to ensure the risk of erroneous deprivation of a juvenile's interest in juvenile court adjudication is kept significantly low. The only attempt at differentiation made by automatic transfer and prosecutorial waiver laws is based primarily on the offender's age, the crime allegedly committed, and occasionally a juvenile's delinquency history.[320] If the standard for due process protections is an opportunity to be heard at a meaningful time and in a meaningful manner, than automatic transfer and prosecutorial waiver laws exemplify procedures completely devoid of due process. Such transfer laws lack any individualized consideration of the offender or the circumstances surrounding his crime and background. Because no attempt to determine the juvenile's ability to rehabilitate occurs, the risk of erroneous deprivation of juvenile court rehabilitative services to juveniles amenable of rehabilitation is enormous.

To prevent a risk of erroneous deprivation, a fitness hearing provides a meaningful way for juveniles to be heard before any potential transfer occurs. At a fitness hearing, the state can present its case as to why it believes the juvenile is beyond the help of the juvenile court system.[321] Furthermore, probation officers and counselors usually must present investigative findings regarding the circumstances surrounding the juvenile's crime and his background.[322] Most importantly, the juvenile can testify, presenting evidence as to why he is amenable to the juvenile court's rehabilitative programs and services, thus providing him a meaningful opportunity to be heard before a potential transfer.[323]

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[318] Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[319] Roper v. Simmons, 543 U.S. 551, 573 (2005).

[320] *See supra* Part I.C.

[321] *See, e.g.*, CAL. WELF. & INST. CODE § 707(a) (West 2013).

[322] *Id.*

[323] *Id.*

Additionally, when the court provides a statement of reasons for a finding of unfitness, the juvenile has the opportunity to appeal the judicial determination.[324] In contrast, there is no opportunity for a juvenile to appeal a legislative waiver or mandatory judicial waiver.[325] There are also extremely narrow grounds for appeal on prosecutorial waivers since courts give significant deference to prosecutorial discretion.[326] The finality of a transfer to adult courts under these waiver schemes, combined with the enormous risk of erroneous deprivation, proves just how necessary a fitness hearing is in the transfer process.

3. The Interests of the State

The third *Eldridge* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[327] The Government undoubtedly has penological interests aimed at protecting public safety. But laws transferring juveniles to adult criminal systems absent a fitness hearing are not only unnecessary to achieve this interest, but actually contradict it. These laws increase the frequency of secondary deviant behavior due to stigmatization,[328] and turn juveniles capable of reform into more hardened criminals.[329] The impact on the Government's administrative and fiscal burdens following a full fitness hearing requirement, however, is less clear.

a. The Penological Interests of the State

To advance penological interests, states have enacted automatic transfer and prosecutorial waiver laws—believing that harsher consequences are needed to

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[324] *See* Klein, *supra* note 45, at 389.

[325] *Id.*

[326] As John D. Burrow points out:

> Another criticism of prosecutorial waiver is that such decisions, for the most part, are non-appealable. It is alleged no process is in place wherein the decisions of the prosecutor can be reviewed to ensure the case has no factual errors. The lack of review may be attributable to the traditionally wide latitude given to prosecutors in their charging decisions. This argument is grounded in the belief that because prosecutors possess so much latitude, there should be some mechanism for review. Further, it is alleged that prosecutorial waiver expands the traditional function of prosecutors. Moreover, some believe discretion in charging decisions is a necessary part of prosecutors' jobs, it must still be structured and constrained. Allowing prosecutors wide latitude in deciding the forum for prosecution unnecessarily expands this discretion without the benefit of checks and balances.

John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL'Y 1, 20–21 (2005) (internal citations omitted).

[327] Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[328] *See supra* Part III.B.3.a.

[329] *See infra* Part III.C.3.c.

punish, deter, and incapacitate violent juvenile offenders.[330] But as the Court recognized in *Graham*, the penological interests of retribution, deterrence, and incapacitation apply quite differently to juvenile offenders,[331] and moreover are already prevalent within the juvenile court system.

While society is entitled to impose punishment on serious juvenile offenders, such punishment must be "directly related to the personal culpability of the criminal offender."[332] Transfer to the adult criminal system cannot be related to the personal culpability of a juvenile offender if no hearing is held to determine his level of culpability. The only way to fairly punish a juvenile for being a serious and violent offender through adult sentencing is to hold a hearing and perform an investigation to determine if his culpability truly warrants such punishment. For most juvenile offenders, society's entitlement to impose punishment on juvenile offenders is adequately achieved through juvenile court adjudication.

When confined following juvenile court adjudication to a juvenile detention facility for a period of weeks, months, or years, it is misguided to claim a juvenile is not being "punished." As previously stated, the concept of punishment has crept its way into the juvenile justice system.[333] Many detained juveniles are required to wear department issued clothing signifying their confined status, and in some states they must wear handcuffs and leg shackles when transported to and from the courtroom.[334] Their living quarters commonly consist of white brick walls, gray concrete floors, small windows, and recreation yards surrounded by barbed wire fences.[335]

One of the most common misconceptions is that confinement in secured juvenile detention facilities does not constitute punishment because facilities are referred to as camps, ranches, guidance centers, reformatory schools, rehabilitation facilities, etc. In response to an accusation that commitment to an "industrial school," a form of secured juvenile detention, was not punishment, the California Supreme Court stated "it certainly does not come under the classification of pleasure. Calling a reformatory an 'industrial school' does not mitigate its

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[330] *See supra* Part I.C.

[331] Graham v. Florida, 560 U.S. 48 (2010).

[332] *Id.* at 71.

[333] *See supra* Part I.C.

[334] *See generally* Bernard P. Perlmutter, *"Unchain the Children": Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1 (2007). Keep in mind the juvenile is still behind closed doors at all times and cameras are not allowed inside juvenile courtrooms. So while a juvenile may feel like he is being confined, the social stigma does not apply as it would in an open adult criminal proceeding.

[335] *See* Richard Ross, JUVENILE IN JUSTICE (2012).

bleakness, loneliness and destitution of parental love and care."[336] The California Supreme Court further opined:

> What is punishment? It is the infliction of pain, sorrow, and grief. To take a child from the comfort of his home, the joy of his companions and the freedom of field, river and wood, and confine him to a building with whitewashed walls regimented routine and institutional hours is punishment in the strictest sense of the word. To say, as the Commonwealth says, that this institutionalized incarceration is 'for the care and treatment' of the juvenile does not make it any less abhorrent to the boy of spirit, health and energy.'[337]

Deterrence is also not a sufficient penological justification to support directly filing juvenile cases in adult court. Using the threat of adult court adjudication as a widespread deterrent ignores the fact that, due to their lack of maturity and underdeveloped sense of responsibility, juveniles are less likely than adults to consider potential punishment when making decisions.[338] Just as the limited deterrent effect of LWOPP is insufficient to justify imposing LWOPP sentences on juveniles,[339] neither is any *de minimis* deterrent effect of adult court adjudication sufficient to justify depriving a juvenile's liberty interest in juvenile court adjudication.

Moreover, juvenile courts already have a deterrence effect. Juvenile courts have the power to place juveniles on strict probation, order them to perform community service hours, impose orders of restitution, and even place juveniles into confinement away from their friends, family, and community for years.[340] For proponents of adult court transfers as a form of punishment, the deterrence resulting from the threat of adult prosecution still exists under a mandatory fitness hearing scheme. This is because prosecutors would still retain the ability to file motions to transfer juveniles to the adult criminal justice system per judicial waiver.

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[336] Ramona R. v. Superior Court, 37 Cal.3d 802, 811 (2011) (citing *In re* Holmes, 109 A.2d 523, 530 (1954)). Pointing out the bleakness of secured juvenile confinement appears to contradict portions of this article, but that is not the case. First, only a very select few juveniles should be subjected to secured confinement under such conditions—those that have proven they are beyond saving and are a serious risk to the public safety. Second, while a juvenile confinement facility may be cold, bleak, and lonely, it still does not suffer from the high levels of violent, abusive, and inhumane conditions that flood our over-crowded adult prison system.

[337] *Id.*

[338] Graham v. Florida, 560 U.S. 48, 70–72 (2010).

[339] *Id.* at 72.

[340] *See, e.g.*, CAL. WELF. & INST. CODE §§ 727, 730–31 (West 2013).

Finally, incapacitation is an insufficient justification for transferring juveniles into the adult criminal system absent a fitness hearing. If a juvenile poses a serious enough risk to public safety meriting incapacitation, juvenile courts have the power to confine him in a juvenile detention facility, sometimes until many years past the age of eighteen.[341] Furthermore, states are capable of incapacitating truly dangerous juveniles for as long as possible in rehabilitative focused juvenile detention facilities, followed by extended periods of incarceration in adult facilities, without having to transfer the juvenile into the adult court system.[342]

Increased threat of adjudication in the adult criminal system fails to advance the states penological interests.[343] Those interests are better served by returning to the originally developed method of transfer—the judicial waiver scheme. This scheme maintains what *de minimis* deterrent effect threat of adult transfer has, but also prevents risks to public safety arising from mass transfers of juveniles to adult courts, jails, and prisons.

b. The Administrative and Fiscal Burdens

If courts are required to provide full fitness hearings every time the state requests juvenile transfer to the adult criminal system, administrative costs will

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[341] *See* DEPARTMENT OF JUVENILE JUSTICE, CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION (April 16, 2013) http://www.cdcr.ca.gov/Juvenile_Justice/. ("The Division of Juvenile Justice provides education and treatment to California's youthful offenders up to the age of 25 who have the most serious criminal backgrounds and most intense treatment needs.").

[342] This is an example of blended sentencing:

> Blended sentencing statutes first came into effect in the early 1990's. The concept of blended sentencing is an innovative way to combine the original aims of the juvenile court system, namely rehabilitation, with the retributive goals of punishment. There are several different models, but what is common to all of them is the ability to consider both juvenile and/or adult sentences. For example, one model allows the judge to impose both a juvenile sentence and an adult sentence. At the end of the juvenile sentence, the juvenile is reevaluated. If the juvenile is deemed rehabilitated, then the judge will stay the adult sentence. If not, the juvenile then serves his adult sentence in an adult correctional facility. There is no one set type of blended sentencing statute. Other blended sentencing statutes only allow the judge a choice of which type of sentence he or she wishes to impose, i.e. either juvenile or adult. There are various models that differ among the states. The different models vary as to which venue the juvenile is prosecuted in and which judge imposes the sentence.

Kristin L. Caballero, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders?*, 19 ST. JOHN'S J. LEGAL COMMENT. 379, 412–14 (2005).

A heavily publicized case in Snohomish County, Washington several years ago provides an example of blended sentencing in action. Instead of arguing over whether or not to charge a fifteen-year-old girl as an adult, the lawyers for both sides "reached an agreement to send the teen to juvenile detention until she turns 21 and then to an adult prison for 100 more months . . . ." *See Snohomish County teen sentenced in school stabbings,* THE SEATTLE TIMES (March 7, 2012), *available at* http://seattletimes.com/html/localnews/2017693397_stabbing08.html.

[343] *See supra* notes 316–25 and accompanying text.

increase as judges, prosecutors, public defenders, bailiffs, court clerks, and court reporters all need to be present. But these cost increases are offset by the positive collateral effects of providing such hearings. The most obvious cost offsets are a probable reduction in the amount of case requests for transfer to the adult criminal system.[344] If prosecutors must actually prove why a juvenile should be transferred, logically the amount of case requests for transfer will decrease due to prosecutorial office resource constraints.

Moreover, the adult court transfer was created for only the most serious recidivist violent juvenile offenders—those juveniles demonstrating an incapacity for rehabilitation within juvenile courts.[345] Currently, many of the cases waived without fitness hearings are recidivist property offenders and first-time violent offenders.[346] Requiring prosecutors to truly assess individual situations and prioritize which juveniles pose the largest public-safety risks will bring the adult court transfer scheme back in line with its original purpose.

With an initial increase in staffing and facilities requirements, followed by an offset due to a decrease in transfer requests, the Government's exact long-term administrative and fiscal burden remains unclear. One conclusion that is clearer, however, is that the state's interest in public safety would be better served by requiring mandatory fitness hearings for adult court transfers.

c. Transfers Absent a Fitness Hearing are Contrary to the State's Interest in Public Safety

For the many juveniles transferred into the adult criminal system who still have strong potential for reform, county jails and state prisons only turn them into more hardened criminals, with an increased likelihood of reengaging in criminal activity upon release.[347] A task force supported by the Centers for Disease Control and Prevention evaluated a series of studies conducted on groups of juveniles housed in county jails and state prisons, as well as those detained in juvenile detention facilities.[348] The study found that transferred juveniles were more likely than those housed in juvenile detention facilities to commit more violent and

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[344] Obviously this is only true if juvenile court proceedings are less expensive than adult court proceedings. Further research is needed to determine whether or not this true. But findings of several studies show that the cost to incarcerate a person in a juvenile facility is higher than the cost to incarcerate a person in an adult facility.

[345] *See* Cintron, *supra* note 51, at 1272.

[346] *Id.*

[347] *See* Wood, *supra* note 302, at 1456.

[348] *Id.*

cumulative crime, and were 33.7% more likely to be re-arrested.[349] "The task force concluded that 'juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system' and that '[t]ransferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence.'"[350] This finding comports with earlier studies conducted in Florida and New York.[351] The state's interest in public safety is better served by making sure all juveniles capable of reform have the opportunity to do so through rehabilitative services offered by juvenile courts. This interest is not served by using county jails and state prisons as factories turning delinquent children into criminal adults.

Ultimately, the interest of the state should be ensuring juvenile delinquents capable of rehabilitation get every opportunity to do so. Requiring mandatory fitness hearings for adult court transfers best protects this interest. Such a requirement would likely increase the state's administrative and fiscal burdens, but given the benefits of a full hearing requirement, this increase is a small price to pay.

4. The Public Interest

Finally, under the third Eldridge factor, the public interest must be considered.[352] While most people would not want to shoulder the increased cost burden of mandatory fitness hearings prior to adult court transfers, the end goal of

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[349] *Id.* at 1456–57. This is most likely because the juvenile's

> developmental stage and malleability make [him] particularly vulnerable to criminal socialization when incarcerated with adults . . . . [J]uveniles confined in adult facilities are 'especially likely to engage in violent behavior and to develop identities linked to domination and control.' While confined in adult facilities, juveniles lack models for building a positive identity, honing productive life skills, and solving problems and disputes. Rather, juveniles may spend considerable amounts of time with experienced adult offenders, who may pass along new methods and techniques related to criminal activity and the avoidance of detection . . . . To survive the violence they encounter in adult facilities, juveniles have reported that they often attempt to fit in to inmate culture. Many juveniles can only adjust to life in adult prisons or jails by 'accepting violence as a part of daily life and, thus, becoming even more violent.'

Id. at 1455–57.

[350] *Id.* at 1457.

[351] The studies "conclusively showed that, contrary to the intentions of legislators who push for transfer provisions, transferred youth, even if incarcerated for longer periods of time, display a significantly higher rate of recidivism in a shorter time following incarceration than similarly situated youth who were not transferred." Klein, *supra* note 45, at 403 (citing Donna M. Bishop et al., *The Transfer to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996)); *see also* Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Offenders*, in A Sourcebook: Serious, Violent, Chronic Juvenile Offenders 245 (James C. Howell et al., 1995).

[352] Matthews v. Eldridge, 424 U.S. 319, 347 (1976).

creating more productive law-abiding members of society is universally agreeable. This end goal is achievable by keeping juveniles in a juvenile court system created to rehabilitate them, not by diverting them into an adult court system that turns juveniles perfectly capable of reform into hardened criminals.

At the dawn of the twentieth century, the public desired to save the children of the United States from its callous and harsh adult criminal justice system, and to divert them into a juvenile justice system focused on rehabilitating and saving them.[353] Despite the fact that since then over-sensationalized fear has led to certain get tough policies,[354] common sense tells us that the public still has an interest in rehabilitating juveniles capable of rehabilitation, and only placing the most serious violent offenders—those incapable of rehabilitation—in the adult criminal system. As the public, and the Court, become increasingly aware of the numerous scientific studies justifying creation of the juvenile court system,[355] that interest will only continue to grow.

Conclusion

State and federal legislatures created the juvenile court system because they understood that juvenile offenders are different—they have a decreased level of criminal culpability and are much more amenable to rehabilitative services. The United States Supreme Court recently reaffirmed these understandings in *Roper*, *Graham*, *J.D.B.*, and *Miller*, with *J.D.B.* and *Miller* further adding that the unique characteristics of juvenile offenders—their immaturity, susceptibility to external influences, and transitory and unformed characters—demand increased individualized procedural protections under the United States Constitution.[356] The Court, however, has yet to correct one of the most harmful violations taking place against juveniles in jurisdictions all across the United States—the deprivation of due process of law.

In creating a court system designed exclusively for the unique developmental and cognitive characteristics of juvenile offenders with the goal of rehabilitation over punishment, society created for juveniles a liberty interest in adjudication within the juvenile court system.[357] Furthermore, this liberty interest arises out of the Constitution itself due to the increased liberty constraints and stigmatization juveniles incur when transferred into the adult court system.[358]

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[353] *See supra* Part I.A.

[354] *See supra* Part I.C.

[355] *See supra* Part II.

[356] *See supra* Part II.

[357] *See supra* Part III.B.1.

[358] *See supra* Part III.B.2.

Once we as a society categorically place a juvenile in a protected position, we cannot then rip him out of that position—causing him to suffer a grievous loss—without a hearing, without providing a meaningful opportunity to be heard, and without providing a statement of reasons.[359] We must provide all protections the Due Process Clauses of the Fifth and Fourteenth Amendments afford. Due process demands holding a full fitness hearing to determine whether the juvenile truly is beyond saving in the juvenile court system before transfer into the adult court system.[360] While requiring more fitness hearings would increase administrative and fiscal burdens on the state, such increase is necessary to protect both the juvenile's and the public's interest.[361]

The juvenile has a compelling interest in both an opportunity to rehabilitate if amenable and avoiding the devastating consequences of being cast into the adult criminal system.[362] The juvenile's personal interest aligns with the public's interests. No one would disagree that the public benefits more when juvenile delinquents are reformed and guided into law-abiding adulthood, rather than subjected to psychologically devastating adult correction centers where they will either engage in self-destruction, or become even more hardened criminals.

The juvenile court system is far from ideal. As a result of the "get tough" era, some juvenile courts are more geared towards punishment than rehabilitation.[363] Some juvenile detention facilities are so worn down, overcrowded, or poorly run, they look and feel no different than their adult counterparts. But despite these deficiencies, the purpose at the heart of the juvenile court system in our society remains rehabilitation; reaching out and intervening in the life of the juvenile before he is beyond saving.[364]

Organizations constantly engage in research to discover how juvenile courts can improve their rehabilitative services and facilities, and advocate to protect the rights of juveniles in the juvenile courts.[365] But for a juvenile transferred to the adult criminal justice system, any progress towards greater rehabilitation in the juvenile court system is nothing more than a "what could have been." If transferred under a scheme failing to provide him a fitness hearing, he has been labeled incurable without an opportunity to be heard, without a statement of reasons, without even so much as a single individual asking him, "why?"

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[359] *See supra* Parts III.B.3., III.C.

[360] *See supra* Part III.C.

[361] *See supra* Part III.C.

[362] *See supra* Part III.C.1.

[363] *See supra* Part I.C.

[364] *See, e.g.*, CAL. WELF. & INST. CODE § 202(b) (West 2013).

[365] *See, e.g.*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, (last visited May 2, 2014); COALITION FOR JUVENILE JUSTICE, http://www.juvjustice.org (last visited May 2, 2014); JUVENILE LAW CENTER, http://www.jlc.org (last visited May 2, 2014).