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Ignoring Individualism: How a Disregard for Neuroscience and Supreme Court Precedent Makes for Bad Policy in Idaho's Mandatory Juvenile Transfer Law

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IGNORING INDIVIDUALISM: HOW A DISREGARD FOR NEUROSCIENCE AND SUPREME COURT PRECEDENT MAKES FOR BAD POLICY IN IDAHO'S MANDATORY JUVENILE TRANSFER LAW

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I. INTRODUCTION

The historical relationship between juveniles and the judicial system is complex and multi-faceted. Addressing juvenile criminal offenders involves historical trends, social attitudes, biological developments, Constitutional considerations, and punishment principles. Through the discourse, a question remains as to juvenile offenders and how they differ from adult offenders. If a difference exists in the cause of crime, the influence upon action, the understanding of judicial procedure, or the ability for future improvement, then one could argue that differences must also exist in the trial and treatment of juvenile offenders. The

most difficult component is analyzing the differences and then overlaying a legislative procedure that accounts for justice in this regard.

This article evaluates the past and present factors for juveniles in the judicial system, and then considers the current Idaho legislation that mandates the transfer of juveniles into adult criminal court when they are accused of certain, enumerated crimes. Part II examines the history of juvenile courts and the transfer of offenders out of those courts. It also highlights the Supreme Court rulings for youth, the rationale and social influence in national trends, and the stance of Idaho legislation on the topic. Part III argues that Idaho's mandatory juvenile transfer laws are bad policy because they contradict the rationale of the Supreme Court and ignore recent and overwhelming scientific data on neurobiological development. This article concludes with the recommendation to eliminate the automatic transfer laws and instead impose particularized rules for procedure in which the accused juvenile is granted counsel, an ability to answer allegations, and an individualized process.

II. HISTORY OF JUVENILE COURTS

A. Origins of Juvenile Courts

A nineteenth century shift in philosophy laid the foundation for the American juvenile court system.[1] As the nation limited the scope of capital punishment, it also reconsidered whether it should treat juveniles as adults.[2] One of the first representations of this reconsideration of juvenile treatment occurred in 1824 in New York, where legislation authorized the court to move criminals into the House of Refuge if they were under the age of 16.[3] The House of Refuge was an establishment that provided structured rehabilitation for juveniles and thus an alternative to the punishment of incarceration.[4] In addition to juveniles who had committed crimes, the House of Refuge also accepted poor and unfortunate youth, and provided all with education and community through a regimented schedule.[5] As a foundation and justification for its practice, the House of Refuge and similar programs referenced *parens patriae*, a philosophy with origins in the English common law.[6] *Parens patriae* literally means "parent of his or her country" and generally refers to the capacity of the state to provide protection for individuals un-

1. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1202 (1970).

2. Lucia B. Whisenand & Edward J. McLaughlin, Completing the Cycle: Reality and the Juvenile Justice System in New York State, 47 ALB. L. REV. 1, 12 (1982).

3. *Id.* (citing Act of Mar. 29, 1824, ch. 126, [1824] N.Y. Laws 110). *See also*, B. K. PEIRCE, A HALF CENTURY WITH JUVENILE DELINQUENTS; OR THE NEW YORK HOUSE OF REFUGE AND ITS TIMES 34 (1869).

4. Fox, *supra* note 1, at 1205.

5. Clifford E. Simonsen, Juvenile Justice in America 301 (3d ed. 1991).

6. *See generally* Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L. J. 195 (1978).

able to care for themselves.[7] With beginnings in the feudal system, the doctrine frequently arose to justify the King's powers as a guardian, or his 'royal prerogative.'[8] For example, when a legally insane individual owned land, *parens patriae* allowed the King to retain control of the property to ensure security during the lunatic's life and proper transfer upon death.[9]

Similar to the King providing protection for the insane, American courts imposed a structure and rehabilitative perspective upon juveniles through institutions like the House of Refuge. The states were therefore undertaking a parental role for the protection of these delinquent youth. However, as the circumstances changed, so too did the methods to provide this protection.[10] Originally meant for minor juvenile offenders, the House of Refuge and other similar establishments began accepting more serious offenders over time.[11] With this changing dynamic, the institutions began a procedure of sending minors to work on rural farms or other labor-intensive environments until they turned 21.[12] Reformers were critical of this methodology and states sought a more effective method of providing rehabilitation for juvenile offenders without resorting to incarceration.[13]

Since the principle of *parens patriae* came to the United States as a variation of the English application, it existed as a unique right and decision of each state. After failed institutional procedures, American courts became involved in the juvenile protection scheme through legislative action.[14] In 1899, Illinois became the first state to establish a juvenile court.[15] This first court, founded in Cook County, was a result of Illinois legislation that permitted circuit court judges to hear cases involving "dependent, neglected, and delinquent" children under the age of 16.[16] The cases were heard in a specially designated courtroom called "Juvenile Court."[17] Additionally, these cases involved delinquent, de-

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7. *Parens patriae*, BLACK'S LAW DICTIONARY (9th ed. 2009).
8. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972).
9. Custer, *supra* note 6, at 196.
10. *See* Thomas J. Bernard & Megan Clouser Kurlychek, The Cycle of Juvenile Justice 65 (2d ed. 1992).
11. Fox, *supra* note 1, at 1213.
12. Barry Krisberg, The Juvenile Court: Reclaiming the Vision 3 (1988).
13. *See* BERNARD, *supra* note 10, at 66.
14. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.*, Barez, 458 U.S. 592, 600 (1982).
15. *See* Barry Krisbero & James F. Austin, Reinventing Juvenile Justice 30 (1993).
16. Juvenile Court Act of 1899, 1899 Ill. Laws 131.
17. *Id.* at § 3.

pendent, and neglected children.[18] Unlike the punitive philosophy of criminal courts at the time, this Illinois juvenile court sought to investigate, diagnose, and treat the problems, instead of assigning guilt or blame.[19] Thus, the doctrine of *parens patriae* arose again – this time as a rationale for juvenile court and state intervention in cases of deviant children in the court process.[20]

Although Illinois was the first state to enact a juvenile court, it was by no means the last.[21] Within twenty-five years, every state besides Maine and Wyoming had created juvenile court systems comparable to the one in Illinois.[22] Such widespread acceptance of juvenile court reform can be attributed to several factors, such as the expansion of social work, an emergence of child psychology, and the child welfare movement, which included child labor laws and mandatory school provisions.[23] In combination, the influential factors resulted in the acceptance of the juvenile court in an overwhelming number of states by 1925.[24]

B. Evolution of Juvenile Courts

Throughout the inception of the juvenile court system, legislatures have retained the presumption that children are inherently good and thus separate from the rules of criminal procedure.[25] This presumption finds its general roots in the philosophy of *parens patriae*, which proclaims "the child who has begun to go wrong . . . is to be taken in hand by the state . . . as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention."[26] More specifically, however, the supposition of goodness and morality pervades the doctrine of rehabilitation. Broadly speaking, to *rehabilitate* is to treat a disease, requiring an individual diagnosis with the intent to return back to health.[27] Therefore, a child cannot be considered inherently evil in order for this rehabilitative juvenile court system to thrive. Simply put, "the rehabilitative purposes of the juvenile court system can be fulfilled only if the scope of the regime is limited to those offenders who are capable of re-

18. Michele Benedetto Neitz, A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court, 24 GEO. J. LEGAL ETHICS 97, 101 (2011).

19. *See* Simonsen, *supra* note 5, at 228.

20. *See* Fox, *supra* note 1, at 1193.

21. *See generally*, Barry C. Feld, The Transformation of the Juvenile Court, 75 MINN. L. REV. 691 (1991).

22. *See* Paul W. Tappan, Juvenile Delinquency 172 (1949).

23. *See* Merril Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1064 (2010); Fox, *supra* note 1, at 1230.

24. Tappan, *supra* note 22, at 172.

25. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

26. *Id.* at 107.

27. *See* Barry C. Feld, The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes, 78 J. Crim. L. & Criminology 471, 475 (1987).

habilitation."[28] As a result, the idea of crime and punishment for juveniles remained outside the early twentieth century discourse, which instead focused primarily on treatment and rehabilitation.[29] The goal of rehabilitation therefore controlled the entire juvenile process by the time this new court system had spread throughout the country.[30]

Since the goals of the juvenile system focused so significantly on the treatment of the youth, reformers and critics constantly analyzed the effects of the courts.[31] Similar to the reform movement prior to juvenile courts, changing circumstances and undesirable realities encouraged a further evolution in the juvenile system through the middle of the twentieth century. One influential factor was state governments and their increasing control over organizations.[32] After earlier failures of the eighteenth century rehabilitation institutions, states became more involved in moving criminal children into private schools and organizations.[33] This transition rendered aspects of the juvenile court system irrelevant, insofar as the state was able to directly provide rehabilitation services.[34] Additionally, industrialization and urbanization limited the role of the juvenile court to place delinquent children in family or foster homes.[35] Even more, the negative realities of some juvenile housing complexes again encouraged a change in the court system. Critics discovered that some housing facilities had become less of a home for juveniles and more of a cellblock, with guards and isolation rooms.[36] From all these factors, criticism mounted against the initial juvenile justice system, which had often limited constitutional rights in favor of a state-controlled rehabilitation.[37]

In addition to the circumstantial and sociological changes that produced criticism of the juvenile court system, many critics also struck at the heart of the system – the rehabilitation doctrine. One emerging school of thought challenged the perception that children were inherently good.[38] Similarly, the idea that someone could eliminate or cure youth

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28. Directors of The Columbia Law Review Association, Inc., *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 283 (1967) [hereinafter Rights and Rehabilitation].

29. *See* Mack, *supra* note 25, at 107; Application of Gault, 387 U.S. 1, 15–16 (1967).

30. *Rights and Rehabilitation*, *supra* note 28, at 282.

31. *See generally* Helen Leland Witmer & Edith Tufts, The Effectiveness of Delinquency Prevention Programs (1954).

32. *Id.* at 34–36.

33. *Id.* at 35–36.

34. *Id.* at 36.

35. Fox, *supra* note 1, at 1231.

36. Albert Deutsch, Our Rejected Children 15 (1950).

37. *See, e.g.,* Witmer & Tufts, *supra* note 31, at 3.

38. Fox, *supra* note 1, at 1233.

delinquency was diminishing.[39] The population of juveniles was increasing.[40] Juvenile crime was reaching an exceptionally high level.[41] And scholarly investigation into the situation revealed that procedural inadequacies perpetuated the problem.[42] The practical pressures of the court system and the statistics to encourage change resulted in another wave of reconsideration about the juvenile court system.

C. Supreme Court Rulings

As a consequence of the changing mid-twentieth century perceptions, juvenile courts incorporated more formal procedures. Although many issues existed, the judiciary narrowed its focus to the rights of juveniles and protective judicial procedures. Since *parens patriae* claimed to provide such individualized and distinct treatment for the youth, it also consistently deprived the equivalent of due process protections in the Constitution.[43] The underlying rationale for early due process deprivation was that these rights "would only hinder the court in its benevolent relationship to the child and hinder the child in accepting the treatment to be provided."[44] Procedural safeguards and constitutional guarantees were therefore considered unnecessary before the judicial revolution of the mid-twentieth century.[45] Afterwards, juveniles received many Constitutional rights that they previously had not been afforded, particularly with respect to the Due Process Clause of the Fourteenth Amendment.

i. The Early Supreme Court Ruling

The first significant Supreme Court case involving a juvenile was *Haley v. Ohio*.[46] Although this case occurred twenty years before the influential 1960s, it marked a transition in the way the Supreme Court addressed the Constitutional rights of a juvenile. In 1948, a 15-year-old African-American was arrested as a suspect in a convenience store robbery and shooting.[47] Although parties generally disagreed about the facts, undisputed testimony revealed that the juvenile was arrested around midnight, questioned without counsel for five hours, shown alleged confessions from two other youth, and then coerced into a confes-

39. Fox, *supra* note 1, at 1233.

40. *See* Laura B. Shrestha & Elayne J. Heisler, *The Changing Demographic Profile of the United States*, CONGRESSIONAL RESEARCH SERVICE 15 (Mar. 31, 2011), https://www.fas.org/sgp/crs/misc/RL32701.pdf.

41. Bernard, *supra* note 10, at 4.

42. Fox, *supra* note 1, at 1233.

43. Thomas Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence 3 (Bruce Dennis Sales, 1981).

44. *Id.* at 4.

45. *Id.*

46. 332 U.S. 596 (1948).

47. *Id.* at 597.

sion.[48] Once in jail, and after his mother retained a lawyer, the accused juvenile was still not allowed any visits by counsel, family, or friends until he was formally charged three days later.[49]

The Supreme Court ruled that the Due Process Clause barred the use of a confession taken illegally from the adolescent.[50] Specifically, the Court stated, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[51] This ruling in *Haley v. Ohio* is significant because it proclaims the right of all American citizens—youth and adult—to due process and fairness.[52] Significantly, this judicial application to both juvenile and adult criminals appears to contradict the original purpose of juvenile rights. Recall, the initial reform movement sought to treat young criminals differently than adults, and consequently, the entire process afforded different rules and results for a young offender.[53] Importantly, the Supreme Court in its 1948 decision recognized that such stubborn insistence on different treatment can actually restrict Constitutional rights.[54] In other words, blindly using a principle that sought to protect juveniles had resulted in a deprivation that harms these defendants in Court.

Furthermore, the Court in *Haley* demonstrated a flexible and beneficial position. On one hand, the Court ruled that "the Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."[55] On the other hand, the Court explicitly considered the accused's age, experience, and maturity when it analyzed the actions of the police officers.[56] Although twenty years before the wave of Supreme Court cases, the bench offered a glimpse into future juvenile rights and representation.

ii. Mid-Century Landmark Decisions

At the end of the 1960s, the Supreme Court addressed juvenile rights with several landmark cases. Changing social and political land-

48. *Id.* at 597–98.
49. *Id.* at 598–99.
50. *Id.* at 599–600.
51. *Id.* at 601.
52. Haley, 332 U.S. at 596; *See also* Sally T. Green, Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights, 110 PENN ST. L. REV. 233, 263–64 (2005).
53. *See supra* Part II.B.
54. *Haley*, 332 U.S. at 596.
55. *Id.* at 601.
56. *Id.* at 599–601.

scapes, as well as the aforementioned inadequacies and faults in the current juvenile system, resulted in a group of Supreme Court cases that incorporated a new interpretation and philosophy regarding children in court. The consequence was a fundamental change in how the judicial system treats juveniles accused of a crime.[57]

In many ways, this striking change reflected the Supreme Court decision in *Haley v. Ohio*, therein providing the same Constitutional rights to juveniles as the Court has afforded adults. However, equal treatment supplies not only equal Constitutional rights, but also equal judicial process and punishment. Thus, while juveniles gained Constitutional protections, they also became subject to the punitive sentencing that original juvenile reform sought to avoid.

The year 1966 marked the first time the United States Supreme Court specifically reviewed a state's statutory juvenile transfer laws.[58] In the case of *Kent v. United States*, a 14-year-old boy named Morris Kent was arrested for his involvement in several crimes, including breaking into homes and attempted theft. Two years later, an intruder entered a woman's apartment and proceeded to rape her and steal her wallet.[59] The fingerprints at the scene matched up with Kent, who was on probation at the time.[60] Police arrested Kent and brought him to the station for seven hours of interrogation, at which point he confessed to the crimes.[61] Without arraignment or other probable cause, the police held Kent in custody for a week and subjected him to juvenile court jurisdiction, according to the District of Columbia Juvenile Code Act.[62] Under this code, the juvenile court judge has the authority to waive jurisdiction of a youth if he is 16 years or older and is charged with a felony.[63] Despite the mandate to investigate and hold a hearing, the juvenile court judge ignored Kent's motion for a hearing and transferred him into adult criminal court.[64]

The Supreme Court considered the process of this D.C. juvenile court and its implications on the accused's Constitutional rights.[65] The Court held that the D.C. Juvenile Code Act required a full investigation before a waiver, and thus the juvenile court must conduct a hearing.[66] At this hearing, the accused must be given counsel, who has access to all applicable reports and records.[67] In its analysis, the Supreme Court focused on the Constitutional due process rights of the parties in juvenile

57. *See* Robert C. Trojanowicz & Merry Morash, Juvenile Delinquency: Concepts and Control 140 (3d ed. 1983).
58. Kent v. United States, 383 U.S. 541 (1966).
59. *Id.* at 543.
60. *Id.*
61. *Id.* at 544.
62. *Id.* at 544–45.
63. *Id.* at 547–48.
64. *Kent*, 383 U.S. at 548.
65. *Id.* at 551–64.
66. *Id.* at 561.
67. *Id.* at 561–62.

court. Any state's juvenile legislation, particularly with regards to the judge's discretion to waive hearings, must "satisfy the basic requirements of due process and fairness."[68] The Court emphasized the following in its holding:

> [T]here is no place in our system of law for reaching such tremendous consequences without ceremony–without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults . . . would proceed in this manner. It would be extraordinary if society's special concern over children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.[69]

In my opinion, the Court's poignant language supports extending the same due process protections that are enjoyed by adults to juveniles. Therefore, any state laws that allow transfer of juveniles to criminal court must satisfy fairness and the Constitutional rights afforded to all citizens. One particular method to satisfy this fairness and process is to consider the minor offender through eight particular factors.[70] The factors in *Kent* directed the analysis of the juvenile and imposed a framework through which the transfer procedure must pass.[71] The Court still explicitly gave deference and discretion to the juvenile courts, but did not authorize complete control, especially of the juvenile's Constitutional rights.[72]

In 1967, the Supreme Court addressed the Constitutional rights afforded to juveniles in the case *In re Gault*.[73] There, the Supreme Court ruled on the rights of a fifteen-year-old boy who was arrested for making lewd remarks to a neighbor.[74] At the time of arrest, Gerald Gault was

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68. *Id.* at 553.
69. *Id.* at 554.
70. The determinative factors are: (1) the seriousness of the offense to the community and whether protection of the community requires waiver; (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the alleged offense was against persons or property; (4) the prosecutive merit of the complaint; (5) the desirability of the trial and dispositions of the entire offense in one court when the juveniles associates in the alleged offense are adults; (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) the record and previous contacts of the juvenile with the court; (8) the prospects of adequate protection of the public and the likelihood of rehabilitation of the juvenile. *Kent*, 383 U.S. at 566–67.
71. *Id.* at 566–568.
72. *Id.* at 557.
73. *In re* Gault, 387 U.S. 1 (1967).
74. *Id.* at 4.

still subject to six months' probation.[75] Police never informed his parents of the arrest and did not properly serve a petition.[76] The first hearing had no transcript or complaint presented, and at the second hearing, Gault was sentenced to the State Industrial School.[77] To make matters worse, under the Arizona juvenile system, this convicted minor was not entitled to an appeal.[78]

At the Supreme Court, the issue was whether Gault received sufficient due process when he was adjudicated as a delinquent and sentenced to a state institution.[79] On this point, the Court noted the goal of the juvenile system is to protect the children.[80] But in this instance, the juvenile system had in effect restrained the juvenile's liberty by placing him in an industrial school. Because of this, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"[81] The Supreme Court, therefore, held that notice of the charge must be given to the child's parents before the hearing and within sufficient time.[82]

Three years after its ruling in *Gault*, the Supreme Court instilled an even higher burden of proof in juvenile cases. *In re Winship* involved a twelve-year-old boy who stole $112 from a woman's purse.[83] The original adjudication occurred in the New York Family Court, where a judge relied on New York processes instead of the Fourteenth Amendment to the U.S. Constitution.[84] Accordingly, the hearing judge utilized the "preponderance of the evidence" standard and ordered the child to eighteen months in a training school, subject to extensions until he turned eighteen years old.[85]

Upon review, the Supreme Court took issue with this distinct evidentiary standard, stating, "The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as wel to the innocent child."[86] According to the Court, individuals of all ages deserve the same Constitutional protections against accusations.[87] Since the Due Process Clause of the Constitution protects the accused to proof beyond a reasonable doubt when they are charged with violation of a criminal law, this standard applies to juveniles.[88] Thus, the Court ex-

75. *Id.*
76. *Id.* at 5.
77. *Id.* at 7.
78. *Id.* at 8.
79. *Gault*, 387 U.S. at 13.
80. *See id.* at 14–16; *see generally* Stephen A. Newman, Forward: The Past, Present, and Future of Juvenile Justice Reform in New York State, 56 N.Y.L. SCH. L. REV. 1263 (2011).
81. *Gault*, 387 U.S. at 27–28.
82. *Id.* at 31–34.
83. *In re* Winship, 397 U.S. 358, 360 (1970).
84. *Id.*
85. *Id.*
86. *Id.* at 365.
87. *Id.*
88. *Id.*

panded upon the ruling in *Gault* and held that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are . . . notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."[89]

In accounting for the insufficiencies of juvenile court standards, the Supreme Court, in the middle of the twentieth century, granted Constitutional due process procedures for all accused members of society. Again, this apparent triumph in rights and process also embodied a new perspective regarding adolescent criminals. These Constitutional protections afforded juveniles with rights and responsibilities. As a result, the trend following *Winship* involved transferring juveniles to criminal court.

iii. Social Aftermath

At the very least, Supreme Court decisions expanded the criticism of juvenile courts in the 1970s. In fact, many commentators interpreted the rulings as invalidating juvenile courts and their treatment of children.[90] Socially, the population of teenagers in America increased even more, and the crime rates spiked as well.[91] Thus, the situation encouraged and simultaneously justified the practice of transferring juvenile offenders into criminal court. Criminal courts seemed to represent a solution to apparent judicial abuses from juvenile court judges.

Over time, the rhetoric also focused on the superior justiciability of criminal courts and the necessary punishment for heinous crimes. Coinciding with Supreme Court cases, the United States Federal Government committed resources to studying and understanding crime in the country. In particular, President Johnson created the Commission on Law Enforcement and the Administration of Justice in 1965.[92] The goal of the Commission was to analyze crime in America, determine a cause for rising rates, and outline a set of solutions for the issue.[93] Published

89. *Winship*, 397 U.S. at 368.

90. *See, e.g.*, Jennifer Park, Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies, 76 GEO. WASH. L. REV.786, 796–97 (2008); Barry C. Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform, 79 MINN. L. REV. 965, 1071 (1995); Barbara Margaret Farrell, Pennsylvania's Treatment of Children Who Commit Murder: Criminal Punishment Has Not Replaced Parens Patriae, 98 DICK. L. REV. 739, 751 (1994).

91. PRESTON ELROD & R. SCOTT RYDER: JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 25 (2011); *see also* Shrestha & Heisler, *supra* note 40, at 15.

92. *See* President's Comm'n on Law Enforcement and the Admin. Of Justice, Task Force Report, The Challenge of Crime in a Free Society 55–79 (1967).

93. *Id.*

in 1967, the Report concluded juvenile courts throughout the country did not satisfy the system's initial goals and aspirations.[94] In short, it stated the juvenile court system "has not succeeded significantly in rehabilitating delinquent youth . . . or in bringing justice and compassion to the child offender."[95] Again, the coinciding suggestion was a different approach to the youth. The Report determined that delinquent behavior was prevalent and widespread, especially among the juveniles of the country and their involvement in less serious offenses.[96]

In addition to the Report commissioned by the President, other politicians and researchers were simultaneously rejecting the rehabilitation model that laid the foundation to the juvenile court system. The Quakers, who were instrumental in the early rehabilitative programs, explained that "after more than a century of persistent failure, this reformist prescription is bankrupt."[97] In 1978, Senator Kennedy wrote, "[S]entencing in America today under a scheme dominated by a rehabilitative philosophy is a national scandal."[98] Even more, a famous criminal law report called for a total restructuring of the philosophical foundations of criminal punishments and procedures.[99] The critique of rehabilitation focused on the inadequacy of sentencing discretion, the function of parole, and the uses of probation, among other items.[100]

Overall, the academic and political sentiment moved away from rehabilitation and towards retribution. By the end of the 1970s, a generally pessimistic sentiment existed in the area of research and rehabilitation of juveniles. Some researchers even called it the "Nothing Works" Doctrine.[101] Between the 1970s and 1980s, states shifted their focus in juvenile law to punishment and deterrence.[102] The shift coincided with several political taskforce publications, particularly in the form of *Justice Reports*.[103] These taskforce reports generally concluded that the rehabilitative model should be abandoned, given its inconsistencies, unex-

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94. *Id.*

95. *Id.* at 80.

96. *Id.* at 55.

97. Working Party of the American Friends Service Committee, Struggle for Justice: A report on Crime and Punishment in America 8 (1971).

98. Edward M. Kennedy, *Symposium on Sentencing Part I, Introduction*, 7 HOFSTRA L. REV. 1, 1 (1978).

99. Wayne Lafave & Austin W. Scott, Handbook on Criminal Law 23 (Jesse H. Chopper et al. eds., 1972).

100. *See generally* Francis Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981).

101. *See, e.g.,* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013).

102. Barry Krisberg & James F. Austin, *Reinventing Juvenile Justice*, 23 CONTEMPORARY SOCIOLOGY 710, 710–11 (Sept. 1994).

103. *See generally* J. Feinberg, Doing And Deserving: Essays in the Theory of Responsibility (1970); R. Singer, Just Deserts: Sentencing Based On Equality And Desert (1979); Alan M. Dershowitz, Fair And Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing (1976).

pected and inhumane consequences, and exploitation.[104] Additionally, the end of the 1970s saw reformation in criminal sentencing. After initial unsuccessful attempts to pass legislation, Congress succeeded in enacting the Sentencing Reform Act in 1984.[105] Among other things, the Act combined the political rejection of the rehabilitative structure into general sentencing guidelines that judges and other judicial officials could utilize.[106] Symbolically, it was this Act that signaled the removal of individualized sentencing and hopes for rehabilitation.

D. National Juvenile Transfer Laws

The transition away from a theory and practice of rehabilitation affected the juvenile population and its position in the American court system. Due to the academic research, political discourse, new legislation, and statistical evidence, juveniles began to receive punishment for the sake of vengeance.[107] At the time, most state juvenile court legislation had mechanisms through which serious juvenile offenders could be transferred into criminal court and treated as an adult.[108] In many cases, these transfer laws had originated with the inception of the juvenile courts.[109] For instance, according to the Pennsylvania Juvenile Act that passed in 1933, an offender could be transferred into criminal court if he or she was "above the age of fourteen years" and charged with an offense that is "punishable by imprisonment in a State penitentiary."[110] In states where transfer was allowed, it often occurred without procedural formalities. However, it was precisely this issue that the Supreme Court addressed in *Kent v. United States*.[111] The 1966 ruling made clear that decisions which impair a juvenile's right to be heard in juvenile court could not occur "without ceremony."[112] Then, because of the increasing social and political pressure, more than half of the United States made

104. *See generally* J. Feinberg, Doing And Deserving: Essays in the Theory of Responsibility (1970); R. Singer, Just Deserts: Sentencing Based On Equality And Desert (1979); Alan M. Dershowitz, Fair And Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing (1976).

105. Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984).

106. *See generally id.*

107. *See* Krisberg & Austin, *supra* note 102, at 710–11.

108. Feld, *supra* note 27, at 478.

109. *Id.*

110. Act of June 2, 1933, No. 311, § 18, 1933 Pa. Laws 1441; *see also* Com. ex. rel. Freeman v. Superintendent of State Corr. Inst. at Camp Hill, 242 A.2d 903, 905 (Pa. Super. Ct. 1968).

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

112. *Id.*

it easier to transfer juveniles to criminal court by 1976.[113] These states struck a balance between constitutionality and transfer laws.[114] First and foremost, the transfer laws needed to be constitutional following the United States Supreme Court decision in *Kent*, and as a result, states decided to utilize the criteria set forth in *Kent* as their new transfer provisions.[115]

One way states have transferred a juvenile into criminal court is through statutory exclusion. With statutory exclusion—also referred to as "statutory waiver," "legislative exclusion," and "mandatory waiver"—a state statute is able to exclude particular offenses from the juvenile court's authority altogether.[116] Similar to the transfer laws, some of these statutory exclusions were in place at the inception of the juvenile court system, and thus pre-dated the *Kent* and *Gault* rulings. The aforementioned Pennsylvania Juvenile Act, for instance, contained statutory language that excluded an individual from juvenile court if he or she was charged with murder.[117] A statutory exclusion of this sort allowed juveniles to be tried in criminal court without the heightened constitutional scrutiny required by the Supreme Court. The most common method is designating the specific offenses in legislation that will exclude a juvenile from juvenile court.[118] Many states have utilized this legislative waiver, both before the 1960s Supreme Court cases and after.[119] In 1987, Professor Feld effectively described the use of these statutes in different states:

> The dates when these offense exclusions statutes were adopted are especially significant. Although the capital/life sentence exclusions have been in the statutes for more than forty years in states such as Colorado, Indiana, Louisiana, Maryland, Mississippi, and Vermont, thirteen of the present offense exclusion states have adopted or have expanded this strategy within the past fifteen years. Beginning in 1970, and in direct response to the Supreme Court's *Kent* decision, Congress excluded a catalogue of offenses from the jurisdiction of the juvenile courts of the District of Columbia. By 1975, four other states followed suit, and, by 1980, nine states excluded serious present offenses

113. *See* Krisberg & Austin, *supra* note 102, at 710–11.

114. *See* Feld, *supra* note 27, at 489–490.

115. *See, e.g.*, Feld, *supra* note 27, at 490.

116. *See* Rachel Jacobs, *Waving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J. L. & GENDER 989, 1000–01 (2013).

117. Act of June 2, 1933, *supra* note 110.

118. *See, e.g.*, Feld, *supra* note 27, at 508–10 (providing the examples of California, Delaware, Georgia, Indiana, Kentucky, Maine, Maryland, New Mexico, Virginia, and Washington as states with specific present offense waiver statutes. These states are in addition to the nearly 20 states that list present offenses or prior records to be considered for waiver.).

119. *Id.* at 505–07 (Table listing the year each waiver statute was added to state legislation).

> from juvenile court jurisdiction. The remaining states have acted similarly since 1980.[120]

As expected, even more changes have occurred since the publication of Professor Feld's report. In many cases, states have added additional categories to their legislative waiver statutes.[121] The trend, then, is to designate certain serious offenses in the state statute in order to try juveniles in criminal court.

Not every juvenile transfer into criminal court is the result of legislative waiver statutes. A waiver can also occur through the prosecutor's discretion, in what is called "prosecutorial waiver," "concurrent jurisdiction," or "direct file."[122] In such a case, prosecutors decide whether a case is filed in juvenile court or adult criminal court.[123] This prosecutorial transfer method arose most commonly after the Supreme Court cases of the 1960s and 1970s, and employed the notion that concurrent jurisdiction was available to the juvenile and criminal courts.[124] In this way, it is the prosecutor's decision to determine the forum, and this choice cannot be appealed.[125] Although it does not compel the transfer of the juvenile like the legislative waiver, the prosecutorial transfer method has received significant criticism due to the ease of transfer, the dependence upon the prosecutor, and the potential for abuse.[126] In other words, prosecutorial waiver "raises concerns of arbitrariness, since it is not always subject to judicial review . . . [and] the decision frequently depends on the philosophy of the prosecutor and judge, the political climate, the publicity surrounding the offenses, and the make-up of the

120. Feld, *supra* note 27, at 517.

121. *See, e.g.*, Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 655 n.134 (1994) (noting examples of expansion in the use of legislative waiver in Oklahoma, Rhode Island, Hawaii, Montana, and New Jersey in the years between 1987 and 1994).

122. *See generally* Lisa A. Cintron, Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court, 90 NW. U. L. REV. 1254 (1996).

123. *See* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver,* 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284–85 (1991).

124. *Id*. at 285.

125. Dean J. Champion & G. Larry Mays, Transferring Juveniles to Criminal Courts: Trends and Implications for Criminal Justice 72 (1991).

126. *See, e.g.*, Julie B. Falis, Statutory Exclusion—When the Prosecutor Becomes the Abuser, 32 SUFFOLK U. L. REV. 81, 94 (1998); Robert O. Dawson, An Empirical Study of Kent Style Juvenile Transfers to Criminal Court, 23 ST. MARY'S L.J. 975, 1001 (1992); Deborah L. Johnson, Debra E. Banister, & Michelle L. Alm, The Violent Youth Offender and Juvenile Transfer to the Adult Criminal Court, 2004 J. INST. JUST. INT'L. STUD. 84, 89 (2004).

community."[127] Despite its drawbacks, prosecutorial waiver usage has increased more than four times since the 1970s.[128]

A third method to transfer an individual out of juvenile court and into criminal court is through judicial waiver. As the centerpiece of the decision in *Kent*, judicial waiver is the original transfer methodology in which a judge determines whether a juvenile ought to be transferred and tried in criminal court.[129] Although judges often exercise their discretion according to the applicable state statute and the elements from *Kent*,[130] the final decision is theirs alone to make. On one hand, this process allows for an individualized determination based on a variety of factors.[131] However, on the other hand, the judge often incorporates the prosecutor's suggestions to simplify the procedure, is frequently influenced by the juvenile's race, and typically makes inconsistent rulings.[132] Nevertheless, all but five states utilize judicial waiver in some form.[133]

E. Idaho Juvenile Transfer Laws

Originally enacted in 1977, Idaho's judicial waiver statute originated as part of the state's Youth Rehabilitation Act and allows for the transfer of juveniles into adult criminal court.[134] The original statute permitted a waiver of the juvenile jurisdiction and the transfer to adult proceedings as long as the child was at least fourteen years of age and was "alleged to have committed an act . . . [which would be a crime if committed by an adult]."[135] Similar to other states at the time, the legislation lists many of the factors from the *Kent* Supreme Court case[136] as a way to identify the issues when determining whether to waive the juvenile court's jurisdiction.[137] Then, in 1981, Idaho added a legislative

127. Chelsea Dunn, Condemning Our Youth to Lives as Criminals: Incarcerating Children as Adults, 11 RICH. J.L. & PUB. INT. 30, 37–38 (2008).

128. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 108 (2000).

129. *See* Kent v. United States, 383 U.S. 541, 554 (1966); Dunn, *supra* note 127, at 36–37; *see generally* Dawson, *supra* note 126.

130. *See Kent*, 383 U.S. at 566–67; *see supra* note 70 (listing the 8 determinative factors).

131. Daniel M. Vannella, Let the Jury do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings, 48 WM. & MARY L. REV. 723, 740 (2006).

132. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 704–05 (1991).

133. The five states that do not have statutes allowing judicial waiver are Louisiana, Massachusetts, Nebraska, New York, New Mexico. *See* Vannella, *supra* note 131, at 739.

134. *See* IDAHO CODE § 16-1806 (2016) (amended and redesignated in 1995 as IDAHO CODE § 20-508 (2016)) in the section titled 'Waiver of Jurisdiction and Transfer to Other Courts.

135. IDAHO CODE § 16-1806(1)(a) (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-508(1)(a) (2016)).

136. *See supra* note 70 (listing the 8 determinative factors from *Kent*).

137. "In considering whether or not to waive juvenile court jurisdiction over the child, the juvenile court shall consider the following factors: (a) The seriousness of the offense and whether the protection of the community requires isolation of the child beyond that afforded by juvenile facilities; (b) Whether the alleged offense was committed in an aggressive,

waiver section (§ 16-1806A) to its Code to provide the definitions of violent offenses and to outline the proper proceedings against the offenders.[138] This 1981 addition conformed with the national trend to delineate the offenses that result in mandatory transfer to criminal court. The 1981 addition mandated automatic transfer of a juvenile to the adult criminal court system if he or she was charged with any one of the following five violent crimes: murder of any degree or attempted murder; robbery; rape (excluding statutory rape); mayhem; and assault or battery with the intent to commit any of the aforementioned crimes.[139]

In 1984, the Idaho legislature amended the list of violent offenses, adding "forcible sexual penetration by the use of a foreign object" and "infamous crimes against nature, committed by force or violence."[140] Also, the scope widened even further, so that all other crimes (felonies or misdemeanors) charged in the complaint will proceed as an adult in every respect.[141] The expansion continued in 1990, when the section added a controlled substance violation to the crimes delineated for mandatory transfer.[142] In this way, a juvenile caught with a controlled substance within 1,000 feet of any school, as well as any structure used for a school activity, would be transferred as a matter of law to adult criminal court.[143]

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violent, premeditated, or willful manner; (c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons; (d) The maturity of the child as determined by considerations of his home, environment, emotional attitude, and pattern of living; (e) The juvenile's record and previous history of contacts with the juvenile corrections system; (f) The likelihood that the juvenile will develop competency and life skills to become a contributing member of the community by use of facilities and resources available to the court; (g) The amount of weight to be given to each of the factors listed in subsection (8) of this section is discretionary with the court, and a determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one (1) or a combination of the factors set forth within this section, which shall be recited in the order of waiver." IDAHO CODE § 16-1806(8) (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-508(8) (2016)).

138. IDAHO CODE § 16-1806A (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-509 (2016)).

139. IDAHO CODE § 16-1806A(1)(a-g) (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-509(a–j) (2016)).

140. IDAHO CODE § 16-1806A (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-509 (2016)).

141. *Id.*

142. *Id.*

143. "A violation of the provisions of section 37-2732(a)(1)(A)(B) or (C), Idaho Code, when the violation occurred on or within one thousand (1,000) feet of the property of any public or private primary or secondary school, or in those portions of any building, park, stadium or other structure or grounds which were, at the time of the violation, being used for an activity sponsored by or through such a school." IDAHO CODE § 16-1806A(1)(h) (2016) (amended and resdesignated in 1995 as IDAHO CODE § 20-509(1)(i) (2016)).

Consequently, Idaho legislation provides a variety of methods in which a young offender can be transferred out of juvenile court. If a specified crime has allegedly been committed, a fourteen-year-old will automatically waive his or her right to participate in juvenile court due to Idaho's statute.[144] Even more, after any criminal act by a minor of any age, a judge or prosecutor can make a motion to transfer the juvenile into criminal court system.[145] The number and scope of offenses in the mandatory waiver statute, as well as the addition of a judicial waiver option that applies to any crime, makes Idaho's juvenile transfer laws some of the most extensive in the United States. Although the average national transfer age is at least sixteen years old, Idaho uses one of the youngest mandatory ages in the country, and allows for even younger upon hearing.[146] Even the original list of violent offenses, in 1981, contained more offenses than the majority of other states.[147] Idaho may not have the absolute youngest age for automatic waiver or the longest list of statutory offenses, but the combination of quantity and character of the transfer statutes allows for an atmosphere in Idaho that frequently tries juveniles as adults in the state's criminal courts.

Idaho's automatic transfer rule violates the specific Due Process requirements set forth in *Kent*. The Supreme Court in *Kent* clearly expressed that a court must take care to consider unique factors when it determines jurisdiction for the case and issues a sentence to a juvenile offender.[148] The *Kent* decision famously indicated the eight particular factors a court must weigh in this determination.[149] Following the judicial ruling, Idaho incorporated all these factors into its legislation in some degree, as a protective measure and to ensure the constitutionality of its statute.[150] To that extent, the Idaho legislation had successfully implemented the Supreme Court holding into its state law. However, an amendment in 1981—to automatically mandate transfer for certain violent crimes—changed Idaho's position in the matter.[151]

Since the introduction of ID Code § 16-1806A—now § 20-509—the state has abandoned the Supreme Court precedent in *Kent* and the requirement of individual consideration. The legislation allowed for exceptions to the eight specific factors and failed to mandate them in every juvenile case. Instead of a procedural requirement, the consideration of such factors now only applies to specific crimes and specific hearings.[152] However, if the prosecution alleges murder, robbery, rape, mayhem, as-

144. *See* IDAHO CODE § 20-509 (2016).
145. *Id.*
146. Feld, *supra* note 27, at 512–13.
147. *Id.*
148. Kent v. United States, 383 U.S. 541, 543 (1966).
149. *See* Feld, *supra* note 132, at 704–05.
150. IDAHO CODE § 16-1806(8) (2016) (amended and redesignated in 1995 as IDAHO CODE §20-509 (2016)).
151. *See supra* note 143.
152. IDAHO CODE § 20-509 (2016).

sault, forcible sexual penetration, or a controlled substance violation near a school, then the juvenile court automatically waives its jurisdiction without utilizing the precise factors from *Kent*.[153] Thus, by automatically transferring a juvenile into criminal court and trying him or her as an adult, Idaho courts fail to consider the age, maturity, level of culpability, and potential for rehabilitation.

Kent held that a proceeding must provide a hearing, effective counsel, and legitimate reasons before waiving the juvenile court jurisdiction and trying a youth in an adult criminal court.[154] The Court sought to protect juveniles from thoughtless mandates and automation, and thus prioritized the hearings in which juvenile offenders receive individual consideration.[155] The holding required that a full investigation and hearing occur before the transfer, since the move into adult criminal court is of consequence in itself.

Idaho's mandatory transfer statute is contradictory to the holding and reasoning in *Kent*. Although the *Kent* factors apply in some instances in Idaho, they are ignored for many circumstances, solely due to the crime committed.[156] As a consequence of specific enumerated crimes, Idaho's youths are automatically and irreversibly move into criminal court for adult criminal sentencing, without the required hearing that considers culpability and amenability to rehabilitation.[157] Idaho juvenile courts release their jurisdiction according to the charged offenses and without a hearing. Since *Kent* found a violation of due process when the D.C. juvenile court failed to hold a hearing or investigate allegations for a fourteen-year-old, Idaho's statute is a Constitutional violation because it allows for automatic transfers based only on the alleged offense.[158] In the event that the alleged crime is one enumerated in ID Code § 20-509, the juvenile's fate is determined.[159] Thus, insofar as *Kent* requires a hearing, counsel, and legitimate due process, the Idaho transfer rules violate the Supreme Court precedent.[160]

F. Recent Supreme Court Rulings on Juveniles in Criminal Courts

While state legislatures passed laws concerning juvenile rights and their position in the court system, the United States Supreme Court also

153. *Id.* at § 20-509(1).
154. Kent v. United States, 383 U.S. 541, 554 (1966).
155. *Id.* at 553.
156. IDAHO CODE § 20-509(1) (2016).
157. *See Kent*, 383 U.S. at 567.
158. *See id.*
159. IDAHO CODE § 20-509(1) (2016).
160. *See Kent*, 383 U.S. at 567.

addressed the issue.[161] As a result of state legislation and juvenile transfer laws, more severe sentences were imposed upon youth who were tried as adults, without the sentencing limits or protections that often exist in juvenile court.[162] State courts penalized violent offenders as though they were competent adults, and issued sentences accordingly.[163] Within the last ten years, the Supreme Court decided three cases concerning juveniles and their position within the criminal court system.[164] The rulings have resounding national consequences with regard to juveniles, as well as psychological, social, and scientific conclusions about mental and physical capacity.

i. New Rulings Uphold Juvenile Rights and Issue Protections for Minors

As more juveniles were more frequently tried in the adult criminal court system, the Supreme Court initially had a difficult time deciding the constitutionality of extended sentences. One major ruling came in 1988, when the Court prohibited the execution of any criminals under sixteen years of age, even if they committed violent crimes.[165] In its ruling, the Court reasoned that "the potential deterrent value of the death sentence is insignificant . . . ."[166] However, it took only one year for the discourse surrounding capital punishment and its effectiveness to reverse course. In *Stanford v. Kentucky*, the Supreme Court found that an individual who murders at the age of sixteen can be punished by death, and such a punishment "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."[167] The Court found evidence for its opinion in historical and societal consensus.[168]

Like a pendulum, this attitude and social acceptance used in *Stanford* inverted by 2005, when the Supreme Court overruled itself once again. That year, in *Roper v. Simmons*, the Court distinctly abrogated the ruling in *Stanford* and held that the Eighth and Fourteenth Amendments prohibit the execution of all individuals who committed crimes before they turned eighteen.[169] In *Roper*, the seventeen-year-old defendant and his two friends planned and executed the murder of a woman.[170] After breaking and entering her home, the defendant tied up the victim and threw her off a bridge, where she drowned in the water below.[171] At trial in Missouri, the defendant was convicted of first-

165. Thompson v. Oklahoma, 487 U.S. 815, 837–38 (1988).
166. *Id.* at 837.
167. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).
168. *Id.*
169. Roper v. Simmons, 543 U.S. 551, 555 (2005).
170. *Id.* at 556.
171. *Id.* at 557.

degree murder and sentenced to death.[172] However, the Missouri Supreme Court reversed the trial court's decision, citing the Eighth Amendment.[173] In its appellate review, the United States Supreme Court again looked to social opinion and evolving standards,[174] but this time noted how the majority of states were trending away from the death penalty for juveniles.[175] The Court took particular care to dissect the Eighth Amendment and whether a penalty of death is unconstitutional for a juvenile.[176] After some analysis, the Court concluded that a juvenile should not be subject to "the most severe punishment" because juveniles are different from adults in their sense of responsibility, their vulnerability to negative influences and outside pressure, and their formation of character.[177] Furthermore, the death penalty fails to satisfy the goals of retribution or deterrence in a juvenile.[178] Consequently, the Supreme Court overruled *Stanford v. Kentucky* and held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[179]

The Supreme Court considered extended juvenile sentencing five years later, when it heard the case *Graham v. Florida*.[180] When the defendant was sixteen years old, he attempted to rob a barbeque restaurant with three other young men.[181] During the robbery attempt, the defendant's accomplice used a metal bar to strike a worker in the head.[182] Charged for armed robbery, the defendant was tried as an

172. *Id.* at 558.

173. *Id.* at 559–60.

174. The idea of evolving standards comes from an early Supreme Court case, calling for the Court to look beyond simple history when determining what is cruel and unusual punishment, and instead look to "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The Court justifies this approach by looking to relativity, and the ethical nature of the question of 'what is cruel?' To this, the Court often quotes the dissenting opinion of a 1972 case: "A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

175. *Roper*, 543 U.S. at 564 (noting that 30 states prohibit the death penalty for individuals under 18 years of age); *Id.* at 575–78 (explaining the national and international trend towards abolishing the juvenile death penalty).

176. *See id.*

177. *Id.* at 568–70.

178. *Id.* at 571.

179. *Id.* at 578.

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

181. *Id.* at 53.

182. *Id.*

adult under Florida law and received three years of probation under a plea agreement.[183] While on probation, the defendant attempted several more robberies, one of which ended in a high-speed chase and an arrest.[184] The trial court found the defendant guilty of armed burglary and attempted armed robbery, and sentenced him to the maximum sentences for each crime respectively, which was life imprisonment and fifteen years.[185] The Florida Court of Appeals affirmed the sentences, noting the violent nature of the offenses and the culpability of this seventeen-year-old.[186]

On appeal to the Supreme Court, the majority analyzed the national consensus and the legislation of the states.[187] Even though thirty-seven states allowed life sentences without parole, the Court considered the frequency of these sentences in order to determine the national trend and sentiment.[188] Through this perspective, the Court concluded that even the states that allowed juvenile life sentences were infrequently utilizing them.[189] Combining this trend with some evidence from *Roper*, the Supreme Court explained the unfortunate position of juveniles with respect to punishment and extended prison sentences. The majority opinion noted the severity of the life sentence without parole, especially for juveniles, who are less deserving of severe punishments, will spend a greater percentage of life in prison, and achieve few of the intended penological benefits.[190] For these reasons, the Court held, "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[191]

The Supreme Court's analysis in *Graham* produced a categorical rule for juveniles and the sentences they can receive. Although the sentence in question did not involve the death penalty, it was extreme enough to warrant a complete analysis as to the position of juveniles and the effectiveness of punishment. As a result, the Court weighed the constitutionality of the life sentence without the possibility of parole in a manner that incorporated scientific characteristics and the components of the Eighth Amendment. The implication of *Graham*, then, is seen on the entire practice of sentencing juveniles, and contributes to a universal effect.[192] Consequently, the Supreme Court was willing to hear and rule upon a similar case two years later in *Miller v. Alabama*.[193]

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183. *Id.* at 54.
184. *Id.* at 54–55.
185. *Id.* at 57.
186. *Graham*, 560 U.S. at 58.
187. *Id.* at 62.
188. *Id.*
189. *Id.*
190. *See id.* at 68–72.
191. *Id.* at 82.
192. *See Graham*, 560 U.S. at 61–62. The alternative (and one that is much more common) is a challenge to the defendant's own sentence in particular. To this effect, the Court goes to length to distinguish the defendant's case from other seemingly similar issues: "The present case involves an issue the Court has not considered previously: a categorical

In *Miller*, the Supreme Court considered two cases that involved juveniles convicted of murder at the age of fourteen.[194] Both young men were sentenced at the lower courts to life imprisonment without the opportunity of parole.[195] One case, *Miller v. State*, involved a juvenile named Evan Miller who attacked his mother's drug dealer with a baseball bat.[196] In order to hide evidence of the crime, Miller and his friend set fire to the drug dealer's trailer, resulting in his death.[197] The state charged the juvenile with murder in the course of arson, which holds a mandatory sentence of life without parole.[198] The companion case to *Miller* was *Jackson v. Norris*.[199] There, the defendant named Kuntrell Jackson waited outside while his two friends used a shotgun to rob a video store.[200] When the shop owner refused and threatened to call the police, one friend shot and killed him.[201] Through the Arkansas statute,[202] the state prosecuted Jackson as an adult, and charged him with a capital felony murder and aggravated robbery. Like Miller, Jackson was sentenced to life in jail without parole, and the United States Supreme Court granted the petition for certiorari.[203]

In the *Miller* opinion, the Court concluded that the respective states' mandatory prison sentences were unconstitutional. In both cases, the laws "mandated that each juvenile die in prison even if a judge or jury thought that his youth and its attendant characteristics, along with nature of his crime" demanded a lesser sentence.[204] The Court held that the sentences of life without the possibility of parole for juveniles were unconstitutional for two particular reasons. Firstly, the Supreme Court had previously barred any capital punishment or life without parole

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challenge to a term-of-years sentence. The approach in [other] cases ... is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach."

193. Miller v. Alabama, 132 S. Ct. 2455 (2012).

194. *Id.* at 2460.

195. *Id.*

196. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012).

197. *Miller*, 132 S. Ct. at 2460.

198. *Id.* at 2463; *See* ALA. CODE § 13A-5-40(a)(9) (2013); ALA. CODE § 13A-6-2(c) (2013).

199. 378 S.W.3d 103 (Ark. 2011), *rev'd*, 132 S. Ct. at 2455 (2012).

200. *Miller*, 132 S. Ct. at 2461.

201. *Id.*

202. *See* ARK. CODE ANN. § 9-27-318(c)(2) (2011).

203. *Miller*, 132 S. Ct. at 2463.

204. *Id.* at 2460.

sentences for juveniles who commited non-homicide crimes.[205] The Court intentionally imposed categorical bans on such sentencing practices in *Roper* and *Graham*, particularly because the culpability of the juveniles and the severity of the sentence were so disproportionately imbalanced.[206] Secondly, the Supreme Court had previously ruled that justices must impose sentences based on the characteristics of the accused and the details of his offense.[207] By combining precedent of previous decisions, the Court in *Miller* held that juveniles are entitled to individualized consideration before receiving a sentence of life without the possibility of parole.[208] Thus, this sentence, as well as any statute mandating such a sentence, would violate the Eighth Amendment.

ii. Objective Criteria and its Role in an Evolving Penalty Standard

Through its ruling in *Miller*, the Supreme Court endorsed the trending attitudes of the nation, conforming to what it claimed were "evolving standards of decency that mark the progress of a maturing society [standards within society]."[209] The Court determined society's standards with a consideration of objective factors such as state legislation, as well as justifications for sentencing.[210] An analysis of the legislation alone revealed that still twenty-nine states allowed the juvenile sentencing of life without parole, yet, the majority concluded that no national consensus was needed in this regard.[211]

Although the Supreme Court in *Miller* was not the first to utilize social standards and objective indicia,[212] it used this evidence to reject the harsh penalties imposed on juveniles. To decide if a punishment is cruel and unusual, and thus in violation of the Eighth Amendment, the

205. *Id.* at 2463; *see generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010).

206. *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010).

207. *See* Woodson v. North Carolina, 428 U.S. 280 (1976), where the United States Supreme Court held that the death sentence imposed by the lower court was unconstitutional insofar as it violated the 8th and 14th Amendments. The Court stated, "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304; *see also* Lockett v. Ohio, 438 U.S. 586 (1978).

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

209. *Id.* at 2463.

210. *Id.* at 2465–70.

211. *Id.* at 2471.

212. *See, e.g.,* Furman v. Georgia, 408 U.S. 238, 277 (1972) (stating, "we must make certain that the judicial determination is as objective as possible"); Weems v. United States, 217 U.S. 349, 380 (1910) (arguing that the Court must consider how different jurisdictions evaluate the mode of punishment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947) (suggesting that the Court ought to use historical and jurisdictional usage in order to determine acceptability of punishments).

Supreme Court has also considered objective factors.[213] Some of the objective factors arise in the form of statutes that are passed by the elected officials of society.[214] In this regard, the Court presumes statutes written by democratically elected representatives are constitutional.[215] The statutes containing the objective factors reflect the will of the electorate, which include citizens of the nation. But even more, the Supreme Court uses the objective factors to determine social acceptance of a punishment.[216] Justice Brennan delivered this idea of social acceptance in his concurring opinion of *Furman v. Georgia*:

> The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use.[217]

This goal to determine social acceptance through objective means also incorporates science. In fact, one of the most important objective factors is research by developmental and neurological scientists that explores psychological differences between adults and minors. The use of science emerged in *Roper*, when the Supreme Court reasoned that juveniles, by their nature, have a diminished capacity when compared to adults.[218] Thus, according to *Roper*, the scientific nature of juveniles indicates that they cannot be part of the class who deserves the death penalty.[219] The Court in *Roper* explicitly noted the scientific consensus at the time of its ruling (2005).[220] Subsequent cases continue to cite the *Roper* science as authoritative and give no reason to reconsider the issues.[221] *Roper* conclusively explains three main differences between adults and juveniles.[222] First, minors possess a "lack of maturity and underdeveloped sense of responsibility" which often results in "impetu-

213. *See* Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584, 592 (1977).

214. *See* McCleskey v. Kemp, 481 U.S. 279, 300 (1987).

215. Gregg v. Georgia, 428 U.S. 153, 175 (1976).

216. *See*, *e.g.,* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947) (suggesting that the Court ought to use historical and jurisdictional usage in order to determine acceptability of punishments).

217. *Furman*, 408 U.S. at 278–79.

218. *Roper*, 543 U.S. at 570.

219. *Id.* at 569–71.

220. *Id.*

221. *See* Graham v. Florida, 560 U.S. 48, 68 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

222. *Roper*, 543 U.S. at 569–70.

ous and ill-considered actions and decisions."[223] To support this contention, the Court cites data that adolescents disproportionately engage in reckless behavior in every regard.[224] Then, to further the point, the holding notes how every state recognizes the immaturity and irresponsibility of children by not allowing citizens under the age of eighteen to vote or serve on juries.[225] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[226] The Court supports this second factor with evidence that juveniles have less control than adults over their environment.[227] Third, "the character of a juvenile is not as well formed as that of an adult."[228] Overall, the holding in *Roper* integrated the scientific conclusions about juveniles in order to rule that even if the crime is heinous, a minor is a different type of offender than an adult. Youth are immature, irrational, irresponsible, vulnerable, and struggling to find an identity, and their actions fail to indicate depraved character. *Roper* then used all of these findings to support a holding that disallowed the execution of individuals younger than eighteen.[229]

The Supreme Court continued to address the contrasts between juveniles and adults while maintaining its focus on the differences in scientific discoveries. In *Graham*, the Court agreed with the scientific findings from *Roper* in a decision that reached beyond the issue of life sentences for non-homicidal crimes.[230] In *Graham*, the Court imposed its categorical analysis to non-homicide juvenile offenders, and relied on developments in neuroscience for support.[231] The Court used scientific studies to explain the fundamental differences between youth and adult brains, before agreeing with *Roper* that it is "misguided to equate the failings of a minor with those of an adult."[232] As evidence, the majority spoke of the early psychological and sociological theories about juvenile brain development, and then reinforced these ideas with current trends and advancements in neurological studies.[233] The Court then concluded that "parts of the brain involved in behavior continue to mature through late adolescence."[234] Also, juveniles have more of an ability to change in the future, and therefore their behavior is less of an indication of de-

223. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

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

225. *Id.*

226. *Id.*

227. *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

228. *Roper*, 543 U.S. at 570.

229. *Id.* at 572.

230. Graham v. Florida, 560 U.S. 48, 68–69 (2010).

231. *Id.* at 61–62.

232. *Id.* at 68; *Roper*, 543 U.S. at 570.

233. *Graham*, 560 U.S. at 68.

234. *Id.* at 68.

praved character.[235] The result is then that psychology and brain science proved—even in 2010 when the opinion released—"fundamental differences between juvenile and adult minds."[236]

Related to the Supreme Court's rationale, scientific data continues to support these differences between adults and juveniles. MRI brain scans show that the frontal lobe is essential for "volition, planning, selection, sequential organization, and self-monitoring of actions."[237] The frontal cortices are used during high-level reasoning, regulation of emotion, goal planning, comprehension, and impulse control.[238] However, this critically important frontal lobe is not fully developed until adulthood.[239] The normal brains of minors are in the process of developing, which impacts the neurological processes of youth.[240] Studies demonstrate the comparative effects of such underdevelopment when the same task requires adolescents to utilize different brain processes than adults.[241] Thus, with the multitude of functional brain imaging results, scientists have made the connection between the neurological and the behavioral. One expert concluded, "[t]o the extent that transformations occurring in adolescent brains contribute to the characteristic behavioral predispositions of adolescence, adolescent behavior is in part biologically determined."[242]

Neurological studies also focus on the link between adolescent behavior and its scientific explanation. For instance, studies note the biological explanation for risk-taking behavior, especially related to the changing frontal brain regions.[243] These risks are often characterized by

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235. *Id.*

236. *Id.*

237. Celine Chayer & Morris Freedman, *Frontal Lobe Functions*, 1 CURRENT NEUROLOGY & NEUROSCIENCE REP. 547, 547 (2001).

238. *See* Michael S. Gazzaniga et al., Cognitive Neuroscience 75 (2002).

239. *See*, *e.g.,* Elizabeth R. Sowell et al*., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (10th ed. 1999) (revealing the differences in maturation of brain regions from childhood to young adulthood, with use of an MRI); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–62 (10th ed. 1999) (studying matter in frontal lobe with an MRI, and finding a pre-adolescent increase in cortical gray matter with an increase in white matter during adolescence).

240. *See* Tomás Paus et al., Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study, 283 SCIENCE 1908, 1908 (1999).

241. *See* Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 198-99 (1999).

242. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 447 (2000).

243. *Id.* at 421–24; Laurence Steinberg, *Risk-Taking in Adolescence: What Changes, and Why*?, 1021 ANNALS N.Y. ACAD. SCI. 51, 57 (2006) (concluding, "[m]y argument is that

behavior-seeking stimuli that produce sensations, pleasures, and rewards.[244] Other studies connect the propensity of alcohol consumption with the underdeveloped brain.[245] Tests also determine that an adolescent brain experiences more pleasure and addictive tendencies from tobacco than an adult brain.[246] The substance influences relate to the research on forethought, which concludes that adolescents possess weak future-orientation, fail to effectively anticipate consequences, and disregard risk.[247] The massive amount of neurological and behavioral science led some researchers and scholars to reconsider free will and culpability in the criminal law context.[248] Even more modest commentators note the new and necessary role of neuroscience in determining rationality.[249]

Overall, the Supreme Court decisions in *Furman*, *Roper*, *Graham*, and then most recently in *Miller*, reveal several important principles. First, the Court is looking to objective criteria to determine the social and scientific attitudes with regard to juvenile status and punishment.[250] Second, and very much related to the new social and scientific trends, the Court is incorporating these objective items into its decision-making.[251] The majority opinions utilize data from neurological studies

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heightened risk taking during this period is likely to be normative, biologically driven, and inevitable.").

244. *See* Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010).

245. L.P. Spear, *The Adolescent Brain and the College Drinker: Biological Basis of Propensity to Use and Misuse Alcohol*, J. STUD. ON ALCOHOL & DRUGS, Supp. 14, at 71, 77 (2002) ("[T]he brain of the adolescent is unique and differs from that of younger individuals and adults in numerous regions, including stressor-sensitive, mesocorticolimbic DA projections that are critical for modulating the perceived value of reinforcing stimuli, including use of alcohol and other drugs.").

246. *See* Theodore A. Slotkin, *Nicotine and the Adolescent Brain: Insights from an Animal Model*, 24 NEUROTOXICOLOGY & TERATOLOGY 369, 369 (2002) ("Effects of nicotine on critical components of reward pathways and circuits involved in learning, memory and mood are likely to contribute to increased addictive properties and long-term behavioral problems seen in adolescent smokers."); *see also* Jennifer M. Brielmaier et al., *Immediate and Long-Term Behavioral Effects of a Single Nicotine Injection in Adolescent and Adult Rats*, 29 NEUROTOXICOLOGY & TERATOLOGY 74, 74 (2007) (finding that one dose of nicotine rewards the brain of an adolescent rat more than the brain of an adult rat).

247. *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD. DEV. 28, 29–30 (2009).

248. *See, e.g.*, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything, in Law and the Brain*, 359 PHIL. TRANS. R. SOC. LOND. B. SCI. 1775 (2004).

249. *See, e.g.*, Stephen J. Morse, *New Neuroscience, Old Problems, in Neuroscience and the Law*, 6 CEREBRUM 81 (2004); J.A. Silva, Forensic Psychiatry, Neuroscience, and the Law, 37 J. AM. ACAD. PSYCHIATRY LAW 489 (2009).

250. *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Furman v. Georgia, 408 U.S. 238, 382 (1972).

251. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Furman v. Georgia, 408 U.S. 238, 382 (1972).

and trending legislatures as evidence.[252] From these interpretations, the Supreme Court has indicated a split between youth and adults in regard to maturity, brain development, decision-making, forethought, potential for future rehabilitation, and generalized character.[253] The distinction between the two groups reinforces the need to use different processes and strategies for punishment. The recent Supreme Court rulings generally stand for the proposition that certain extreme punishments are unfit and unconstitutional for juvenile offenders. Additionally, the Court is willing to consider the juvenile offender in a unique way, suggesting explicitly and implicitly that sentencing determinations ought to be conducted on an individualized and case-by-case basis. It is from these procedures and principles that state legislation exhibits bad policy if it automatically transfers a juvenile offender into criminal court because this procedure fails to account for the neurological differences, fails to provide protections for a vulnerable subsection of criminals, and fails to fulfill any justifiable punishment goals.

III. IDAHO'S MANDATORY JUVENILE TRANSFER LAWS ARE BAD POLICY

Idaho's mandatory transfer legislation is bad policy because it violates the rulings and reasoning of the United States Supreme Court. The Supreme Court has held that youth must be analyzed uniquely, according to their situation, and with flexibility based on neurological science that demonstrates their vulnerability.[254] The Court concludes automatic transfer of juveniles violates Due Process and mandatory sentences of these offenders are unconstitutional.[255] Because of these rulings, the Idaho transfer statute is bad policy because it refuses to judge each juvenile individually, fails to address the differences between juvenile and adult brain development, and denies the offender a chance to rehabilitate.

252. *See generally* Marty Beyer, Immaturity, Culpability & Competency in Juveniles: A Case Study of 17 Cases, 15 CRIM. JUST. 27 (2000).

253. *See Graham*, 560 U.S. at 70–71 (noting juveniles make "ill-considered actions and decisions" and "are less likely to take a possible punishment into consideration when making decisions.").

254. *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

255. *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

A. Idaho's Mandatory Juvenile Transfer Laws Violate Supreme Court Rulings

The Supreme Court has considered and decided upon the sentencing of juveniles. As previously mentioned, three Supreme Court cases highlighted the imposition of serious sentences upon juvenile offenders, and restricted the gravity of the judicial decisions. *Roper* ruled that a court violates the Eighth Amendment if it imposes the death sentence on a minor.[256] *Graham* then ruled that it is unconstitutional to impose a life sentence upon a juvenile without the opportunity for parole for non-homicide crimes.[257] Finally, and most recently, *Miller* held that a mandatory life sentence without the possibility for parole violates the Eighth Amendment if it is imposed upon a minor.[258] In each Supreme Court case, the majority opinion took issue with extreme penalties imposed upon minors.[259] However, under the present Idaho transfer statute, there is no protection in place that avoids such penalties. In particular, an Appendix in *Graham* highlighted Idaho Code § 20-509 as a piece of legislation that allows for life sentences without parole for non-homicide juvenile offenders.[260] Without saying more, the Court demonstrated that its ruling invalidated the current Idaho legislation, insofar as the statute allows for precisely the sentence that the Court found to violate the Eighth Amendment.[261]

The Idaho Code is structured to provide several apparent safeguards in the juvenile transfer process. One such safeguard is the age listed in the juvenile waiver statute, Idaho Code § 20-508. There, it explicitly states that fourteen is the lowest threshold for an offender who is alleged to have committed any act that "would be a crime if committed by an adult."[262] However, in its current form, this age threshold is simply one of four ways in which a minor can be transferred into criminal court. Surprisingly, what appears to be an age requirement is instead a variation on an otherwise unrestrictive statute. The statutory language allows the juvenile court to waive jurisdiction of a minor if he or she is "alleged to have committed any of the crimes enumerated in section 20-509, Idaho Code; *or* . . . alleged to have committed an act other than those enumerated in section 20-509, Idaho Code after the child became fourteen years of age which would be a crime if committed by an adult."[263] Thus, the minimum age requirement in Idaho applies only to

256. *See Roper*, 543 U.S. at 551.
257. *See Graham*, 560 U.S. at 80.
258. *See Miller*, 132 S. Ct. at 2455.
259. *See generally id.*; *Graham*, 560 U.S. at 80; *Roper*, 543 U.S. at 551.
260. *Graham*, 560 U.S. at 82 ("Appendix").
261. *See id.* at 82–84 (Appendix I: Jurisdictions that permit life without parole for juvenile nonhomicide offenders).
262. IDAHO CODE § 20-508(1)(b) (2016).
263. IDAHO CODE § 20-508(1)(a)–(b) (2016) (emphasis added).

non-serious offenses, while any allegations of serious offenses proceed without restrictions.

The combination of serious offenses with the absence of age restrictions is a modern amendment in the Idaho legislation. In fact, the previous legislation (under the Idaho Code § 16-1806) allowed a court to waive jurisdiction only if the minor was at least fourteen years of age.[264] In 1995, the Idaho legislature renumbered the statute and amended the requirements for transfer.[265] Once effective on October 1,[266] Idaho allowed for the transfer of any minors, regardless of age, so long as they were charged with a serious offense.[267]

While the Supreme Court has imposed additional restrictions upon the sentencing of minors within the last twenty years, Idaho has amended its legislation to allow fewer restrictions for these determinations. The state has not incorporated the Supreme Court rulings or reasoning into its legislation, and continues to allow for the imposition of harsh sentences upon juveniles. The state of Idaho allows sentences without the possibility of parole.[268] Idaho also allows for the infliction of the death penalty upon its citizens.[269] Without explicit language in its statutes, Idaho's present legislation allows these extreme sentences for minors tried in criminal court.

Although the Idaho adult criminal court system is unlikely to contradict the Supreme Court by sentencing a juvenile to life without parole or the death penalty, the current Idaho legislation is bad policy in principle. The Supreme Court suggests in its recent rulings that a state ought to provide protections for its juvenile offenders. The rationale for this protection argument comes from the differences between juvenile and adult offenders. The statutes in Missouri (where *Roper* originated), Florida (where *Graham* originated), Arkansas, and Alabama (where *Miller* cases originated) all lacked protections for minor offenders.[270] The respective state statutes did not proactively and explicitly sentence juveniles to death or life without the possibility for parole. The statutes instead lacked any meaningful protective provisions.

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264. *See* IDAHO CODE § 16-1806 (1994) (current version at IDAHO CODE § 20-508 (2016)).

265. *See id.; see also* IDAHO CODE § 20-508 (2016).

266. 1995 Idaho Sess. Laws 106.

267. IDAHO CODE § 20-509 (2016).

268. *See id.* (explaining that a judge may alter a juveniles sentence, but providing no explicit restrictions on the sentencing otherwise).

269. *See* IDAHO CODE § 19-2705 (2016) (explaining the procedural requirements when a person is sentenced to death).

270. *See* Ioana Tchoukleva, Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama, 4 CAL. L. REV. CIR. 92, 97 (2013).

Without particular language to set age limits, require hearings, or restrict sentences on juvenile offenders, the Idaho transfer statute is no different than the invalidated statutes from Missouri, Florida, Arkansas, and Alabama. In the most crucial aspect, the statutes from all these states focused entirely on the crime committed. With a presumption that certain crimes were notably heinous or gruesome, the statutes resulted in a threshold, beyond which an offender of any age would be penalized to the maximum extent allowed by law. The supposition is therefore one where a minor can be treated as an adult in procedure and sentencing if he or she has committed an adult crime.

However, the Supreme Court invalidated these crime-based statutes precisely because they lacked consideration of the individual offender and failed to impose limitations and restrictions on the procedures and sentencing. Thus, in this way, the current Idaho transfer statute is bad policy insofar as it does not require individual consideration in every case. Although the age limitation and hearing requirement remain in one respect, these protections do not apply if a fourteen-year-old commits murder or is found with marijuana within one thousand feet of a school.[271] Although we trust the district judges in adult criminal court, it is bad policy to force a minor into a complicated system that utilizes unrestricted sentencing procedures when the juvenile court is a legitimate alternative. This is particularly troublesome due to its automatic nature. To conform with the principles and rationale of the recent Supreme Court cases, Idaho ought to consider the crime, defense, character, and potential sentence in relation to the individual juvenile offender and not simply to the alleged crime. The Idaho legislation ought to protect minors through the process by imposing restrictions on age and punishment.

B. Idaho's Legislation Ignores Scientific Information Regarding Juveniles

The recent rulings by the Supreme Court do not simply condemn harsh sentences imposed on minors. The Court also speaks of the importance in integrating objective factors into the individual analysis of an offender.[272] According to the Court, an analysis into a juvenile offender must therefore be two-fold: First, the offender should be judged under an objective array of factors and information, including but not limited to scientific tests, data, and analyses that speak to the maturity, understanding, cognitive development, and rehabilitation potential of

271. *See* IDAHO CODE § 20-509(a), (i) (2016).

272. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (explaining the importance of "objective indicia"); Graham v. Florida, 560 U.S. 48, 61 (2010) (beginning an analysis by speaking of the objective factors); Roper v. Simmons, 543 U.S. 551, 567 (2005) (explaining the role that objective indicators have played in the national consensus and thus the Eighth Amendment analysis).

the offender. Second, these objective factors ought to apply uniquely to the minor who is subject to judicial proceedings.[273]

Idaho's transfer statute fails to incorporate the neurological factors that make juveniles different than adults. By focusing only on the crime, the automatic transfer provision disregards the neurological deficiencies in minors that alter their behavior. Additionally, because the statute lacks the general protections for procedure and sentencing, there is more reason to require consideration of the psychological defenses for a minor.

Specifically, Idaho's statute is bad policy for two reasons: First, it treats a juvenile like an adult for the crime committed, even though scientific research proves that juveniles are unlike adults. Second, it does not allow for a defense in which the juvenile can express this research as to the causes, predispositions, and consequences of the crime and its punishment.

First, for all the scientific research regarding the differences in a juvenile brain, the *Roper* court narrowed the distinctions to conclude juveniles lack the maturity and responsibility of adults, make ill-considered decisions, are more vulnerable to pressure, and are more easily manipulated.[274] *Roper* and *Graham* determined the differences to be so significant that it would be wrong to equate the acts of an adult with the acts of a minor.[275] Portraying the information this way reverses the foundation of the Idaho automatic transfer statute. The Supreme Court is using neurological and behavioral studies to show extreme biological differences, then deciding that crimes of a minor must be treated differently than crimes of an adult. The Idaho legislation is using action as its foundation, so that the same heinous crimes require the same procedure and sentencing potential, for minors and adults. Idaho's position is bad policy because it fails to consider the research that undercuts the notion that 'the crimes are the same.' The Supreme Court, in focusing on the differences between underdeveloped and developed brain cognition, sought to express how in fact the crimes are not the same, even for an identical result. If a juvenile commits murder, then the biological components of that decision and action is different than if an adult commits murder. The juvenile lacks an understanding of the action, cannot comprehend the consequences, is vulnerable to the social pressure, has a tendency to take risks, and could learn from the mistake. Thus, the act of murder by a fourteen-year-old is different than murder by a thirty-

273. *See, e.g.*, *Miller*, 132 S. Ct. at 2470; *Graham*, 560 U.S. at 61; *Roper*, 543 U.S. at 567.

274. *Roper*, 543 U.S. at 569–70.

275. *Id.* at 572–73; *see also Graham*, 560 U.S. at 68–70.

four-year-old. Idaho's automatic transfer statute ignores this notion, and fails to integrate it into the current provision, which focuses on the likeness of actions and consequences.

Second, Idaho's statute is bad policy because it does not allow for a juvenile to defend his or her actions by way of these neurological differences. After the charge, there is no method through which the offender can introduce information of biological differences. The harshness of the automatic transfer is seen through this waiver of juvenile jurisdiction. Not only does the juvenile court not consider the individual offender, but there is no place for essential scientific evidence until the juvenile is in adult criminal court.

Idaho's automatic transfer statute disregards the overwhelming scientific research, as well as the Supreme Court cases that depend on these objective facts. When an individual over the age of fourteen is charged with a specific serious crime, that minor is automatically transferred into the adult criminal court system.[276] Consequently, the alleged offender is subject to the same trial procedures and sentences of adult offenders. Although one could argue that this provides additional legal and due process protection otherwise lacking in the juvenile court system, the real result is an equalization. In the Idaho system, certain offenders are necessarily treated as though they were adults because of the charge. The possible sentences raise questions about the procedure. As previously mentioned, Idaho legislation has no restrictions or safeguards to prevent harsh sentences. Even more, the equalization of certain serious juvenile offenders with their adult counterparts contradicts the Supreme Court rulings. The Supreme Court in *Roper*, *Graham*, and *Miller* focused on the differences between juveniles and adults. Scientific research has proven the differences in brain formation, cognition, and behavior. To allow for the automatic treatment of a minor as an adult is not only unconstitutional, but illogical. The Idaho transfer statute presupposes that the seriousness of a crime is indicative of the culpability of the offender. However, the underdeveloped brain in youth that encourages risky behavior and limits understanding, as well as the potential for rehabilitation and maturity, indicates precisely the opposite – seriousness of a crime fails to indicate the character and culpability of the offender, and lacks any implication into the potential for treatment and rehabilitation. In fact, to equate the crime with the adult criminal system, the Idaho automatic transfer statute supposes that the juvenile either acted like an adult or deserves punishment like an adult. The neuro-scientific research portrays a youth action as entirely different than an adult action, even if the consequence is the same. Additionally, a punishment's potential deterrent effect is lost on a minor who generally makes risky choices, does not consider future implications, and cannot comprehend potential impacts. Therefore, not only is the Idaho automatic transfer statute unconstitutional in its contradicting the recent

276. IDAHO CODE § 20-508 (2016).

Supreme Court cases, but also insofar as it ignores biological realities that make it illogical and absent of any legitimate benefit.

C. Recommendations for Change

To improve the treatment and handling of juveniles in the Idaho judicial system, I recommend that the legislation eliminate its automatic transfer laws. In their place, the Idaho legislation ought to spell out particularized procedural rules for an initial hearing in which the juvenile is granted counsel, an ability to answer allegations, and an individualized process. Protective safeguards ought to be instituted regarding the age and competency of the minor offender. Finally, the judge for the initial hearing ought to have experience with juveniles and incorporate suggestions as to the proper treatment of the offenders.

Holding a mandatory hearing is beneficial to the juvenile offenders because it provides a structure for proper due process protections. The hearing also enables a reflection as to the character of the offender and his or her individualized position. Considering the individual prior to a transfer embodies the reasoning of the Supreme Court insofar as it treats adults and juveniles differently. Juvenile offenders should not be subject to extreme sentences, and after the Supreme Court rulings in *Roper*, *Graham*, and *Miller*, imposition of such sentences would be unconstitutional as a violation of the Eighth Amendment. Idaho should explicitly delineate these sentence limitations in its legislation. The effect would be two-fold: First, it would eliminate any temptation of judges in adult criminal court to equate the crime directly with the sentence. Second, it would highlight the distinct treatment of young offenders and represent an act of structured mercy and practicality.

The elimination of automatic transfer does not rule out any and all potential transfers. In fact, if Idaho finds it necessary to proceed against a juvenile in adult criminal court, it could still allow for this option. Most concerning is in the automation of the process. A cost-benefit analysis can assist in this matter—the benefits of efficiency and ease of transfer do not outweigh the potential cruel treatment, imposition of extreme sentences, neglect for neuroscience, and requirement for differentiation. The automatic transfer also cannot provide a noticeably superior process than non-automatic transfer. Thus, the consequence of automatic transfer does not outweigh the detrimental effects—and especially, the potential effects—of such a policy.

Conversely, a hearing requirement would impose a predictable and structured procedure for juvenile offenders. An argument can be made that mandatory and automatic consequences for specified crimes provide the most predictability. Broadly speaking, however, the automation for only several enumerated offenses produces a variation in responses.

Furthermore, the evidence to support each allegation is likely to vary, and therefore qualifies the automation on the subjective decision of the prosecuting attorney. Additionally, when the Supreme Court sought legitimacy and predictability in the case of the death penalty, it explicitly barred the use of mandatory sentences according to delineated offenses. There, the Court demanded an individualized consideration regarding the character of the crime and of the offender. Arbitrariness is not solved with automation.

The hearing requirement and abandonment of the automatic transfer would also shift the focus of juvenile law back to rehabilitation and individualization. Idaho has the potential to progress beyond the historical failings and inadequacies of the juvenile court system. The origins of the juvenile court sought rehabilitation for young and malleable offenders. Abuse in the mid-twentieth century ushered in the role of transfer. But this protection has since overrun the solution and its proportionality. Now, similar due process violations in the mandatory transfer require a further compromise. Elimination of the automatic transfer and imposition of a hearing requirement allows for this compromise—between the offense and the offender, the past and the future, the consequence and the cause, the biology and the judiciary, the punishment and the rehabilitation. An intentional incorporation of juvenile rights and protections advances justice and sensibility, while not substantially impeding the imposition of a penalty.

IV. CONCLUSION

Idaho's automatic transfer of juvenile offenders to adult criminal court is bad policy, and fails to provide Constitutional due process protections for youth. Insofar as the Idaho legislation mandates an automatic transfer for particular crimes, it does not follow the United States Supreme Court holding and rationale in *Kent*, which requires a procedure of individualized consideration with respect to the offender and the crime. Furthermore, the automatic transfer disregards rehabilitative principles, protective safeguards, and scientific evidence that demonstrates the differences between juvenile and adult neurology and behavior. Finally, the benefits of transferring a juvenile automatically and without an individualized hearing do not outweigh the Constitutional, procedural, and philosophical costs of the procedure.

Beck Roan