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Challenging Moral and Policy Rationales for Charging Youth as Adults

Thesis by
Molly Lockwood

In Partial Fulfillment of the Requirements for the Degree
of
Bachelor of Arts



PITZER COLLEGE
Claremont, California
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submitted to
Professor Gregory Antill
and
Professor Rachel VanSickle-Ward

This thesis is dedicated to my heroes at the Public Defender Service for the District of Columbia.

ABSTRACT

Does the practice of charging juveniles as adults serve the retributive and consequentialist goals of criminal justice policy? Proponents of limiting juvenile court jurisdiction argue that the rehabilitation-oriented remedies available therein are neither sufficient to hold adolescents accountable for wrongdoing, nor strong enough to deter future youth crime. The first chapter of this thesis examines the forward and backward looking premises underlying juvenile transfer to adult criminal court. I find that transfer policies are inconsistent with dominant theories of responsibility and punishment as applied to juveniles. I argue in Chapter One that transfer produces undesirable outcomes with respect to the youth it impacts—who are less blameworthy and more amenable to reform compared with adults—and also with respect to society as a whole. Chapter Two turns to an analysis of case law challenging transfer policies, and finds that legislative pathways to reform are more likely to be effective than court-based challenges. I conclude that voters and policymakers must take action to correct the failed policy of charging youth as adults.

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INTRODUCTION

The law recognizes a distinction between juveniles and adults. Juveniles lack the responsibility¹ necessary for full legal personhood: they cannot vote, purchase alcohol, or enter into contracts. These restrictions on the civil rights and liberties of juveniles are intended to protect them from the irrational choices they might make as a result of their cognitive immaturity, and to protect society from the potential consequences of those choices. Likewise, juveniles are subject to a separate criminal code that is designed to address their special developmental status. A separate juvenile justice system that emphasizes rehabilitation over retribution is desirable and necessary on the grounds that youth are generally less responsible and more amenable to reform than adults. But not all accused youth can take advantage of the rehabilitative treatment afforded to their peers in juvenile court.

Tough-on-crime political sentiment of the 1980s and 1990s inspired a nationwide trend of limiting the jurisdiction of juvenile courts. In response to a perceived increase in dangerous youth crime, states expanded judicial, statutory, and prosecutorial mechanisms for designating juvenile offenders as legally responsible adults, thereby transferring jurisdiction of chosen cases to criminal court. Calling for the expansion of concurrent jurisdiction of juvenile and criminal courts, McCarthy noted in 1994: “Violent crime certainly seems to be increasing dramatically, especially among juveniles.”² But crime statistics were not the sole motivator of the transfer trend: “The call to reform juvenile court laws does not rest entirely on the juvenile court's

¹ I use responsibility and culpability somewhat interchangeably throughout this paper, but I think of culpability as corresponding to moral blameworthiness, and responsibility as corresponding to legal liability as it *ought* to be (recognized as existing on a spectrum). The relationship between the two concepts is an open question.

² Francis Barry McCarthy, “The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction,” *Saint Louis University Law Journal* 38, no. 3 (Spring 1994): p. 633.

inability to deal with the increased level of juvenile crime, however. Most of the proposals for change reflect a shift in philosophy concerning when offenders should be held accountable criminally for their actions.”³ Expanded transfer statutes remain in place today in many jurisdictions across the United States. An estimated 95,000 juveniles are processed through the adult criminal court system each year,⁴ and some 4,500 minors are held in adult jails and prisons at any given time.⁵

Significant protections are afforded to youth who remain in the juvenile court system to preserve their privacy and prospects for community re-entry. The revocation of these protections is life-altering for youth subjected to transfer. Once transferred to adult criminal court, youth may be subject to pretrial confinement in adult jail and, if convicted, incarceration in adult prison. Youth tried as adults lose the anonymity carried with juvenile status, and upon release must shoulder the continuing burden of a criminal conviction, which has implications for civil rights, employment, and housing far into the future.⁶ No gatekeeping process exists to ensure that direct-file transferees are capable and deserving of facing adult treatment. While certain crimes may be too serious, or offenders too dangerous, for redress in juvenile court, some 47% of youth tried as adults are charged with nonviolent crimes.⁷ Further, no checks against systemic discrimination exist within direct-file transfer provisions, placing transfer in tension with the

³ *Ibid*, p. 640.

⁴ Equal Justice Initiative, “All Children Are Children: Challenging Abusive Punishment of Juveniles,” p. 9.

⁵ The number of minors held in adult jails and prisons peaked at 13,392 in 1997 and declined to 4,535 by 2017: United States Department of Justice, “OJJDP Statistical Briefing Book: Jail inmates younger than 18, 1993-2017.”

⁶ Bishop, Donna M. et. al., “Prosecutorial Waiver: Case Study of a Questionable Reform,” *Crime and Delinquency* 35, no. 2 (April 1989): pp. 179-201

⁷ See, e.g., Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestone, “Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting,” *Juvenile Offenders and Victims: National Report Series Bulletin*, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (2011): p. 13.

fundamental principle of justice that mandates equality. The highly disproportionate number of non-white transfer cases suggests that stricter criteria for transfer eligibility is needed.⁸ Transfer policies subject vulnerable youth populations, particularly non-white and low income youth, to arbitrarily harsher treatment compared to their peers.

Thirteen jurisdictions give prosecutors the power to unilaterally and permanently strip a defendant of juvenile status by filing charges against them directly in adult criminal court.⁹ The remarkable power of prosecutors to make adults of minors demands answers to several questions: what capacities are required for adult criminal responsibility? To what extent do adolescents possess these capacities? Finally, if they do not have the requisite capacities, how should the law protect youth defendants against an unfounded adult designation? Chapter One of this thesis explores the capacities needed for adult-level culpability through the application of developmental science to moral and legal theory. I argue that adult treatment of juvenile offenders is inconsistent with dominant retributive theories of punishment, and while some older juveniles are substantially similar to rational adults, there are important consequentialist reasons for maintaining an entirely separate juvenile system. Chapter Two, guided by the question of possible legal defenses against transfer, engages a comprehensive analysis of attempts to challenge the constitutionality of direct-file transfer statutes. I find that while some important protections have been restored to youth through successful litigation, legislative reforms are needed to bring about the systemic reforms which will bring practice in closer alignment with the overarching goals and justifications of criminal process and punishment.

⁸ *Ibid*

⁹ I list these jurisdictions in section 2.2, pp. 26-27.

CHAPTER I: THEORY

I begin section one by unpacking the dominant forward and backward looking justifications for criminal punishment. I lean on Brink's theory of predominant retributivism to explain how courts should ideally weigh retributive considerations.¹⁰ Brink lays out a proportionality requirement for retributive justice, then identifies features of the criminal process that are inconsistent with this requirement. After explaining the framework, Brink proposes a solution for assessing marginal responsibility in criminal proceedings.¹¹ I evaluate the standing of adolescents within Brink's responsibility framework by applying developmental research to each of the questions the framework poses. I conclude that while not all adolescents lack the capacities for adult legal responsibility, consequentialist reasons justify the maintenance of an entirely separate system for juveniles. In exceptional cases, transfer decisions should be made by a neutral third party—not a prosecutor. Finally, I introduce the debate between developmental researchers and legal scholars which renders immaturity an unworkable courtroom defense.

1.1 Justifying Aims of Punishment

For moral and political reasons, punishment is undesirable unless necessary. Two separate overarching goals justify punishment: retribution and downstream positive social outcomes of the punitive action, such as deterring future crime. Pure retributivism in the Kantian tradition holds that punishment is the proper and necessary response to moral guilt, regardless of downstream considerations.¹² But punishing one guilty individual can have negative

¹⁰ David O. Brink is the Co-Director of the Institute for Law and Philosophy at the University of San Diego School of Law.

¹¹ Brink, David O, "Partial Responsibility and Excuse," *University of San Diego School of Law Legal Studies Research Paper Series*, no. 17-304 (2017)

¹² Kant, Immanuel. *The Metaphysics of Morals*. Translated by Mary Gregor. (Cambridge: Cambridge University Press, 1991)

consequences for others. Perhaps the family of a convicted felon suffers when the household breadwinner goes to prison, or perhaps a whole community suffers when a teenage convict commits more crimes upon release than they would have if treated appropriately in the juvenile justice system.¹³ These innocent members of society should not suffer the unintended consequences of punitive action. On the opposite end of the spectrum, utilitarians in the tradition of Bentham are purely concerned with social outcomes.¹⁴ But retributivists object that the moral scales are not adequately balanced if someone guilty of causing harm escapes sanction. Even those most sympathetic to the harmful social consequences of criminal punishment grapple with retributive instincts. Reflecting on the murder of his younger sister, renowned public defender and racial justice advocate Charles Ogletree wrote: “I wanted the satisfaction of knowing that the person responsible for her death would be brought to justice. I wanted retribution.”¹⁵

How should the two overarching goals of punishment be balanced? Courts are principally concerned with retributive considerations, while legislatures are tasked with managing the broader social impacts of criminal justice policy. Brink’s theory of predominant retributivism is representative of general retributive theories and captures existing courtroom practice, in which retributivism guides the distribution and level of punishment, while social consequences, such as community safety, are secondary considerations. Brink proposes a solution for bringing existing courtroom practices in closer alignment with the principles of retributive justice by introducing a nuanced evaluation of culpability. A basic principle of retributivism demands that retribution be

¹³ This latter example is empirically supported: recidivism rates are higher among youth punished more severely as a result of being transferred to criminal court. Thus, the inverse consequentialist argument that punishing the guilty deters future crime, at least with respect to the individual being punished, does not hold true.

¹⁴ Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. (Charlottesville, VA: InteLex Corporation, 1983).

¹⁵ Ogletree, Charles, “Beyond Justifications: Seeking Motivations to Sustain Public Defenders,” *Harvard Law Review* 106, no. 6 (April 1993): pp. 1239-1294.

proportionate to culpability (moral guilt), which exists on a spectrum—yet defendants are generally adjudicated either as fully guilty or not guilty at all. Brink argues that the law should recognize the scalar nature of culpability.¹⁶ I adopt Brink’s terminology and lean on his framework to define the gap between retributive theories of punishment and actual criminal process: namely, the missing evaluation of partial responsibility.

Brink’s framework allows for lenient treatment of marginally less culpable adolescents by introducing various thresholds of responsibility for juries and judges to take into account, but undervalues consequentialist reasons to treat even the most advanced adolescents in the juvenile system. Brink makes two important contributions: he provides a viable pathway for correcting systemic violations of the proportionality principle, and articulates a unified framework for evaluating moral and legal responsibility. Retributivism is tied directly to moral culpability, and thus fails to justify punishment if responsibility is treated as absolute. I argue that the downstream consequences of punishment, both for the individual being punished and society as a whole, are at least equally important to retributive goals—and that existing practices fail on both counts.

1.2 Justice and Retribution

A first principle of justice mandates impartial administration of criminal process and punishment, as reflected in the phrase “equal justice under law” emblazoned on the pediment of the United States Supreme Court. A second principle of justice holds that retribution must be proportionate to culpability. Excessive punishment of an individual violates the proportionality requirement of retributive justice, whereas excessive punishment of a particular group, evidenced

¹⁶ Brink 2017, pp. 39-59.

by racial disparities at every turn of the criminal system, violates equal justice. Each time a person is convicted of a crime they did not commit in violation of proportionality, or a person of color is locked up while a white person guilty of the same offense walks free in violation of impartiality, the legitimacy of the justice system is undermined. A third principle of justice not to be overlooked holds that the criminal justice system should serve the purpose of advancing societal goals, such as community safety and overall social good. The deeply subjective and human nature of the legal system means that no law and no algorithm can perfectly achieve these principles. The work of administering justice is therefore dynamic and continuous. Criminal codes and individual rulings that fall short of any of the principles of justice must be revisited and overhauled as necessary. A law that conflicts with retributive or consequentialist ideals cannot be vindicated in the name of justice if a better alternative is available, and a law that violates the equal justice principle is indefensible.

No one should be punished to the fullest extent of the law if they are only partially blameworthy—for example, if the wrongdoing was not done willingly or intentionally. Inversely, an injustice is done if the perpetrator of a crime is not held accountable to the extent that they are blameworthy. Brink's predominant retributivism holds that, *ceteris paribus*, punitive action should be proportional to desert. Desert serves as an upper limit on punishment: there may be consequentialist reasons to punish someone to a lesser or greater extent than that which desert would dictate, but excessive punishment is held to be an impermissible violation of the underlying justification for retributivism.¹⁷ Advocates of special treatment for juvenile offenders advance several arguments of this nature. For example, a judge might think it prudent to grant

¹⁷ Brink 2017, pp. 40-41.

leniency to a seventeen year old who, despite demonstrating advanced cognitive abilities suggestive of full moral and legal responsibility, is more amenable to rehabilitation than a hardened adult criminal. For this seventeen year old, performing one hundred hours of community service is a more effective treatment than spending a few months stewing in a jail cell. A judge may forgo harsh sentencing for a juvenile offender with consequentialist benefits of reform-oriented treatment in mind. However, it would be wrong to impose the harshest available punishment on a less advanced seventeen year old even if there are consequentialist reasons, such as making an example in hopes of deterring future crime, for doing so. Retributivism dominates over consequentialism in the latter example.

Before turning to the case of adolescents in particular, it will be useful to define the basic elements of retributive calculations. Three retributive considerations might bear on punishment: the act itself, the consequences of the act, and the actor's will. According to Brink, desert is a function of all three.¹⁸ By retributive principles, a crime with particularly harmful consequences warrants a punitive response towards the upper limit of remedies available in the criminal system because the moral transgression is more offensive. A cold-blooded murder, for instance, should yield a harsh sentence. But if the crime was not committed willfully, a more lenient approach is necessary. Culpability, which is dependent on the subject's will, sets the upper bounds of punishment. An agent might commit a horrible crime with bad consequences, yet not be culpable at all—and without culpability they are not eligible for punishment.

These retributive calculations are grounded in moral instincts. P.F. Strawson describes the process of moral appraisal as a natural social phenomenon by which the *reactive attitudes* of

¹⁸ Brink holds that punishment should be proportional to the harmful outcomes of the wrongdoing and badness of the act, *constrained by the agent's culpability*.

a reasonable person towards blameworthy or praiseworthy motives guide our conceptions of desert.¹⁹ Our rational and emotional responses to criminal acts shape the sanctions that we respond with. Whereas a subject acting freely out of good or ill will is the proper target of gratitude or resentment, a subject who acts either incidentally or out of incompetence pushes us to adopt an *objective* stance toward them—just as we would towards an unfortunate accident like a natural disaster. We can be upset about the act perpetrated by the latter subject (or the harm caused by the natural disaster), but cannot properly direct our resentment towards the subject herself—because her act was not motivated by ill quality of will. If adolescents are not fully competent to act in accordance with good moral judgement and engage in wrongdoing without exhibiting total “criticizable quality of will,” then we are obligated to adopt a modified attitude towards their wrongdoing—an attitude of forgiveness.²⁰

Responsibility is therefore inversely related to excuse: to the extent that a person commits an act because of duress or incompetence, they are less responsible for the act. Brink offers the example of an adolescent who committed a property crime under intense peer pressure from gang members to illustrate partial responsibility.²¹ Depending on the facts, this case could be an example of either duress or incompetence. If the subject committed the crime while held at gunpoint, they were under duress and had no reasonable opportunity to act otherwise. If the act was not thus coerced, the question becomes whether the subject at the time of the act possessed the necessary capacities to resist the directives of their associates. But what are those particular

¹⁹ Strawson, P.F. *Freedom and Resentment and Other Essays*. (Abingdon, Oxon: Routledge, 2008)

²⁰ Because culpability exists on a spectrum, motives may be only partially “criticizable,” especially in the case of adolescents. I lean on Talbert’s terminology here to evaluate the blameworthiness of motives: Talbert, Matthew, “Blame and Responsiveness to Moral Reasons: Are Psychopaths Blameworthy?” *Pacific Philosophical Quarterly* 89 (2008): 516-535.

²¹ Brink 2017, p. 40.

capacities, and how should the law evaluate to what degree a particular defendant possesses them? I take this up in the next section by adopting Brink's definition of competence and discussing the challenges of evaluating adolescent competence within existing criminal process.

1.3 Culpability and Cognitive Science

Beyond simple intent: defining adult criminal competence

In *Partial Responsibility and Excuse* (2017), Brink articulates a theory of culpability and punishment that extends beyond the specific mental elements considered in a typical legal proceeding.²² The legal standard for responsibility focuses narrowly on *actus reus* (the material facts of the case) and *mens rea* ("guilty mind"). A finding of *mens rea* requires only that a subject was capable of formulating, and did in fact formulate, intent to commit a crime. Brink begins from the premise that simple intent is only one component of culpability. Culpability in the broader sense includes intent, but goes further to encompass all of the factors we should think requisite to full moral blame. These factors include the ability to conform one's conduct to one's judgement, having a reasonable grasp on moral and legal dictates, and predicting the consequences of one's actions. A teenager may be capable of forming criminal intent and committing wrongdoing, but if they aren't equipped to fully understand the consequences of their actions as a result of unfinished cognitive development, they are arguably responsible to a lesser extent than a fully developed adult would be.

Culpability involves various capacities which children develop over time, and which some adolescents might possess to a lesser extent than the average reasonable adult. Brink places the cognitive and volitional capacities relevant for criminal responsibility under the umbrella of

²² *Ibid.*

normative competence. He defines normative competence as the ability to understand and assess reasons for acting (cognitive competence) combined with the ability to self-govern in accordance with those reasons (volitional competence).²³ In other words, a prerequisite for moral agency (and thus appraisal, whether praise or blame) is the ability to make judgements about right and wrong and to exercise the will in order to execute the rational response.²⁴

To be adjudicated normatively competent, a person must possess both cognitive and volitional capacities. A person with advanced dementia cannot be held responsible for criminal acts because, as a result of severe cognitive decline, they are unable to control their conduct. Illustrating total lack of volitional competence, a study of criminal behavior among neurodegenerative disease patients found that “[w]hile they are able to understand their actions and sometimes even able to verbalize that they were wrong, patients with [behavioral variant of frontotemporal dementia] lack the inhibitory circuitry in the orbitofrontal, anterior insular, and anterior cingulate cortex to prevent inappropriate behavior.”²⁵ The patient is competent to judge something to be wrong, but incompetent to act in conformity with that judgement. In contrast, a very young child might possess basic volitional competence, or the ability to consciously control their own actions, without yet having developed the understanding that biting one’s classmate is wrong. Cognitive competence develops through experience: the child would likely internalize moral and practical reasons not to bite through observation of their classmate’s adverse reaction

²³ Brink 2017, pp. 43-44.

²⁴ Reasons-responsiveness assumes a compatibilist response to the free will versus determinism debate: even if our actions are essentially causally determined by the laws of nature, we can still possess the sort of freedom that’s required for moral responsibility.

²⁵ Madeline Liljegren et. al., “Criminal behavior in frontotemporal dementia and Alzheimer disease,” *JAMA Neurol* 72 (2015): p. 299.

to the bite, and perhaps through serving a sentence in timeout. A partial or total lack of either cognitive or volitional capacities mitigates a subject's culpability.

Accounting for developing normative competence

Depending on age, adolescents generally do not lack normative competence altogether, nor have they fully developed their cognitive and volitional capacities as defined by Brink. A fourteen year old might understand that violence is wrong and illegal, but lack the ability to conform their conduct to that judgement because, for instance, they cannot resist negative peer influence. This form of diminished volitional competence is reflected in the Model Penal Code, which cites as excuse a "lack [of] substantial capacity...to conform [one's] conduct to the requirements of the law."²⁶ However, it's not clear that an adolescent's susceptibility to peer pressure or cognitive immaturity could rise to the legal standard of "lack of substantial capacity" in the same way a dementia patient's cognitive decline would. On the other hand, the adolescent in question might only partially understand the harm caused by violent acts because of abnormal formative circumstances (perhaps they grew up in an abusive home) that impeded their ability to grasp moral reasons. The Federal insanity test imposes the strict condition of "severe mental disease or defect" as the basis for the subject's inability to distinguish right from wrong.²⁷ The first example, in which the subject succumbs to peer pressure, illustrates an impaired or undeveloped capacity to respond to reasons, while the second, regarding childhood abuse, illustrates inability to recognize reasons in the first place. If either of these capacities are diminished, the subject is culpable to a lesser extent than a person with full normative

²⁶ Brink 2017, p. 43,

²⁷ *Ibid*, p. 43.

competence would be. But neither condition is adequately recognized by the law with respect to the marginal cases of immature developing brains.

The criminal system treats responsibility as a threshold below which one is not responsible at all (not guilty) and above which one is fully liable to punishment.²⁸ While the level punishment admits of degrees, the guilty conviction precedes any such nuanced consideration of partial responsibility. The initial charges brought by the prosecution, and eventual conviction by the judge or jury determine the sentencing bracket, leaving room for an adolescent offender to be punished more severely than they would be were earlier consideration given to culpability mitigating factors that should have kept them in juvenile court. The inconsistency between criminal responsibility as conceptually defined and as treated by the law is troubling because the retributive justification for punishment demands proportionality, and the all-or-nothing approach to criminal responsibility denies proportionality by design. Brink proposes a multi-level approach to proportional justice through the introduction of various thresholds of responsibility.²⁹ Under this system, a defendant could be adjudicated *partially* guilty on a number of grounds, making them eligible for more lenient punishment depending on the threshold of guilt. This proposal would break apart the existing framework employed by courts in a way that more closely reflects the scalar nature of moral responsibility, thus mitigating the fatal problem of systemic over-punishment and bringing practice into closer alignment with moral and legal theory.

The developing normative competence of juveniles has not been accounted for in the design of existing criminal proceedings, nor can the problems inherent in transfer be satisfied by

²⁸ *Ibid*, p. 48.

²⁹ *Ibid*, p. 58.

Brink's multi-threshold approach. The marginal cases of Alzheimer's and dementia patients, psychopaths, and young children have been evaluated in depth, but moral theorists have often stopped short of probing the difficult marginal case of the developing brain.³⁰ Courts are likewise accustomed to dealing with cases of "insanity," for which traditional punitive responses are understood to be moot—but adolescence is not insanity. Brink addresses this lacuna in the 2004 article *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*.³¹ Brink argues that the trend to limit juvenile court jurisdiction was fatally flawed in its basis on fears about the perceived uptick of violent youth crime. In its narrow focus on criminal acts and outcomes perpetrated by youth, the reshaping of public policy neglected to account for the equally important culpability piece of the proportional punishment equation. Harsher punishment was motivated by beliefs about more widespread and offensive punishment, while the level of adolescent competence, which presumably remained constant, was ignored. Although the type of offense sets guidelines for what sort of punishment might be administered, the level of culpability functions as a constraint on the amount of punishment that is deserved under predominant retributivism.³² Drawing on developmental science and legal doctrine, Brink argues that the trends towards more punitive policies, including the expansion of transfer, were misguided given the diminished normative competence of adolescents.³³

Brink considers two possible defenses of juvenile transfer. First, proponents of transfer might argue that violent crimes are easy to recognize as wrong, meaning that adolescents are more likely to be cognitively competent in their judgements about such acts. Even an adolescent

³⁰ See, e.g., Scanlon 1998, Watson 2004, Talbert 2008, and Shoemaker 2015.

³¹ Brink, David O., "Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes," *Texas Law Review* 82, no. 6 (May 2004): 1555-1586.

³² This references my exposition of retributive calculations from earlier in this chapter: 1.2, p. 10.

³³ Brink 2004, pp. 1558-1559.

with impeded moral judgement should know that murder, for example, is wrong. But recognizing reasons against engaging in a particular act is only one piece of responsibility. According to Brink's theory of normative competence, one must also have the volitional capacity to act in accordance with those judgements—which vulnerable adolescents might substantially lack.³⁴ Brink also considers the individualized justice perspective, which holds that transfer is justified because many older adolescents are normatively competent and should be punished accordingly. Adult treatment might meet the proportionality requirement for an advanced adolescent. But actual transfer policies, Brink argues, do not track normative competence: instead, there are arbitrary age cut-offs or enumerated crimes which presumptively make a defendant eligible for transfer (or ineligible for juvenile court). Brink advocates for the preservation of a separate juvenile justice system for younger defendants, and the significant reform of transfer mechanisms in line with the goals and justifications of punishment. He concludes: “We need to bring consistency to our views about adolescents. The trend to try juveniles as adults is inconsistent with retributive, rehabilitative, and deterrent rationales for punishment and with the related rationales for having a separate system of juvenile justice in the first place.”³⁵

Criminal policy as it relates to juvenile transfer is severed from its jurisprudential grounding. As Brink has shown, the widespread limitation of juvenile court jurisdiction was based on the faulty premise that adolescents and adults are equally culpable for criminal behavior, when in fact adolescents are cognitively distinct from adults and incapable of certain adult functions required for full culpability. The retributive principle cannot be met if juveniles are arbitrarily subjected to adult treatment under transfer laws. Brink's analysis would lead to the

³⁴ *Ibid*, pp. 1576-1577.

³⁵ *Ibid*, p. 1584.

conclusion that juveniles should only be eligible for transfer upon a finding of normative competence, and that even upon transfer their level of competence should have bearing on the eventual punishment. The multi-level responsibility threshold proposal is a clever and practical way to introduce a nuanced evaluation of culpability to adult hearings in conformity with the requirements of retributive justice. But this proposal on its own would not (and was not intended to) solve systemic violations of the proportionality principle with respect to juveniles, because it would not prevent juveniles from being unfairly placed within the punitive adult system in the first place. Instead, juvenile policy should be reformed based on Brink's exposition of diminished normative competence and with the consequentialist goals of rehabilitation and re-entry at the forefront.

CHAPTER II: PRACTICE

The retributive arguments against adult punishment of juvenile offenders laid out in Chapter One have been vindicated by the Supreme Court of the United States. In the landmark case *Roper v. Simmons* (2005), the Court cited a study on developmental immaturity in support of striking down the juvenile death penalty.³⁶ The study referenced in the majority opinion identified several significant and legally relevant areas of developmental difference between children and adults.³⁷ Youth have less freedom to resist peer pressure (evidence of diminished volitional capacities), and have diminished ability to process information necessary for decision

³⁶ Steinberg, Laurence and Scott, Elizabeth, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," *American Psychologist* 58, no. 12 (2003): 1009–1018.

³⁷ In addition to the backward-looking developmental differences mentioned here, the study and the Court found that youth are more likely than adults to undergo character reform—an important forward-looking reason to pursue a rehabilitative rather than punitive response.

making and weighing of risk (as a result of unfinished cognitive development). These aspects of immaturity match the normative competence deficits described in section 1.3 which on their face justify lenient treatment of accused youth. Writing for the majority, Justice Kennedy spelled out the implications of developmental immaturity for the proportionality requirement of just punishment:

Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.³⁸

The death penalty was thus declared an unjust punishment for any juvenile in any jurisdiction based, in part, on the finding that juveniles are less culpable than adults. The Court again relied on the proportionality principle derived from the Eighth Amendment to strike down juvenile life without parole sentences in *Miller v. Alabama* (2012).

The Supreme Court's holding that "the case for retribution is not as strong with a minor as with an adult"³⁹ calls the widespread transfer of youth to adult criminal court into question, because minors are automatically eligible for adult-level retribution upon transfer. But attempts to apply this principle to transfer statutes have failed in courts based on both individual claims of immaturity and broad claims about the constitutional validity of treating juveniles as adults. Proponents of reform have been largely unsuccessful in extending the logic of *Roper* and *Miller* to less severe adult penalties for juvenile offenders. In another obstacle for reformers, procedural aspects of transfer decisions have often been ruled outside the scope of judicial review despite apparent conflicts with constitutional principles. This chapter begins with an overview of the

³⁸ *Roper v. Simmons*, 543 U.S. 551 (2005). Opinion of the Court by Justice Kennedy.

³⁹ *Ibid.*

developmental research that marks the distinction between juveniles and adults, and explains the difficulty of applying these findings to legal contexts on an individual basis. I then present a comprehensive review of cases which have sought to challenge transfer statutes on constitutional grounds, and conclude by assessing current strategies for reform based on the outcomes of those cases.

2.1 The Science-Doctrine Disconnect

Despite widespread findings that juveniles are incompetent to stand adult trial or are undeserving of punitive treatment as a result of cognitive immaturity, legal doctrine does not recognize immaturity as a compelling defense once juveniles are placed in adult court. In theory, the proportionality problems raised by Brink could be solved with an evaluation of normative competence that would determine whether a particular defendant is eligible for adult-level punishment. But I have found no evidence that such a test exists, and nothing to suggest that courts would use it to evaluate the competence of juvenile defendants if it did. Some jurisdictions afford juveniles the right to a transfer hearing, in which criteria loosely relating to normative competence are used to evaluate transfer eligibility. But in jurisdictions without such a statute, juveniles can only attempt to claim immaturity as a culpability-mitigating defense while already on trial as an adult. This section briefly summarizes the findings of developmental research, then evaluates arguments that immaturity claims based on this research are doomed to fail in court.

Cognitive science began to catch up with policy just as tough-on-crime transfer statutes were going into effect nationwide during the 1990s. Researchers studied adolescent development using emerging technology such as brain scans, and identified striking physical differences between adolescent and adult brains. The potential for applying these findings to a variety of

legal contexts seemed enormous. Interdisciplinary studies by social, behavioral, and clinical psychologists, as well as defense lawyers, prosecutors, and judges, sought to contribute important research that would shape juvenile justice policy. Adjudicative competence, defined as a defendant's ability to understand and participate in legal proceedings, was a topic of central concern in these studies. The mental capacities needed for adjudicative competence are closely related to those required for moral and ideal legal culpability (defined by Brink in terms of normative competence). A fully developed adult has reasonable capacity to weigh risks, make intertemporal decisions, and successfully govern their own conduct, in and out of the courtroom, whereas an adolescent is likely to underappreciate risk, discount long term consequences, and succumb to impulses or external influence.⁴⁰ Thus, an adolescent with diminished normative competence could be disadvantaged in both the substantive and procedural aspects of a criminal case. They may have lacked the substantial capacity to opt out of criminal behavior in the first place, making them less culpable than a reasonable adult—and for the same reasons may be less competent to stand trial than a reasonable adult.

Studies have shown that adolescents are generally ill-equipped to understand their trial rights, participate meaningfully in their own defense, and weigh plea bargains.⁴¹ For example, adolescents may be more likely to plead guilty to crimes they claim not to have committed;⁴² on the other hand, an immature defendant might insist on going to trial instead of accepting a plea bargain because they irrationally believe they will be acquitted. Adolescents do not evaluate and weigh decisions, nor do they appreciate risk, in the way a fully developed rational adult would.

⁴⁰ Steinberg and Scott 2003, p. 1012.

⁴¹ Grisso, Thomas et. al., "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," *Law and Human Behavior* 27, no. 4 (August 2003): pp. 333-363.

⁴² Helm, Rebecca K. et. al, "Limitations on the ability to negotiate justice: attorney perspectives on guilt, innocence, and legal advice in the current plea system," *Psychology, Crime & Law* 24, no. 9 (2018): p. 917.

These findings suggest that a hearing on cognitive competence should be a prerequisite for transfer. Grisso proposes age-based guidelines: exclusive jurisdiction of juvenile courts over accused youth younger than fourteen, presumptive jurisdiction over fourteen and fifteen year olds, and for older adolescents a process for arguing cognitive incompetence.⁴³ Without the opportunity to argue cognitive incompetence as a basis for ineligibility to stand adult trial, transferees in adult court have attempted to claim incompetence as a basis for acquittal or sentence mitigation. But these claims have not succeeded.

Developmental research weighs overwhelmingly in favor the argument that adult treatment of juvenile defendants is inconsistent with scientific reality, at least with respect to younger adolescents in earlier developmental stages. Yet despite the large volume of peer-reviewed studies establishing the diminished adjudicative competence of youth as a result of developmental immaturity, there is no indication of the efficacy of these findings as legal claims. Maroney finds that courts have cited this kind of research only incidentally and not as a decision-altering factor in adult trials of juvenile defendants.⁴⁴ Grisso concedes that while diminished cognitive and volitional capacities of youth may be a culpability mitigating factor generally, the science cannot support individual immaturity defenses.⁴⁵

Developmental researchers including Grisso have advocated for a hearing requirement, meaning that transfer would only be permissible upon a finding of competence to stand trial. This requirement would act as a gatekeeping mechanism to ensure that only the most advanced

⁴³ Thomas Grisso, "What We Know About Youths' Capacity as Trial Defendants," in "Youth on Trial: A Developmental Perspective on Juvenile Justice," ed. Thomas Grisso and Robert Schwartz. (Chicago: University of Chicago Press, 2000) p. 163.

⁴⁴ Maroney, Terry A., "The False Promise of Adolescent Brain Science in Juvenile Justice," *Notre Dame Law Review* 85, no. 89 (2013): pp. 89-176.

⁴⁵ Grisso, Thomas, "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases," *New England Journal on Criminal & Civil Confinement* 32, no. 3 (2006): p. 12.

juveniles are placed in adult court, and would in principle solve the problems raised by Brink.⁴⁶ But there are significant pragmatic challenges to evaluating normative competence on a case-by-case basis, whether in a transfer hearing or at sentencing. Legal scholars are cynical about the potential for developmental research to influence juvenile policy. Maroney argues that, with respect to claiming immaturity as a culpability-mitigating defense, problems of implementation cripple the argument itself. Defendants can cite generalized research about the adolescent brain, but cannot produce conclusive evidence about the immaturity of *their* brain because the test needed to do so is either nonexistent or deeply impractical. In a survey of several influential studies on adjudicative competence, Sanborn argues that studies leaned on by reformers suffer from critical methodological flaws or simply fail to answer legal questions.⁴⁷ Immaturity claims have been largely unsuccessful as support for acquittal or sentence mitigation because, for example, a person with a lesser degree of cognitive maturity can still be capable of forming the minimal intent to plan and execute a crime. Unlike insanity or self-defense claims, courts generally have not found immaturity to be a compelling excuse for wrongdoing. Other doctrinal challenges include deference to legislative guidelines on eligibility for adult trial—for example, courts will not consider immaturity of defendants accused of legislatively enumerated crimes, because the law did not make transfer contingent on maturity—and the strict standard for proportionality under the Eighth Amendment, which prohibits only the most grossly

⁴⁶ The discussion on adjudicative competence focuses narrowly on backward-looking retributivist considerations and attempts to deduce which juveniles should be eligible for adult trial. I argue on p. 8 and throughout this thesis that consequentialist goals justify the maintenance of an entirely separate juvenile system, even for the most competent adolescents.

⁴⁷ Sanborn, Joseph B. Jr., “Juveniles’ Competency to Stand Trial: Wading through the Rhetoric and the Evidence,” *Journal of Criminal Law & Criminology* 99, no. 135 (2009): pp. 135-214.

disproportionate punishment.⁴⁸ Maroney concludes that developmental science should have a limited role for legislators or other decision makers tasked with making decisions about adolescents generally.

Maroney argues that the specific legal questions raised in a criminal proceeding, particularly those bearing on a finding of *mens rea*, are not answered by science. Courts have found claims based on neuroscience to be unpersuasive because the science is not sufficiently accurate or individualized for legal purposes. General claims about the adolescent brain are not considered legally relevant to an individual evaluation of *mens rea*. “Courts generally perceive [developmental science] either as proving nothing new or as raising a challenge to the rules themselves, rather than informing an inquiry properly falling within the confines of the rules. While they sometimes are ‘troubled by’ the rules and follow them ‘reluctantly,’ courts generally do believe themselves to be bound to them.”⁴⁹ Most juveniles are capable of forming criminal intent as narrowly defined in the same way a fully developed adult would.

But as Brink establishes, *mens rea* is not a holistic account of culpability. To administer proportional justice, courts must consider not just the situational control and normative competence required for *mens rea*, but also the volitional competence required to conform one’s conduct to one’s judgements. Elements of culpability beyond simple intent should be considered prior to trial and sentencing to keep adult courts from having to address immature defendants, whose mitigated culpability they are not equipped to address. Principles of justice also require that punitive concerns are considered in conjunction with the other goals of punishment,

⁴⁸ *Roper* established that the most severe punishment is disproportionate to the wrongdoing that any juvenile is capable of, but the death penalty is cruel and unusual in a way that more routine punishments are not. The law has not established that imposing a sentence on an underage defendant that amounts to twice their lifetime is impermissible under the Eighth Amendment. See: Maroney 2009, p. 119.

⁴⁹ Maroney 2013, p. 145.

including deterrence, rehabilitation, and overall social good. Empirical evidence on carceral outcomes can supplement developmental science to shape our views about the best way to treat juvenile defendants. The gap between the theoretical basis for just punishment and the status quo can only be addressed by keeping juveniles out of adult court.

Sanborn and Maloney raise convincing doubts about the potential for reform based on individual claims of immaturity. There is no evidence that a scientific test for adjudicative competence exists—and even if there were such a test, there is nothing to suggest that courts would embrace it. Marginal competence is not a legally recognized excuse category, unlike extreme incapacity due to mental illness. This analysis suggests that a legislative intervention is called for if reforms are to be made. Certainly, to bring the juvenile justice system (and the criminal justice system more broadly) closer to the principles of justice would require expansive reforms brought about through democratic process. However, the critics' narrow focus on the limited role of developmental science in competency to stand trial and sentence mitigation leaves room for objections based on issues that arise *before* a juvenile is on trial as an adult: namely, the validity of the means by which they are placed in adult court. Giving up on the immaturity defense leaves reformers with another possible solution: challenging the constitutionality of direct-file transfer on a number of grounds.

2.2 Constitutional Challenges to Direct-File Transfer

This section reviews cases that have sought to challenge the constitutionality of direct-file transfer policies.⁵⁰ I chose this transfer mechanism as an area of focus because granting unilateral decision-making power to an interested party defies proportionality by design. Only a neutral

⁵⁰ Direct-file transfer is also known as prosecutorial discretion and/or concurrent jurisdiction.

third party (the judge) is positioned to determine the eligibility of a particular juvenile defendant for transfer. The adversarial party in a criminal proceeding is not thus positioned: just as defense counsel aims to evade punishment for their client to the greatest extent possible, prosecutors have a vested interest in bringing about the strictest penalties available under the law *without regard to a juvenile's culpability or competence*. Weighing the efficacy of direct-file policies, Kupchik writes: “[A] partial and biased party makes this transfer decision instead of the judge. This is not a criticism of prosecutors, but a compliment; to do their jobs effectively, prosecutors must be biased toward conviction and harsh penalties for those suspected of committing crimes.”⁵¹

What rights can juveniles facing direct-file transfer to adult criminal court assert? Juveniles have a right not to be excessively punished both with respect to the crime of which they are convicted (proportionality) and with respect to treatment afforded similarly situated defendants (equal protection). These principles are reflected in constitutional provisions. The Eighth Amendment prohibition on cruel and unusual punishment forbids punishment that is grossly disproportionate to the defendant's culpability. The equal protection clause of the Fourteenth Amendment holds that no discriminatory application of the law is permissible, which makes the disproportionate number of non-white transfers highly suspect. Transfer statutes may also conflict with other constitutional provisions. Due process as enshrined in the Fifth and Fourteenth Amendments may impose requirements on juvenile transfer mechanisms, such as the right to a transfer hearing or reverse transfer mechanism allowing for judicial oversight of transfer decisions. Finally, the separation of powers doctrine has been used to challenge a

⁵¹ Kupchik, Aaron. “Direct File of Youth to Criminal Court: Understanding the Practical and Theoretical Implications.” *Journal of Criminology & Public Policy* 3, no. 4 (2004): p. 647)

prosecutor's broad decision making power. Yet promising as these arguments might seem on the surface, courts have largely found these constitutional safeguards inapplicable to the particular statutes allowing for transfer of youth to adult criminal court by prosecutorial discretion.

Data and Methodology

Data from the Office of Juvenile Justice and Delinquency Prevention, a division of the United States Department of Justice, was used to identify the states which currently have direct-file transfer statutes and to review the provisions of those statutes. As of 2018, thirteen states had direct-file transfer mechanisms. The age of an accused juvenile and the type of alleged offense are relevant considerations for culpability and proportionality, so these provisions are of particular relevance. Of the direct-file transfer states, Montana set the youngest minimum age for direct-file transfer eligibility at 12, with Wyoming following at 13. The majority of direct-file transfer states set the minimum age at 14, and Colorado, Delaware, and the District of Columbia had the highest cut-off at 16. Georgia and Nebraska had no minimum age requirement.⁵² Colorado, the District of Columbia, Florida, Nebraska, and Wyoming allowed direct-file transfer for any criminal offense, while the other states specified which offenses could be charged directly in adult criminal court.⁵³

To identify cases which challenged these statutes, I searched the Westlaw Campus database for cases in each of the thirteen states containing “direct-file juvenile transfer,” “prosecutorial discretion juvenile transfer,” and “Title 16 juvenile transfer” in the body. I restricted the date range on these searches to cases from 1990 to present, capturing the current

⁵² I focused narrowly on direct-file as a transfer mechanism, but including judicial waiver and statutory exclusion, thirteen states have no minimum age for prosecuting children as adults, and children as young as eight have been subjected to this treatment.

⁵³ Department of Justice 2019, “OJJDP Statistical Briefing Book: Prosecutor discretion offense and minimum age criteria, 2018.”

wave of restrictions on juvenile court jurisdiction. Finally, I entered search modifiers to capture the constitutional questions introduced above including “due process,” “equal protection,” “cruel and unusual punishment,” and “separation of powers.” I reviewed the most-cited results for each of these queries. Then, narrowing in on equal protection, I searched for all cases that cited *State v. Mohi* (1995), a case that successfully struck down Utah’s direct-file transfer statutes on equal protection grounds. The results of these searches are reported below, prefaced by a discussion of the particular statute and law review article which motivated this inquiry.

Title 16 and the fight for equal protection of D.C. youth

In Washington, D.C., accused youth face drastically different potential carceral outcomes depending on the geographical boundaries in which they are charged. A unique feature of D.C. governance is the lack of state-level courts, making the U.S. Attorney’s Office (USAO) responsible for all criminal prosecutions. The USAO has the absolute authority to try juvenile defendants in adult criminal court under Title 16 of the District of Columbia Court Reform and Criminal Procedure Act. A separate law, the Juvenile Justice and Delinquency Prevention Act (JJDP), guarantees a transfer hearing for juvenile defendants in all other federal jurisdictions. A juvenile charged with a federal crime in nearby Maryland, or in any other federal jurisdiction, is guaranteed the opportunity to petition to remain in the juvenile system. But a juvenile charged in D.C. is at the mercy of the USAO. “This disparate treatment—providing D.C. youth with fewer trial rights than other young people under prosecution by the U.S. Attorney—has not yet been addressed by scholars or jurists,” notes Gimbel.⁵⁴ Gimbel argues that the legal foundations of

⁵⁴ Gimbel, V. Noah, “There Are No Children Here: D.C. Youth in the Criminal Justice System,” *Georgetown Law Journal* 104, no. 5 (June 2016): p. 1130.

Title 16 have crumbled since it was passed in 1970, and that the statutory scheme which insulates Title 16 from local democratic process is unconstitutional.

Under the law preceding D.C.'s Title 16, juvenile court judges had the discretion to waive jurisdiction over juvenile defendants after a “full investigation.”⁵⁵ Morris Kent, a mentally disabled sixteen-year-old defendant, was transferred to adult court without a hearing.⁵⁶ When a Superior Court judge sentenced Kent to a maximum of ninety years in prison, the decision was appealed up to the Supreme Court on the grounds that Kent was deprived of his right to a full investigation. The Court remanded the case, ruling that juvenile defendants were entitled to a hearing: “[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”⁵⁷ The right to a transfer hearing granted by the *Kent* Court was seen by the USAO as unduly burdensome, and, in keeping with the tough-on-crime political sentiment of the day, Congress was swift in their legislative response. By passing Title 16, they changed the legal definition of “child” to exclude those sixteen and older accused of enumerated crimes and remove the right to a transfer hearing.⁵⁸

In *United States v. Bland* (1972), a direct challenge to Title 16 on due process and equal protection grounds was overturned by the D.C. Court of Appeals. The majority opinion rested on presumptive legislative validity, looking to the now-defunct Federal Juvenile Delinquency Act, which granted direct-file power to prosecutors, for support of the transfer provision. *Bland* is now binding precedent, notwithstanding the fact that the legislation on which it rests has been

⁵⁵ D.C. Code § 11-914 (1961) as cited by Gimbel (2016), p. 1315, note 32

⁵⁶ See Brief for Petitioner at 11-13, *Kent*, 383 U.S. 541 (1966) as cited by Gimbel (2016), p. 1315, note 36

⁵⁷ See *Kent*, 383 U.S. at 554 as cited in Gimbel (2019), p. 1315, note 37

⁵⁸ Gimbel 2016, p. 1316

overturned and replaced with language contradicting its reasoning. Gimbel argues that this updated law passed by Congress in 1974 undermines the *Bland* decision. He points to the Senate Report on the JJDP, which enumerates the specific intent of the legislature: to restore basic constitutional protections, including the right to a hearing, to accused youth.⁵⁹ Congress declined to apply this logic to the parallel law governing D.C.'s Superior Court. By leaving Title 16 untouched, Gimbel argues, Congress created a discriminatory geographical classification which deprives D.C. youth of fundamental procedural and substantive rights.

Gimbel concludes by suggesting that a heightened rational basis judicial review of Title 16 is called for given the significance of the rights and interests at stake. If tried and sentenced in juvenile court, young defendants can be institutionalized in a rehabilitation-oriented facility only until they reach the maximum age of twenty-one. Adult criminal court, in contrast, carries no such sentencing restrictions. Minors awaiting trial in adult court are held in D.C. jail and, if convicted, incarcerated in one of many federal prisons anywhere in the United States. Title 16 bears heavily on the liberty interests of young defendants. The problem is amplified, Gimbel argues, by the disturbing evidence that transfer to adult criminal court is applied to D.C.'s Black youth at a highly disproportionate rate.⁶⁰

Gimbel's approach—identifying a specific transfer statute that is inconsistent with legislative intent—served as a model for my inquiry into direct-file transfer. The challenges to Title 16 carried out in *Kent* and *Morris* failed on the grounds that Sanborn and Maloney identified as problematic (legislative deference and practical challenges to individual competency evaluations), but could succeed on the novel claim that Congress created an

⁵⁹ *Ibid*, p. 1325

⁶⁰ *Ibid*, p. 1342

arbitrary geographical classification when they imposed Title 16 on only D.C. citizens. Instead of attempting to derive the right to a transfer hearing based on procedural fairness, petitioners can look to substantive provisions that stand in conflict with transfer statutes: most compellingly, equal protection of the law. Title 16 is a unique statute because the same legislative body imposed two different standards and procedures for juvenile defendants under their jurisdiction, creating a clear-cut equal protection issue. Unlike the District of Columbia, states set their own criminal justice policies and may be more uniform in the creation and implementation of their laws. However, legislative intent articulated in one area of juvenile justice policy or in constitutional principles could conflict with a particular feature of direct-file transfer statutes, making them eligible for judicial review.

Beyond D.C.: challenging transfer state-by-state

In *State v. Mohi* (1995), a defendant just four months short of eighteen challenged the direct-file statute by which they were charged on the grounds that it violated uniform operation of laws principles enshrined in the state constitution. On appeal, the Supreme Court of Utah agreed: because nothing in the statute distinguished the subclass of juveniles to be tried as adults from other similarly situated juveniles, its operation made for unconstitutional disparate treatment.⁶¹ While the opinion states that Utah's statute differs from direct-file statutes in other states, the Office of Juvenile Justice and Delinquency Prevention's most recent survey of state laws suggests the opposite:

[P]rosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking. Even in those few states where statutes provide some general guidance to prosecutors, or at least require them to develop their own decision-making guidelines, there is no hearing, no evidentiary record, and no

⁶¹ *State v. Mohi*, 901 P. 2d 991—Utah: Supreme Court 1995.

opportunity for defendants to test (or even to know) the basis for a prosecutor's decision to proceed in criminal court.⁶²

Most state constitutions have equal protection provisions similar to Utah's uniform operation of laws requirement, but parallel equal protection challenges to direct-file transfer have not succeeded elsewhere.

The lack of charging guidelines coupled with the disparate impacts of transfer on Black and Latino youth should seemingly make a strong case for equal protection review of prosecutorial discretion statutes. But equal protection requires a finding of particularized discrimination, not simply disparate impacts on minority populations. California's *Manduley v. Superior Court* (2002) is exemplary of the judicial approach to these claims: prosecutors can charge similarly situated defendants differently simply because that power is within their purview by legislative designation. The *Manduley* opinion reads:

Although, as petitioners assert, a prosecutor's decision in this regard can result in important consequences to the accused minor, so does a decision by a prosecutor to initiate criminal charges against any individual, including an adult. Claims of unequal treatment by prosecutors in selecting particular classes of individuals for prosecution are evaluated according to ordinary equal protection standards... These standards require the defendant to show that he or she has been singled out deliberately for prosecution on the basis of some invidious criterion, and that the prosecution would not have been pursued except for the discriminatory purpose of the prosecuting authorities.⁶³

By legislative grant, prosecutors have broad discretion to charge youth defendants as they deem appropriate—so long as the decision is not provably based on discrimination against a protected characteristic like race. Courts also employ the logic of legislatively granted discretion to reject claims that direct-file transfer violates separation of powers.

⁶² Griffin et. al. 2011, p. 5.

⁶³ *Manduley v. Superior Court*, 41 P. 3d 3—California Supreme Court 2002.

After *Manduley*, California voters acted to remove this power from prosecutors by passing Proposition 57. Accordingly, the state implemented new rules requiring a judicial finding of fitness before any juvenile under the age of sixteen can be removed from juvenile court. In this hearing, the prosecutor must prove by a preponderance of evidence that the child would not be amenable to the rehabilitative remedies of the juvenile system due to one or more of the following criteria: 1) the child exhibits a high degree of criminal sophistication; 2) the child could not be rehabilitated before the expiration of juvenile court jurisdiction, meaning that the child would reach the age of eighteen before release would be appropriate; 3) the child has substantial delinquent history; 4) previous attempts to rehabilitate the child have been unsuccessful; or 5) the circumstances and gravity of the alleged offense weigh in favor of transfer.⁶⁴ The judge may retain jurisdiction despite finding one or more of these criteria to apply if they find that the child is nonetheless amenable to juvenile treatment and rehabilitation. These five criteria address retributive considerations, including the weight of the alleged crime under criterion 5) and the child's culpability as reflected in criterion 1).⁶⁵ But forward-looking considerations are emphasized, leaving it up to the judge to determine whether the goals of rehabilitation and character reform outweigh the merits of a more punitive adult-level response. This arrangement vastly outperforms direct-file transfer in addressing the problems laid out in

⁶⁴ See Rule 5.770 §707(a) of the California Rules of Court.

⁶⁵ Criminal sophistication refers narrowly to intent (in the planning and execution of the crime) and past criminal tendencies. (See: *People v. Superior Court*, 18 Cal. 4th 671.) As discussed in section 1.3 of this paper, intent is not a holistic conception of responsibility: Brink's normative competence framework allows that a juvenile may have the sophisticated cognitive capacities needed to form criminal intent (for example: participating in the premeditation of a murder and ultimately pulling the trigger), but be less responsible because they lacked the volitional capacities to conform their conduct to their judgement (perhaps an adult pressured them to participate in the criminal activity, and they complied as a result of deference to perceived authority despite knowing deep down that it was wrong). A deliberation on criminal sophistication should include a holistic analysis of a juvenile's cognitive *and* volitional capacities.

Chapter One, and places an appropriate emphasis on consequentialist considerations for young defendants.

Prosecutors with unchecked discretion are statistically more likely to charge non-white defendants as adults.⁶⁶ In one of many examples, a report found that before Proposition 57 was passed Latino and Black youth were respectively 6 and 12 times more likely to be transferred to criminal court in California compared to similarly situated white defendants.⁶⁷ But individual defendants had little hope of convincing a judge that they were singled out for direct-file transfer on account of their race, the requirement for an equal protection claim. Cheng writes that the particularized harm requirement “necessarily causes courts to neglect more subtle, systemic risks created by the operation of government. Often a criminal defendant...cannot prove that racial discrimination more likely than not tainted his particular conviction.”⁶⁸ Proposition 57 was an appropriate response to an equal protection problem that could not be litigated because of the strict particularized discrimination requirement.

Transfer by judicial waiver does not eliminate the possibility of racial discrimination, nor does it conclusively prevent disproportionate punishment of immature youth. Judges can, and do, discriminate against non-white defendants and neglect to take culpability-mitigating factors into account. But the removal of direct-file properly shifts the presumption in favor of the defendant. Rather than simply charging certain juvenile defendants as adults, prosecutors seeking to remove a minor from juvenile jurisdiction must produce evidence that juveniles are competent and deserving of facing adult treatment—and even then, the judge may retain jurisdiction based on

⁶⁶ See, e.g., Griffin et. al., 2011.

⁶⁷ Males, Mike et. al., “The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California,” *Center on Juvenile and Criminal Justice*, Washington, D.C. (2000).

⁶⁸ Cheng, EK, “Constitutional Risks to Equal Protection in the Criminal Justice System,” *Harvard Law Review* 114, no. 7 (2001): p. 2098.

forward-looking considerations. Short of completely repealing juvenile transfer and restoring an entirely separate juvenile system, which may be politically impossible given the still-prevalent public sentiment that youth offenders should face strict penalties, states should follow California's lead to repeal direct-file transfer.

2.3 Conforming Public Policy to its Stated Goals

Excessive punishment of juvenile transferees is systematically administered because diminished culpability by reason of immaturity is not considered until sentencing, after the most determinative decisions about liability to punishment have already been made. The particular charges brought, and the jurisdiction in which the charges are filed, determine the sentencing bracket—in some cases imposing mandatory minimum sentences with no flexibility. It is a devastating failure of the criminal justice system that underage defendants are punished beyond what they morally deserve under circumstances that they are incompetent to navigate.

Juvenile transfer by prosecutorial discretion violates the proportionality principle of the backward-looking retributivist rationale for punishment because prosecutors necessarily disregard culpability and competence in their emphasis on the harm done. But direct-file transfer fares even worse on the forward-looking consequentialist view. Putting aside the important fact that youth are generally more amenable to rehabilitation (which seriously undermines the case for confining youth offenders long-term), there is no evidence that transfer deters crime; in fact, every published study demonstrates increased recidivism rates among transferees.⁶⁹ The very branch of government responsible for administering criminal justice policy acknowledges that all

⁶⁹ See, e.g.: Zane, Stephen et. al., "Juvenile Transfer and the Specific Deterrence Hypothesis: Systematic Review and Meta-Analysis," *Criminology & Public Policy* 15 no. 3 (2016): pp. 901-925; and Lanza-Kaduce, Lonnie et. al., "Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer," *Journal of Crime and Justice* 28, no. 1 (2005): pp. 59-77.

available data demonstrates a neutral or counter-deterrent effect of transfer.⁷⁰ The laws passed with the goal of reducing youth crime have produced the exact opposite outcome.

Courts should have the power to consider the downstream societal impacts of a decision to impose adult process and sentencing on a juvenile defendant. California affords juvenile defendants the right to a transfer hearing not just on competence, but also on amenability to treatment and community safety. This mechanism is designed to ensure that consequentialist considerations—especially important for young people who, if treated properly, have enormous potential to heal and contribute to society—are not undervalued in criminal proceedings. Supreme Court precedent holds that juveniles are not blameworthy to the same extent as adults. Instead of weighing presumptively towards a punitive response, even one directed appropriately towards mature adolescents, juvenile justice policy should emphasize positive forward-looking outcomes.

CONCLUSION

This thesis argues that transfer policies are inconsistent with dominant theories of responsibility and punishment as applied to juveniles. I have shown that juveniles are distinct from adults because they develop the capacities to form rational judgements and conform actions to will over time. It is unjust to hold juveniles accountable as adults when they have not fully formed the capacities necessary for adult-level responsibility. Moreover, it is counterproductive to treat even the most mature juveniles as adults because they are more likely to engage further in criminal behavior if processed through the adult criminal system. Voters and policymakers must take action to repeal the features of juvenile justice policy which most egregiously violate

⁷⁰ Griffin et. al., 2011.

moral and jurisprudential principles, especially direct-file transfer mechanisms and the practice of holding minors youth in adult jails and prisons. A system which recognizes the vulnerable nature of the formative childhood and adolescence years, and one which emphasizes healing and community over punishment, will advance the good of all members of society.

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