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STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 161529
Case No. 352569
Wayne CC: 02-000893-02-FC

-vs-

JOHN ANTONIO POOLE,

Defendant-Appellant.

BRIEF OF THE *AMICI CURIAE*
THE DETROIT JUSTICE CENTER, AND
MICHIGAN CENTER FOR YOUTH JUSTICE

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RECEIVED by MSC 2/8/2022 11:26:36 PM

TABLE OF CONTENTS

TABLE OF AUTHTORITIES ii

INTEREST AND IDENTITY OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. MANDATORY LIFE SENTENCES WITHOUT PAROLE VIOLATE THE CONSTITUTIONAL PROHIBITION OF EXCESSIVE PUNISHMENT AND RESULT IN GROSSLY DISPROPORTIONATE HARM TO THOSE SENTENCED TO DIE IN PRISON. 5

II. YOUNG ADULTS ARE MORALLY LESS CULPABLE BECAUSE THE CONSENSUS IN THE SCIENTIFIC COMMUNITY IS THAT BRAIN DEVELOPMENT DOES NOT END AT AGE 18 AND TRAUMA ALSO IMPACTS BRAIN DEVELOPMENT. 8

III. MANDATORY SENTENCING PREVENTS CONSIDERATION OF HOW A YOUNG ADULT'S CONTINUING BRAIN DEVELOPMENT LEADS THEM TO 'AGE OUT' OF CRIME, AS CONFIRMED BY BRAIN SCIENCE RESEARCH. 12

IV. THE ADULTIFICATION BIAS IMPACTS YOUTH OF COLOR LEADING TO THE PERCEPTION AND TREATMENT OF YOUNG PEOPLE AS ADULTS THAT RESULTS IN THEIR OVERREPRESENTATION IN THE CRIMINAL LEGAL SYSTEM 14

V. THE SUPERPREDATOR MYTH OF THE 1990s IS A GLARING EXAMPLE OF THE ADULTIFICATION BIAS, LEADING TO HARSH SENTENCING LAWS FOR YOUNGER DEFENDANTS, AND THE OVERREPRESENTATION OF RACIAL MINORITIES IN PRISON. 19

A. Publicity of the Superpredator Myth Led to More Laws Allowing Prosecution of Children as Adults. 19

B. Michigan's Laws Became Worse for Children 21

C. Harsh Sentencing Laws Dramatically Increased the Number of Juveniles in Adult Prison, with an Overrepresentation of Youth of Color 23

D. Reforms After Miller *Reduced the Number of Juveniles Serving LWOP, yet Racial Disparities Still Persist* 25

E. The Momentum for Eliminating Mandatory LWOP Sentences is Growing and Should be Extended to Young Adults Ages 18 to 25. 26

VI. THE CIRCUMSTANCES OF MR. POOLE'S CASE ARE CONSISTENT WITH INCOMPLETE ADOLESCENT BRAIN DEVELOPMENT 29

VII. THE COURT HAS A UNIQUE OPPORTUNITY TO HOLD THAT MANDATORY LWOP SENTENCING IS FUNDAMENTALLY FLAWED WHEN APPLIED TO YOUNG ADULTS AND OVERCOME THE DAMAGE DONE WHEN SENTENCING THESE LESS-CULPABLE PERSONS TO DIE IN PRISON. 31

CONCLUSION 32

RECEIVED by MSC 2/8/2022 11:26:36 PM

Table of Authorities

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RECEIVED by MSC 2/8/2022 11:26:36 PM

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INTEREST AND IDENTITY OF AMICI CURIAE [1]

The Michigan Center for Youth Justice is a Michigan-based non-profit organization working to advance policies to create a fair and effective justice system for youth. Our work focuses on policies and practices that reduce confinement and support trauma-informed, racially equitable, socio-economically and culturally responsive, community-based solutions for Michigan's justice-involved children, youth, and young adults. Through research, collaboration, and advocacy-oriented strategies, we work to shape public policy and educate justice system stakeholders.

The Detroit Justice Center (DJC) is a non-profit law firm advocating alongside Metro Detroit communities to create economic opportunities, transform the criminal punishment system, and promote just cities. DJC seeks to create a "just city" by working towards two goals that are often considered separately, but that fully intersect: (1) how to build equitable communities free from racial and socio-economic discrimination and (2) how to transform the criminal legal system. DJC believes that society cannot build inclusive cities where everyone can feel safe and thrive without remedying the effects of mass incarceration.

DJC works to challenge entrenched opinions that incarceration serves as a solution. In furtherance of this goal, DJC utilizes the following three-pronged approach: (1) defense (e.g. representing system-involved clients and advocating for systemic change), (2) offense (e.g. developing creative economic innovations such as co-ops and community land trusts that empower community members, with an emphasis on formerly incarcerated individuals) and (3) dreaming (e.g. envisioning, articulating and actualizing what we could "build instead" if we

[1] Pursuant to MCR 7.312(H)(4), *amici curiae* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *amici* and their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

prioritized communities over incarceration). DJC is committed to expanding the public safety conversation to explore how we can divest from carceral structures to invest in communities, while simultaneously protecting the constitutional rights of those impacted by the criminal punishment system.

SUMMARY OF ARGUMENT

Mandatory life without parole for youth and young adults is fundamentally unjust. Both the Eighth Amendment and Michigan's prohibition against cruel or unusual punishment prevent the State from imposing such a grossly disproportionate sentence against individuals who deserve distinct treatment because of their age and individual circumstances. The United States Supreme Court has recognized well-established research in four key opinions (See *Roper v Simmons*, 543 US 551, 125 S Ct 1183, 161 L. Ed. 2d 1 (2005); *Graham v Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016)). The research justified a conclusion that young persons lack the understanding and physiological brain functions to fully understand the gravity of their actions as well as its consequences, when compared to their adult counterparts.

In this brief, DJC and MCYJ urge this Court to consider this research as it is also applicable to young adults from age 18 to 25, and the discussion of this research has been well articulated in the briefs of other *amici curiae* as well as Appellant's Supplemental Brief on Appeal. Similar to adolescents, brain development is incomplete for many 18 through 25-year-olds, and just as adolescents, they are thus less culpable as they are still developing

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physiologically and psychologically. Mandatory life without parole ("LWOP") prevents consideration of these critical facts at sentencing.

Amici curiae offer an additional perspective to this discussion. Youth of color are treated more harshly at virtually every stage of the criminal legal process, making them more likely to be convicted of first-degree murder and receive a mandatory LWOP sentence. The racial disparities have been documented over decades, both nationally and in Michigan.

Overrepresentation of young Black people has occurred due to perceptions that young Black people have the same culpability as adults. This adultification of Black youth has led to overrepresentation in the juvenile justice system, police intervention, prosecution, and imprisonment. Primarily, the research has shown that Black youth are judged to be older than their non-Black peers in many contexts. As such, they are incorrectly presumed to have adult decision-making skills and are afforded less deference to their age and maturity level. Moreover, neuroscience research reveals how traumatic events during childhood, more often experienced by children and youth of color due to the various impacts of systemic racism and poverty, can inhibit brain development which further impacts youth's ability to make decisions, as well as appreciate the consequences of their actions.

Also, youth of color are impacted by entrenched notions of violence and safety, which, have a racial discrimination bias. The notion of the "superpredator" in the 1990s led to much of the legislation imposing mandatory LWOP to address the perception that urban youth, mostly Black and Hispanic minorities, were responsible for urban crimes. In Michigan, this bias was further entrenched in 1996, when the Legislature expanded the adult court's jurisdiction to children as young as age 14, who faced a mandatory LWOP for a murder conviction without consideration of their individual circumstances. The harm predicted by these false theories never

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materialized and caused significant harm to thousands of young people before the Supreme Court's decision in *Miller.*

Since the Supreme Court's decisions in *Miller*, 24 states and the District of Columbia have banned mandatory life without the possibility of parole as a sentence for an individual who committed the sentencing offense when they were under the age of 18 years old. Nine states have no individuals serving LWOP sentences, who were juveniles at the time of the offense. Even Michigan has changed its laws, effective October 1, 2021, raising the age of juvenile court jurisdiction to include 17-year-olds. The continuing evolution of these reforms recognize not only that young people deserve distinctly different considerations due to their age and individual circumstances, but also, the previous laws failed to have the deterrent effect of preventing harm. Instead, the consequences of those laws created more harm for juveniles forced into the adult system, particularly Black youth.

This Court has a unique opportunity to rectify the damage caused by mandatory LWOP sentencing, such as the disproportionate percentage of Black individuals who have been imprisoned. These laws were enacted based on false, unrealized theories that young people, would be the source of thousands of violent crimes committed in the future. The very same research that supported the Supreme Court's decisions in *Roper, Graham, Miller, and Montgomery* justify the expansion of *Miller's* holding to young adults, ages 18 to 25. Individualized sentencing rather than mandatory LWOP sentencing would allow these defendants to introduce these mitigating facts, which support a conclusion that LWOP is excessive punishment. Thus, *amici curiae* urge this Court to find mandatory life without parole grossly unconstitutional for young adults, ages 18 to 25.

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ARGUMENT

I. MANDATORY LIFE SENTENCES WITHOUT PAROLE VIOLATE THE CONSTITUTIONAL PROHIBITION OF EXCESSIVE PUNISHMENT AND RESULT IN GROSSLY DISPROPORTIONATE HARM TO THOSE SENTENCED TO DIE IN PRISON.

Imposing life without the possibility of parole as a mandatory sentence for young adults violates the prohibition against cruel and unusual punishment under the United States Constitution, US Const Amend VIII, and the prohibition against cruel or unusual punishment under the Michigan Constitution, Const 1963 art 1, § 16. The U.S. Supreme Court has held that the Eighth Amendment guarantees the right not to be subjected to excessive sanctions, flowing from the principle that "'punishment for a crime should be graduated and proportioned' to both the offender and offense." *Roper*, 543 US at 560 (quoting *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910)). The *Miller* Court reaffirmed that the concept of "'proportionality is central to the Eighth Amendment." *Id.* (quoting *Graham*, 560 US at 59). The *Miller* Court explained that the proportionality concept was informed by "evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 US at 469 (quoting *Estelle v Gamble*, 429 US 97, 102; 97 S Ct 285, 50 LEd 2d 251 (1976)).

In *Miller,* the Court stated that the *Roper* and *Graham* holdings established that younger defendants were "constitutionally different" from adults for the purposes of sentencing. *Miller*, 567 US at 471. Younger persons had less culpability and more capacity for reform making them less deserving of the harshest sentences. *Id.*, citing *Graham*, 560 US at 68. *Roper* and *Graham* also recognized youth had three key developmental characteristics: (1) lack of maturity, impulsivity and impetuosity; (2) susceptibility to outside pressures and negative influences with limited control over their own environment with an inability to escape dangerous situations; and

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(3) not having a "well-formed" character, which was "less-fixed" and capable of rehabilitation. *Miller*, 567 US at 471, quoting *Roper*, 543 at 570.

The Court explained that psychological and brain science research supported finding these distinctions between adult and adolescent brains. *Miller*, 567 US at 471-472. The research showed that only a small percentage of adolescents, who engaged in illegal activity, formed "'entrenched patterns'" of misconduct. *Id.*, quoting *Roper*, 543 at 570.[2] Further, the brain science showed that adolescent brains were still developing, particularly the parts involving behavior control. As the adolescent's brain develops, it could outgrow the tendency to act impulsively and engage in risk-taking. *Id.*, quoting *Roper*, 543 at 570. These distinctions certainly justified considering an adolescent less morally culpable than an adult. *Id.* at 472.

For these reasons, *Roper* and *Graham* adolescents should not be subject to the law's harshest punishments even if they have committed violent crimes. *Miller,* 567 US at 472; citing *Graham v Florida*, 560 US at 71-72. In both *Graham* and *Miller*, the Court recognized that a mandatory life sentence without the possibility of parole was effectively a death sentence for a young defendant because they would serve most of their life in prison with no hope and no motivation to rehabilitate or mature. *Miller*, 567 US at 470; *Graham*, 560 US at 69-70.

When a life sentence without parole is mandated by law, no court can consider mitigating factors about the defendant or the circumstances surrounding the offense when imposing such a sentence. The Supreme Court explained that mandatory schemes prevented the consideration of significant factors, such as:

1. The defendant's age, immaturity, vulnerability to outside influence, inability to appreciate the consequences of risky behavior;
2. The defendant's social and family history, which may have contributed to their lack of maturity;

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[2] Quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)

3. How the defendant's development and social history played a role in the circumstances of the offense;
4. The defendant's inability to assist their attorney and/or fully understand the legal process and assist in their defense; and
5. The defendant's capacity to rehabilitate with maturity and resources that help heal their past trauma and develop life skills.

See Miller, 567 US at 477-478. The Court concluded that any criminal procedure that imposed a life sentence, which failed to consider the defendant's age and these significant factors would be constitutionally flawed. *Miller*, 567 US at 473-474; *Graham*, 560 US at 76.

Having considered all these reasons, the Court held that mandatory sentencing of life without parole for adolescents convicted of homicide violated the Eighth Amendment's prohibition of cruel and unusual punishment. *Miller*, 567 US at 479. The Court's rationale in *Miller* could readily apply to those who committed their offenses when 18 to 25 years old, who still have developing brains and deserve similar consideration.

The *Miller* rationale also supports finding that Michigan's mandatory LWOP sentencing scheme is constitutionally flawed under Michigan's Constitution. This Court has consistently held that Michigan's Constitution provides broader protection than the US Constitution. *People v Bullock*, 440 Mich 15, 30-31; 485 NW2d 866 (1992). Specifically, the distinct phrase "cruel or unusual" in Michigan's Constitution has been recognized as having a distinct history such that the conjunction "or" was intentionally placed in this phrase rather than "and". *Id.* (*see also*, *People v Lorentzen*, 387 Mich 167, 172 n 3; 194 NW2d 827 (1972)). This Court held that these were compelling reasons to interpret Michigan's Constitution more broadly. *Bullock*, 440 at 31. With this interpretation, "excessive imprisonment" is prohibited under Michigan's Constitution. *Lorentzen*, 387 Mich at 172; *Bullock*, 440 at 31.

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Mandatory LWOP sentences for those, who were 18 to 25 at the time of their offense, constitutes excessive imprisonment. The *Bullock* Court explained excessive imprisonment is prohibited because it is "grossly disproportionate." *Bullock*, 440 Mich at 34, n 17 (distinguishing this concept from a review of a court's sentencing decision under *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990)). The Court reasoned that the mandatory LWOP sentence for mere cocaine possession was grossly disproportionate since mandatory sentencing precluded a review of a person's individual circumstances such a habitual offender as well as a first-time offender would receive the same penalty. Since no court could consider an individual's circumstances, mandatory LWOP was grossly disproportionate and, thus, "cruel or unusual". *Bullock*, 440 Mich at 37-38, 40.

Therefore, under both the US Constitution and Michigan's Constitution, the law mandating life without the possibility of parole is grossly disproportionate. For defendants such as Mr. Poole, the failure to consider individual circumstances such as a defendant's age, life history, and developmental maturity at sentencing, is a fundamental flaw that violates the constitutional prohibition against excessive sentences. This Court has a distinct opportunity to rectify this fundamental flaw.

II. YOUNG ADULTS ARE MORALLY LESS CULPABLE BECAUSE THE CONSENSUS IN THE SCIENTIFIC COMMUNITY IS THAT BRAIN DEVELOPMENT DOES NOT END AT AGE 18 AND TRAUMA ALSO IMPACTS BRAIN DEVELOPMENT.

As stated above, the US Supreme Court stated brain science research established that adolescent brains were still developing, which justified the conclusion that adolescents were morally less culpable as were still developing their brains and the ability to make mature

decisions. See *Miller,* 567 US at 472. This Court should acknowledge the importance of recent research findings on adolescent brain development in general. There is general consensus in the scientific community that brain development is not complete until well into a person's twenties; until roughly the age of 25, a young person is much more likely to engage in risk-taking behaviors, to be more vulnerable to negative influences, and to have a greater propensity for rehabilitation and change. National Academies of Sciences, Engineering & Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth* (Washington, DC: The National Academies Press, 2019), p 22. With this scientific evidence in mind, the same logic the US Supreme Court applied to adolescents under the age of 18 subject to mandatory LWOP in *Miller* should also be applied to young adults, aged 18 to 25, in similar circumstances.

Since the US Supreme Court's decisions in *Miller* and *Roper*, recent research has found that adolescent brains are still developing past the age of 18. As discussed in Appellant's Supplemental Brief on Appeal, experts on adolescent brain development have recently published studies in which they conclude that the parts of the brain related to decision-making, risk-taking behavior, and susceptibility to outside influences continue to develop well beyond the age of 18. Scott, Bonnie & Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy,* 85 Fordham L Rev 641, 642 (2016); Spear & Silveri, *Special Issue on the Adolescent Brain*, 70 Neuroscience and Biobehavioral Reviews 1 (2016); Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-regulation*, 21 Dev Sci e12532 (2018); Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J Med & Phil 256 (2013). In other words, a young adult's brain (ages 18 to 25) is less inclined to fully consider the consequences of their actions and therefore more likely to be impulsive and easily persuaded by negative outside

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influences, similar to youth under the age of 18. Extending the scientific evidence used in *Miller* and *Roper* to young adults between the ages of 18 and 25 compels the court to reason that this age group is similarly less culpable than the average adult and therefore a mandatory LWOP sentence is irrational and unconstitutional.

What has been largely left out of the conversation on brain development and constitutionality when it comes to mandatory life sentencing, but is vital to consider, is the impact of trauma on adolescent brain development. Social science data tells us that youth and young adults of color, particularly Black adolescents, are more likely to be exposed to trauma, or Adverse Childhood Experiences (ACEs). Lena J. Jäggi et al., *The Relationship between Trauma, Arrest, and Incarceration History among Black Americans: Findings from the National Survey of American Life*, 6 Society and Mental Health 187–206 (2016).[3] In one study from 2010, Black participants were found to have experienced higher rates of child maltreatment compared to white, Hispanic and Asian participants, particularly related to domestic violence, and were found to be less likely to receive treatment for post-traumatic stress disorder. A. L. Roberts et al., *Race/ethnic differences in exposure to traumatic events, development of post-traumatic stress disorder, and treatment-seeking for post-traumatic stress disorder in the United States,* 41 Psychol Med 71–83 (2011). A 2021 study found that Black youth experience higher rates of polyvictimization, victimization due to experiences with a variety of systems of oppression (such as systemic racism and poverty), and exposure to violent death, resulting in higher levels of posttraumatic stress and maladaptive grief symptoms. Robyn D. Douglas et al., *Racial, ethnic,*

[3] The original ACEs study, conducted in the 1990s, asked questions related to abuse (emotional, physical and sexual), household challenges (domestic violence, substance use, mental health disorders, incarceration and parental separation), and neglect (emotional and physical). See https://www.cdc.gov/violenceprevention/aces/about.html The study was one of the largest to investigate the long-term effects of childhood abuse and neglect, and has spawned considerable further research about adverse childhood experiences.

and neighborhood income disparities in childhood posttraumatic stress and grief: Exploring indirect effects through trauma exposure and bereavement, 34 Journal of Traumatic Stress 929–942 (2021).

Research also tells us that exposure to ACEs is significantly associated with involvement in the criminal legal system during adolescence. Faith Scanlon et al., *National Study of Childhood Traumatic Events and Adolescent and Adulthood Criminal Justice Involvement Risk: Evaluating the Protective Role of Social Support from Mentors During Adolescence*, 80 J Clin Psychiatry 18m12347 (2019); Michael T. Baglivio et al., *The Relationship between Adverse Childhood Experiences (ACE) and Juvenile Offending Trajectories in a Juvenile Offender Sample*, 43 Journal of Criminal Justice 229–241 (2015). When researching the connection more closely, there is strong evidence that ACEs impact brain development by inhibiting or deferring the growth of the Inferior Frontal Gyrus, which plays an important role in impulse control and emotional regulation. Deanna M. Barch et al., *Early Childhood Adverse Experiences, Inferior Frontal Gyrus Connectivity, and the Trajectory of Externalizing Psychopathology*, 57 Journal of the American Academy of Child & Adolescent Psychiatry 183–190 (2018). In sum, an adolescent brain, not yet fully developed, is not as well-equipped as a fully developed adult brain to make rational decisions and brain development can be even further delayed if the child has been exposed to traumatic events. The court must be given discretion to consider this when sentencing youth and young adults, and particularly when sentencing adolescents of color.

Justice Kagan, in *Miller*, recognized that mandatory sentences prevented courts from considering factors such as the individual's family and home environment. *Miller*, 567 US at 477. The Sentencing Project conducted a survey of juvenile lifers finding that many had traumatic histories. Ashley Nellis, PhD, *The Life of Juvenile Lifers; Findings From a National Survey*, The

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Sentencing Project, March 2012. The survey found that most experienced violence in their homes and communities; most (especially girls) had high rates of abuse; most came from socially and economically disadvantaged communities; and most had faced significant educational challenges. *Id.*, at 2-3. These results are significant because young people are less able to extricate themselves from these horrific situations. See *Miller*, 567 US at 471.

Since a young adult's brain is still developing, given their young age, the additional developmental delays from trauma negatively impact this person further. Just as an adolescent, this person may be impulsive, vulnerable to negative, influences, and unable to appreciate the gravity or consequences of their actions. Thus, impairments due to untreated trauma also make these young adults less culpable than an adult, whose brain is fully developed. These factors deserve careful consideration and individualized sentencing. Imposing a mandatory LWOP sentence fails to take these histories into account as well as their impact on a person's brain development, resulting in a grossly disproportionate sentence.

III. MANDATORY SENTENCING PREVENTS CONSIDERATION OF HOW A YOUNG ADULT'S CONTINUING BRAIN DEVELOPMENT LEADS THEM TO 'AGE OUT' OF CRIME, AS CONFIRMED BY BRAIN SCIENCE RESEARCH.

The capacity for rehabilitation for defendants aged 18 to 25 is another reason to hold mandatory LWOP sentences unconstitutional. The *Miller* decision recognized that "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 567 US at 478. As discussed in Appellant's Supplemental Brief on Appeal, the neuroplasticity of a human brain (or the potential for the brain's neuronal circuits to be modified by experience, therefore modifying behavior) is particularly high in the first two decades of a

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person's life and only begins to decrease in the early to mid-twenties. This means that not only youth under the age of 18, but young adults as well, are far more receptive to changing their behaviors compared to fully matured adults. Aoki, Romeo, & Smith, *Adolescence as a Critical Period for Developmental Plasticity*, 1654 Brain Rsch 85 (2017); Laurence D. Steinberg, Age of Opportunity: Lessons from the New Science of Adolescence (2014).

Researchers have distinguished people aged 18 to 25 as a population that is likely to be more transient and in a period of exploration and change. Jeffrey Jensen Arnett, *Identity Development from Adolescence to Emerging Adulthood: What We know and (Especially) Don't Know*, in 1 The Oxford Handbook of Identity Development 53, 54 (2015). The brain development and mental capacity changes that occur during late adolescence suggest that individuals in this developmental window are more agreeable to intervention and rehabilitation. See, e.g., Ronald E. Dahl et al., *Importance of Investing in Adolescence from a Developmental Science Perspective*, 554 Nature 441, 441 (2018); David Scott Yeager & Carol S. Dweck, *Mindsets That Promote Resilience: When Students Believe That Personal Characteristics Can Be Developed*, 47 Educ. Psychologist 302, 312 (2012).

Research also shows that people are less likely to engage in illegal behavior as they grow older. The peak age for engaging in illegal behavior is roughly in the late teens, and research shows that such behavior dramatically declines after the mid-twenties. Steinberg et al., *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, United States Department of Justice Juvenile Justice Bulletin (March 2015), available at <https://www.courts.ca.gov/documents/BTB24-2M-5.pdf>; Sweeten, Piquero, & Steinberg, *Age and the Explanation of Crime, Revisited*, 49 J of Youth and Adolescence 921 (2013); Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young*

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Adulthood, 45 Dev Psychol 1654 (2009); Michael Rocque, Chad Posick & Justin Hoyle, *Age and Crime*, *in* The Encyclopedia of Crime & Punishment 1–8 (2015), https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118519639.wbecpx275 (last visited Feb 3, 2022). Over 50% of justice-involved youth continue to offend until they reach age 25, at which point offending begins to decline. Over the next five years, the recidivism rate drops to between 16% and 19%. *From Youth Justice Involvement to Young Adult Offending*, National Institute of Justice (2014), https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending (last visited Feb 3, 2022). The age-crime curve theory and supporting research indicates that most justice-involved youth will naturally grow out of criminal activity, given the opportunity.

The combination of the well-researched age-crime curve, and the recent research on how brain development continues past age 18, provides strong evidence to apply the *Miller* decision to young adults ages 18 to 25. Under Michigan case law, rehabilitation as well as the capacity for rehabilitation play a significant role in sentencing decisions and the appellate review of the proportionality of sentencing decisions. See *People v Bennett,* 335 Mich App 409, 418-419; 966 NW2d 768 (2021)(citing *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972)). Thus, a mandatory sentencing scheme that prevents consideration of this factor leads to excessive punishment that is grossly disproportionate.

IV. THE ADULTIFICATION BIAS IMPACTS YOUTH OF COLOR LEADING TO THE PERCEPTION AND TREATMENT OF YOUNG PEOPLE AS ADULTS THAT RESULTS IN THEIR OVERREPRESENTATION IN THE CRIMINAL LEGAL SYSTEM .

Racial bias, whether implicit or explicit, contributes to Black adolescents being incorrectly viewed as more culpable or more deserving of harsher punishments than their white

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peers, despite both demographics having incomplete adolescent brain development. Often referred to by scholars, psychologists and social scientists as "adultification bias," the term has been defined to include the "social, and developmental processes in which youth and adolescents are prematurely, and often inappropriately, exposed to adult knowledge and assume[d] to have wide-ranging adult…" responses to decision-making, circumstances, and situations. Keisha Dauphin, *Racial Adultification and the American Criminal Justice System*, Master's Theses and Projects (2020), https://vc.bridgew.edu/theses/91 (Citing S Diaz, *Black Children are Children: Tamir Rice and the Adultification of Black Bodies*, ACLU of Ohio (2016), https://www.acluohio.org/en/news/black-children-are-children-tamir-rice-and-adultification-black-bodies (last visited Feb 2, 2022)).

Several studies have noted that the consequences of adultification bias for Black adolescents directly impact the severity of punishments that are deemed appropriate for these adolescents, despite their inability for adult-level appreciation of risk or adult-level impulse control. Margo Gardner & Laurence Steinberg, *Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study*, 41 Dev Psychol 625–635 (2005).

For example, in one report detailing results from several studies, "*The Essence of Innocence: Consequences of Dehumanizing Black Children*," researchers found that Black youth were viewed as significantly less innocent than other children at every age group, beginning at 10 years old, "provid[ing] preliminary evidence that Black children are more likely to be seen as similar to adults prematurely." Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* 106 J. of Personality & Soc. Psychol. 526 (2014) at 529 (Appendix A). The research also showed that "Black boys were more likely to be seen as

older and more responsible for their actions relative to White boys," *Id. at* 539, and that participants overestimated the age of Black youth and deemed them more culpable than white youth. *Id.* at 532.

Moreover, results from the studies conducted in the "Essence of Innocence" report also demonstrated that "Black felony suspects were viewed as significantly more culpable than either White felony suspects or Latino felony suspects." Appendix A at 532. Specifically, the studies found that "[b]ecause Black felony suspects were seen as 4.53 years older than they actually were, this would mean that boys would be misperceived as legal adults at roughly the age of 13 and a half." *Id*, at 532. While these revelations might shock one's conscience on their own, additional results in the context of law enforcement perceptions of Black youth were even more troubling. In the analysis of one study, the report detailed that "the implicit dehumanization of Black children predicted the extent to which police officers overestimate the age of Black suspects, how culpable those Black suspects are perceived to be, and the extent to which officers were more likely to use force on Black suspects than suspects of other races throughout their career." *Id*. at 535.

Other reports have documented similar findings of adultification bias as it pertains to Black girls and adolescents. In one report, "*Girlhood Interrupted: Erasure of Black Girls' Childhood*," the results detailed ways that Black youth were improperly characterized as developmentally older than their white peers, "especially in mid-childhood and early adolescence— critical periods for healthy identity development." Jamilia Blake et.al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood,* at 8 (2017), Georgetown Law, . Specifically, the study revealed that "Black girls are viewed as more adult than their white peers *at almost all stages of childhood*, beginning most significantly at the age of 5, peaking during the

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ages of 10 to 14, and continuing during the ages of 15 to 19." *Id*. The study also found that Black girls were misperceived to know more about adult topics, to be less innocent, to need less nurturing, less protection, less support, and to be more independent than their white peers of the same age. *Id*., at 1-3. To put it plainly, far too often, "Black children [of all genders] are less likely to be afforded the full essence of childhood and its definitional protections." Appendix A at 539.

Law professor Kenneth Nunn further illustrated this point, by analyzing data documenting the prosecution of youth and the racial breakdown of these youth relative to their ratio in the national population. Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L Rev 679 (2002) (Appendix B) Nunn examined records from the Office of Juvenile Justice and Delinquency Prevention, which reported that although Black youth were only 15% of the nation's youth population, they represented 31% of all cases prosecuted for delinquency. *Id,* at 684. In 1997, prosecutors were more likely to file petitions against Black youth than White youth. In another significant finding, prosecutors were more likely to file waiver requests for transferring a Black youth to the adult criminal system. *Id.* Black children were more likely to be remanded to state custody as punishment than White youth, and, on average, their stay in secure facilities exceeded those of White youth, indicating that Black youth were punished more severely than Black youth for the same criminal activity. *Id,* at 686-687. Recent data confirm that the racial disparity has persisted. By 2019, Black youth were 15% of the national youth population, but represented 41% of youth in custody. The Sentencing Project, *Black Disparities in Youth Incarceration* (July 2021)(Appendix N)

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In Michigan, Black youth fared worse than the national average. The Michigan Committee on Juvenile Justice (MCCJ) has compiled statistics from 2008 through 2020, and they reported, "Minority juveniles in Michigan (and nationwide) are more likely to enter the juvenile justice system than the youth population as a whole, and they are over-represented at nearly every point of contact within the system." MCCJ, *Michigan Racial and Ethnic Disparities Data* , available on their website at https://michigancommitteeonjuvenilejustice.com/michigan-data/michigan-racial-and-ethnic-disparities-data/ (last visited Feb. 4, 2022). In 2012, 59% of the cases that were waived or designated into the adult criminal court were Black youth, even though they made up only 18% of the population. Weemhoff & Staley, Michigan Council on Crime and Delinquency (MCCD), *Youth Behind Bars*, at 11, May 2014 (Appendix D). In 2020, Black youth were only 17% of total youth population, but 67% of those transferred to adult court. *Percentage of Minorities at Stages of the Juvenile Justice System, All Reporting Counties, 2020.* Michigan Committee on Juvenile Justice, State Advisory Group (Appendix C).

If mandatory LWOP is a court's only sentencing option, then there is no opportunity for defense counsel to present racial disparities caused by adultification bias as a mitigating factor. Black youth are more likely to have a criminal history because of this bias and explains how, as a Black youth, they were more likely to be viewed as an adult who deserves criminal punishment rather than a White youth, who would have had similar behavior explained away by their lack of maturity and who may have been treated more leniently as a result. Because of their age, both White and Black youth should be viewed as still maturing and capable of rehabilitation, and therefore less culpable, than more mature adults who engage in illegal behavior. Since a mandatory sentencing scheme prevents such considerations for mitigation, the resulting LWOP sentence is excessive and grossly disproportionate.

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V. THE SUPERPREDATOR MYTH OF THE 1990s IS A GLARING EXAMPLE OF THE ADULTIFICATION BIAS, LEADING TO HARSH SENTENCING LAWS FOR YOUNGER DEFENDANTS, AND THE OVERREPRESENTATION OF RACIAL MINORITIES IN PRISON.

A. Publicity of the Superpredator Myth Led to More Laws Allowing Prosecution of Children as Adults.

In the 1990s, the term "superpredator" was promulgated by political scientist John J. DiIulio, Jr., then a Princeton Professor. John R. Mills et al, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*," American University Law Review: Vol. 65 : Iss. 3, Article 4, p 535, 581 (2016) (Appendix E). DiIulio had warned that thousands of young people would commit violent crimes without remorse and by the year 2000, over 30,000 would be roaming city streets. Carroll Bogert & LynNell Hancock, *Analysis: How the media created a 'superpredator' myth that harmed a generation of Black youth*, NBC News (2020), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101 (last visited Feb 7, 2022). James Alan Fox, a Northeastern University professor, also predicted this same crime wave in multiple news appearances. *Id.,* at 4.

These predictions caused a panic that spread over multiple media outlets, having been repeated in over 40 major news outlets over 300 times in the five years following DiIulio's original article. *Id.* Crime reporting also ballooned in the 1990s when networks averaged 500 stories annually in their nightly news broadcasts. *Id.* at 6. Media reports of ethnic minorities committing violent crimes constituted 62% of crime reporting.[4] *Appendix E*, *supra*, p 583. The

[4] Reports of non-whites as accused or arrested of crimes dominated crime reporting. *Mills*, p 583, n 265 (citing Jane Rutherford, *Juvenile Justice Caught Between The Exorcist and A Clockwork Orange*, 51 DEPAUL L. REv. 715, 720-21 (2002) (explaining that terms like "superpredator" "carry silent, racially charged messages"). National statistics showed that less than half of violent crime arrests for juveniles were ethnic minorities. Yet, media reports of ethnic minorities committing violent crimes constituted 62% of crime reporting. *Mills*, p 583.

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superpredator myth sought to legitimize longstanding fears of Black criminality and assumptions that Black children were not children at all. *See The Superpredator: The Child Study Movement to Today*, 2 (2021) (Appendix K), https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf (last visited Feb 7, 2022). "In the minds of many, 'superpredator' [became] a code word for young Black males." *Appendix B*, *supra*, at 712.

Girded with the racial undertones of the "superpredator" publicity, policymakers passed strict laws that had devastating effects on racial minorities. *Appendix E*, pp 584-585. Between 1992 and 1999, 49 states and the District of Columbia passed laws that made the process easier for juveniles to be tried as and sentenced as adults such as allowing prosecutors to directly file charges against juveniles in the adult system. Jessica Short and Christy Sharp, Child Welfare League of America, *Disproportionate Minority Contact in the Juvenile Justice System*, p 7 (2005). After passage, there was a 35% increase in the number of Black youth who were transferred into the adult system compared to White youth, which only saw a 14% increase in transfers. *Id,* p 8.

The juvenile crime wave never happened, completely debunking the superpredator theory. *Appendix E,* p 535; *Bogert,* p 8. In 2012, Professor DiIulio, Jr., joined 45 other academics in an amicus brief and also submitted an affidavit, stating that he "repudiated the idea and 'expressed regret, acknowledging that his prediction was never fulfilled." Brief of Jeffrey Fagan et al as *Amici Curiae* in support of Petitioners, at 19, *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) ("*Brief*") available at https://eji.org/files/miller-amicus-jeffrey-fagan.pdf.[5] Despite the failure of this prediction, the impact of the fervor following its publicity lived on, and its creators admitted that it created an "ill-suited and excessive

[5] The brief shared that the empirical data showed that the overall prevalence of juvenile offenders in violent crimes actually did not significantly differ from the previous generation. *Brief*, pp 21-22.

punishment regime." *Brief,* p 37. These academics further shared that there was no correlation between the passage of these laws and the reduction in juvenile crime rates after the mid-1990s. *Brief*, p 30. Comparing statistics of various jurisdictions revealed that states with higher incarceration rates of juvenile defendants saw the same level of decrease in violent juvenile crimes as states without those laws for the same period of time. *Brief*, p 32.

B. Michigan's Laws Became Worse for Children

Michigan has a history of some of the harshest laws for juveniles. Historically, this State was only one of four states that automatically tried 17-year-olds as adults.[6] See House Fiscal Agency, *House Legislative Analysis for 2019 Public Acts 97 through 112*, December 20, 2019 (Appendix L) p 2 of 18. From arrest to imprisonment, the State was not required to provide rehabilitative services to 17-year-olds, who automatically went through the adult criminal court and were detained with older adults in jail and prison including a mandatory life sentence without parole. *Appendix L*, p 5 of 18.[7]

To prosecute younger defendants before 1988, the prosecution would file a motion asking the juvenile court to waive jurisdiction and transfer 15 and 16-year-olds to the adult court. The juvenile court had discretion to retain authority over the child or waive the court's jurisdiction and transfer the child to adult court only after considering specific criteria. If waived to adult court and convicted, the juvenile was sentenced as an adult. *See* Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?,* 54 Wayne L. Rev. 1725, 1735 (2008) (summarizing changes in

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[6] Connecticut, New York, and North Carolina also ended juvenile court jurisdiction for individuals, who were under 17 at the time of their offense. See Children's Action Alliance, *Prosecuting Juveniles in the Adult Criminal Justice System*, November 2003, p 6.

[7] Referring to former MCL 712A.14 and MCL 712A.15 before Oct. 1, 2021.

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Michigan's laws)(Appendix J). In 1988, the law gave concurrent jurisdiction of 15 and 16-year-olds to both the juvenile and adult courts, and this change gave the prosecutor the choice of forum if a juvenile was charged with specified criminal offenses, such as murder. *Appendix J*, p 1735. See e.g., 1988 Public Act 52, amending MCL 600.606; MCL 712A.2(a)(1); MCL 712A.2d(1).

Michigan also followed the "superpredator" trend in the 1990s of easing the process to prosecute children as adults.[8] In 1996, the legislature lowered the age from fifteen to fourteen years old, allowing prosecutors to prosecute these juveniles as adults for felony offenses. *Appendix J*, p 1735; see 1996 Public Acts 244, 247, 248, 260, & 262. In addition, these laws expanded the list of specified offenses for which a prosecutor could file against a juvenile, automatically sending the case to the adult court, without the need for a juvenile court waiver hearing. *Appendix J,* p 1735; Senate Fiscal Agency, *Bill Analysis: Committee Summary*, May 21, 1996. (SFA) If the prosecutor chose the juvenile court waiver process or sought to charge a juvenile with a felony not on the list, the juvenile court judge's decision had to give greater weight to the seriousness of the offense and the juvenile's offense history as factors at a waiver hearing. *Appendix J*, p 1736; SFA, p1. Rather than focusing on rehabilitation and individualized sentencing, this legislation eased the process of subjecting children to adult sentences for felony offenses primarily at the discretion of the prosecutor. *See* generally MCL 600.606; MCL 712A.2(a)(1); MCL 712A.2; MCL 712A.4; and MCL 769.1, as enacted before Oct. 1, 2021.

The 1996 legislation further mandated that juveniles automatically receive adult sentences upon conviction after being tried in adult court for first degree murder and other

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[8] "Although the legislature did not provide a coherent rationale to guide decision making, one clear intention of these reforms was to increase the number of juveniles transferred to the adult court and sentenced to adult prisons, specifically youth from Wayne County. Another was to provide a mechanism for younger juveniles to be treated as adults, and presumably, committed to adult prisons." *Shook*, p 1737. (footnotes omitted).

specified offenses. MCL 769.1(1). Under Michigan law, a person convicted of first-degree murder must be sentenced to life, MCL 750.316, and is not eligible for parole. MCL 791.234(6)(a). Accordingly, since 1996, "[t]his 'perfect storm' of statutes results in many juveniles accused of serious crimes being tried as adults in circuit court and those charged with first-degree murder automatically receiving sentences of life without the possibility of parole." Kimberly Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan?,* Mich B J 90, no. 2 (2011): 34-6.

C. Harsh Sentencing Laws Dramatically Increased the Number of Juveniles in Adult Prison, with an Overrepresentation of Youth of Color

The United States is the only country that sentences children under the age of 18 to mandatory life in prison without the possibility of parole.[9] The superpredator theory was disproved, yet the effects of this myth still plague the sentencing of juveniles, particularly Black youth. Young Black defendants have been sentenced per capita at a rate 10 times their white peers to adult sentences. About The Issue, Campaign for the Fair Sentencing of Youth | CFSY , https://cfsy.org/about-the-issue/ (last visited Feb 7, 2022) .

In 2012, twenty-eight states and the federal government authorized trying some juveniles for murder in adult court and mandated an LWOP sentence upon conviction. *Miller*, 567 US at 482. Nationally, approximately 2800 juveniles were sentenced to mandatory life without parole before *Miller* was decided, and 61% of that number were Black juveniles. *National Trends in Sentencing Children to Life without Parole,* (2021), https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf (last visited Feb 7, 2022) (*CFSY Fact Sheet*)(Appendix G).

[9] https://www.sentencingproject.org/publications/juvenile-life-without-parole/

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When looking at statistics before the *Miller* decision, there was a surge in the number of mandatory life sentences in the mid-1990s, 39% of these sentences were imposed from 1993-1998. The Sentencing Project, *Juvenile Life without Parole; Trends in Sentence Over Time*, April 14, 2011 (Appendix H). The number of Black juveniles serving mandatory life sentences had increased since 1992. *Appendix E*, *supra*, p 578. To examine how Black juveniles were disproportionately overrepresented in JLWOP sentences, researchers compared data from homicide arrest rates to see if this explained the disparity. Even after comparing the proportion of JLWOP sentences to the homicide arrest rate, the results confirmed that Black juveniles were more likely to be sentenced to JLWOP than their white peers. *Appendix E*, *supra*, pp 576-578. Other research compared racial characteristics of the victims and discovered that while Black juveniles represented only 23% of those arrested for killing a White victim, Black juveniles made up 43% of the mandatory life sentences for those convicted. Josh Rovner, The Sentencing Project, *Policy Brief: Juvenile Life without Parole*, p 4, May 2021 (Appendix F).[10]

After Michigan's 1988 and 1996 legislative changes, there was a significant increase in the number of juveniles waived into the adult system and sent to prison. *Appendix J*, *supra*, p 1740, 1753. From 2003 to 2013, 20,291 youth were convicted as adults and placed on probation, sent to jail, or imprisoned for a crime they committed before turning 18 years old. *Appendix D*, p 9. Moreover, Black juveniles were the most prevalent ethnic group, who were sentenced as adults, in prison. *Appendix J*, *supra*, p 1752, Table 4. Looking at Wayne County alone, Black juveniles represented 50% of the county's juvenile population, but they were 90% of the juveniles who were sentenced to adult prison from Wayne County. *Appendix J*, *supra*, p 1755.

[10] Citing Ashley Nellis, PhD, The Sentencing Project, *The Life of Juvenile Lifers; Findings From a National Survey*, p 3, March 2012.

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From data compiled by Attorney Deborah Labelle, 376 youth offenders were sentenced to mandatory LWOP sentences. Deborah Labelle & Anlyn Addis*, Basic Decency, Protecting the Human Rights of Children,* ACLU of Michigan (2012) *p 1* (Appendix I). Michigan had the second highest juvenile LWOP population in the United States. *Id.* The statistics for juvenile LWOP sentences in Michigan confirmed racial disparities persisted in this category. After the *Miller* and *Montgomery* decisions, 361 defendants were eligible for resentencing, and 76% were youth of color. (Data provided by Attorney Deborah Labelle, used with permission).

D. Reforms After Miller Reduced the Number of Juveniles Serving LWOP, yet Racial Disparities Still Persist

After *Miller,* there were changes in laws across the States regarding sentencing juveniles to mandatory LWOP, with varying results across the country. *Appendix G*, p 1. Twenty-five states have banned LWOP sentences for juveniles altogether, and nine states have no one serving such a sentence. *Appendix F*, *supra*, p 1. At the start of 2020, 1465 individuals were still serving mandatory LWOP sentences for offenses committed as a juvenile. *Appendix F*, *supra*, p 1. Of those who had been resentenced, 48% had their sentence reduced, 23% had sentences reduced and were released, 3% were resentenced to mandatory life, and 23% are awaiting resentencing. *Appendix G*, p 1. Yet, since *Miller* and *Montgomery*, the majority of juveniles who have still been sentenced to mandatory life are Black. *Appendix G*, p 1.

In Michigan, the Legislature enacted MCL 769.25a after *Miller*, which set forth statutory and procedural requirements to apply to all individuals sentenced to LWOP, who were under the age of 18 when they committed their offense. The statute was applied retroactively after the decision in *Montgomery.* MCL 769.25a provided that each county prosecutor had to notify the trial

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court of all defendants entitled to resentencing, and if the prosecutor was seeking an LWOP sentence for any defendant, they had to file a motion seeking an LWOP sentence.[11]

In July 2016, county prosecutors filed motions seeking to continue LWOP sentences for 229 of the 363 individuals eligible for resentencing under *Montgomery*. Marlena David, *SADO's Juvenile Lifer Unit Secures Term of Years Sentences for Clients formerly Sentenced to Life Without Parole*, State Appellate Defender Office, https://sado.org/Articles/Article/487 (last visited Feb 7, 2022).

The State Appellate Defender Office successfully represented 82 individuals whose mandatory life sentences were converted to sentences with parole eligibility. Of the 361 original JLWOP defendants, there have been a total of 268 resentencings with 248 defendants receiving an indeterminate sentence, leading to the release of 151 individuals. There are still 93 people awaiting resentencing under *Montgomery*--77% are people of color. (Data provided by Attorney Deborah Labelle, used with permission)

E. The Momentum for Eliminating Mandatory LWOP Sentences is Growing and Should be Extended to Young Adults Ages 18 to 25.

As stated above, a total of 25 states have eliminated mandatory LWOP sentences for juvenile defendants, with nine states having no individuals serving such a sentence, making the total 34 states that have eliminated the practice altogether. *Appendix F*, *supra*, p 1. Michigan's opportunity to follow this momentum is now and has already begun. Looking at the historical

[11] If the prosecutor does not file a motion seeking life without parole within that time, the defendant must be resentenced to a term of years. The minimum term must be between 25 years and 40 years and the maximum term is set at 60 years. MCL 769.25(9). The statute also gives priority in scheduling resentencings to prisoners who have already served over 20 years. MCL 769.25a(5)(a).

impact on 17-year-olds in Michigan, who have always been processed automatically in the adult system and were disproportionately youth of color, the state recently enacted significant reforms.

When reviewing data for juveniles who were processed through the adult court system as 17-year-olds, Michigan Council on Crime and Delinquency (MCCD) reported racial discrepancies. MCCD, *Facts About Youth Behind Bars*, (2016) (Appendix M). MCCD reported that between 2003-2013, 20,291 were convicted as adults and placed on adult probation, sent to jail, or imprisoned for a crime committed before they were 18. *Appendix D*, p 9. Fifty-three percent of youth entering the adult system at age 17 were youth of color, even though they make up only 23% of the statewide youth population, and 59% of youth entering the adult system age 16 and younger were Black, even though they were only 18% of the statewide youth population. *Appendix M,* p 1.

At the end of 2013, 5617 people under MDOC jurisdiction entered the adult system for an offense committed at age 17, and 55% of those were in prison. *Appendix M*, p 2. Over half of this juvenile population received a jail sentence. *Id.*, p 1. Given the overrepresentation of youth of color, it is reasonable to infer that the adultification bias, discussed in Section III, *supra*, may have played a role in trial courts that sentenced Black youth to jail or prison.

New laws now have expanded the juvenile court's jurisdiction to include 17-year-olds. The bill package, 2019 Public Acts 97-112, received bipartisan support. *Appendix L*, p 2. Significantly, the brain science research, as discussed in above, supported the consideration of this change. The legislature recognized that a 17-year-old does not have the judgment or impulse control of an adult and should be treated differently. *Id.* Moreover, the analysis revealed that 17-year-olds were "more likely to be victimized by older adults when incarcerated, and data show higher rates of depression,

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suicide, and recidivism when 17-year-olds are sent to adult jail or prison." *Id*. These acts became effective October 1, 2021. 2019 Public Act 113; see, e.g., MCL 712A.2.

Passage of the "Raise the Age" legislation recognizes that for years policymakers were wrong in assuming that 17-year-olds had the same capacity and culpability as adults. Arbitrarily choosing the age 17 for automatic treatment as an adult was never justified and caused long-term harm to both the young person and society in general. Choosing the age 18 for adult treatment is just as arbitrary based on the same evidence regarding brain development, traumatic histories, capacity for rehabilitation, and racially disparate impact. The stark racial disparities that exist within the juvenile justice system and continue into the adult system among young adults between the ages of 18 and 25 are reason enough to find mandatory LWOP unconstitutional for young adults, coupled with the science and logic that convinced the courts in *Roper* and *Miller*, and the Michigan legislature to 'raise the age'.

The incarceration rate of young adults for LWOP in Michigan's prisons as of January 2021 illuminates the continuing racial disparities. Approximately 78% of people in Michigan's state prisons as of January 2021 who were sentenced to LWOP when they were between the ages of 18 and 25 are people of color, 75% are Black. Safe and Just Michigan (SJM), *Dataset obtained from the Michigan Department of Corrections*, (Analyzed by The Detroit Justice Center, January 2021, used with permission). Approximately 74% of people in Michigan's state prisons as of January 2021 who were sentenced to LWOP when they were 17 or younger are people of color, 69% are Black.(SJM Data) Black people comprise only 14% of Michigan's entire population *U.S. Census Bureau QuickFacts: Michigan,* https://www.census.gov/quickfacts/MI (last visited Feb 7, 2022).

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VI. THE CIRCUMSTANCES OF MR. POOLE'S CASE ARE CONSISTENT WITH INCOMPLETE ADOLESCENT BRAIN DEVELOPMENT

Mr. Poole was 18 years old, when he was asked to kill someone by his 42-year-old uncle, Mr. Varner. As discussed in Section III, *supra,* many studies have confirmed parts of the brain related to decision-making, risk-taking behavior, and susceptibility to outside influences continue to develop well beyond the age of 18. *See* Scott, Bonnie & Steinberg, *supra*, p 642 (2016); Spear & Silveri, *supra*; Steinberg et al., *supra.* Given Mr. Poole's age at the time of his crime, he was less likely to consider the consequences, and more likely to be impulsive and easily persuaded by negative outside influences, especially the influences of an adult.

Mr. Poole's traumatic history also impaired his brain development. Mr. Poole was homeless, had a 9th grade education, had never met his father, and had a mother who had a substance abuse history, struggling with a crack cocaine addiction that left her unable to adequately care for her son. (Appellants' Supplemental Brief on Appeal, Summary of Argument). This trauma and lack of a consistent, positive adult support system delayed Mr. Poole's brain development and ability to appropriately calculate and assess all the implications of the crime he committed against Mr. Covington.

Mr. Poole was asked to murder another individual, but his judgment was clouded by the emotions surrounding his coercive familial relationship with his uncle, an adult role model with a fully developed brain who asked Mr. Poole to commit the crime for the uncle's own benefit. Mr. Poole's uncle, Mr. Varner, presented Mr. Poole with an unthinkable request and then persuaded him with the incentive of just $300–money that could only have reasonably "glittered as gold" for a young man without a fully-developed brain who was experiencing extreme poverty and

continuous financial hardship. His actions were consistent with the adolescent brain development of someone his age with his level of trauma and adverse childhood experiences (ACES)--emotion-based and geared toward instant gratification that inappropriately calculated a small reward over the risk of taking a human life.

The many steps Mr. Poole has taken to better himself during his incarceration support the fact that Mr. Poole's brain was not fully developed at the time he committed his crime. He has pursued educational goals, become a sign language interpreter, and also became an elderly aide while in prison. (Appellants' Supplemental Brief on Appeal, Summary of Argument). He clearly has since achieved rehabilitation and an adult's ability to think rationally, with undeniable respect for human life.

Mr. Poole was charged with and convicted of murder in the first degree, despite the fact that his fully adult uncle was the purported orchestrator of the crime. In fact, rather than being convicted as a co-conspirator, Mr. Poole's uncle was offered a deal of a lesser penalty and served a substantially shorter prison sentence than his adolescent nephew who he persuaded to commit this act. (Appellants' Supplemental Brief on Appeal, Statement of Facts) Because of mandatory LWOP sentencing for his conviction, the judge presiding over Mr. Poole's case had no discretion to apply the affirmed cognitive science and engage in anti-adultification sentencing. Expanding *Miller* would allow for courts to retain and to exercise such discretion and would be more consistent with the research that the Court relied upon in deciding *Miller*.

Mr. Poole's LWOP sentence is grossly disproportionate when considering his age and trauma history. When he was 18 years old, he was developmentally unable to rationally consider the gravity of his actions and their consequences. Further, Mr. Poole's rehabilitation in prison is consistent with his maturity and development into someone who would benefit society if

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released, rather than seek to harm it. Such factors are also consistent with the age-crime curve research and assertions that Mr. Poole was less culpable than an adult like his uncle who had a fully developed brain. For these reasons, at just 18 years old, Mr. Poole should minimally have been given the chance during sentencing to someday re-enter society after rehabilitation, through the potential for parole consideration in the future. Expanding the holding of *Miller* to young adults like Mr. Poole allows for the possibility of a more just result, consistent with developmental science.

VII. THE COURT HAS A UNIQUE OPPORTUNITY TO HOLD THAT MANDATORY LWOP SENTENCING IS FUNDAMENTALLY FLAWED WHEN APPLIED TO YOUNG ADULTS AND OVERCOME THE DAMAGE DONE WHEN SENTENCING THESE LESS-CULPABLE PERSONS TO DIE IN PRISON.

Mandatory LWOP sentencing is deeply flawed, when imposed on young immature, impressionable persons, who are overwhelmingly people of color, from marginalized communities that are overpoliced, and subjected to biased stereotypes that lead them to be overrepresented in the criminal punishment system. As the US Supreme Court recognized:

> Life-without-parole terms, the [*Graham*] Court wrote, "share some characteristics with death sentences that are shared by no other sentences." 560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." Ibid. (citing *Solem v. Helm*, 463 U.S. 277, 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)). And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." Ibid. at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825.

Miller, 567 US at 474-475 (quoting *Graham*, 560 US at 69-70) .

Principally, mandatory LWOP sentencing schemes prevent the consideration of significant factors, such as:

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a. The defendant's age, immaturity, vulnerability to outside influence, inability to appreciate the consequences of risky behavior;
b. The defendant's social and family history, which may have contributed to their lack of maturity;
c. How the defendant's development and social history played a role in the circumstances of the offense;
d. The defendant's inability to assist their attorney and/or fully understand the legal process and assist in their defense; and
e. The defendant's capacity to rehabilitate with maturity and resources that help heal their past trauma and develop life skills.

See Miller, 567 US at 477-478.

The courts have considered no individualized factors when sentencing these young adults. Specifically, the court was unable to consider the fact that a young person's brain is not usually as rational as an adults, and even less so when that young person has been exposed to trauma. Further, the court did not consider the significant relationship between young people of color, particularly Black people, the greater likelihood that they experience trauma due to a variety of societal factors, and the impact that has on their decision-making. As decided in *Miller* and *Graham*, failure to consider these factors is fundamentally flawed.

If this Court found that the *Miller* holding was applicable to young adults, then these young adults would have the possibility of parole and the ability and motivation to seek rehabilitation in order to earn their parole. This would not preclude sentences that take into account the severity of an offense. Rather, it provides a more just approach to these individuals, who are still developing in maturity, and are only chronologically older than other juvenile defendants, sometimes by mere days or months.

CONCLUSION

In summary, scientific research supports the conclusion that brain development does not end at age 18 and could be further delayed if impacted by trauma. Most young people are not

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fully developed until their mid-twenties, meaning that young adults should also be considered less culpable and more amenable to rehabilitation than older adults. A mandatory life sentence without the possibility of parole prevents these factors from being considered with regard to sentencing, making the punishment cruel and unusual, especially for youth and young adults. Structural and systemic racism play a significant role in the United States' criminal legal system, as evidenced by the disproportionate impact of the punishment system on people of color. This brief outlines the impact of racial disparities and traumatic childhood experiences in culpability, adultification, brain development, and ultimately in sentencing. The US Supreme Court has already pronounced that mandatory life without parole is an especially harsh punishment for a young person because it fails to allow the consideration of the aforementioned mitigating factors and is thus a constitutionally flawed sentence in such a context.

Wherefore, *amici curiae* join with Appellant and other *amici* in asking this Court to hold that mandatory LWOP sentencing for young adults, ages 18 to 25, is unconstitutional.

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STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JOHN ANTONIO POOLE,

Defendant-Appellant.

Supreme Court No. 161529
Case No. 352569
Wayne CC: 02-000893-02-FC

APPENDICES FOR THE
BRIEF OF THE *AMICI CURIAE*
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MICHIGAN CENTER FOR YOUTH JUSTICE

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RECEIVED by MSC 2/8/2022 11:26:36 PM

INDEX OF APPENDICES

APPENDIX A — Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* 106 J. of Personality & Soc. Psychol. 526 (2014)

APPENDIX B — Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L Rev 679 (2002)(excerpted)

APPENDIX C — *Percentage of Minorities at Stages of the Juvenile Justice System, All Reporting Counties, 2020.* Michigan Committee on Juvenile Justice, State Advisory Group.

APPENDIX D — Weemhoff & Staley, MCCD, *Youth Behind Bars*, May 2014 Michigan Council on Crime and Delinquency

APPENDIX E — John R. Mills et al, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*," American University Law Review: Vol. 65 : Iss. 3, Article 4, p 535 (2016)

APPENDIX F — Josh Rovner, The Sentencing Project, *Policy Brief: Juvenile Life without Parole*, May 2021

APPENDIX G — *National Trends in Sentencing Children to Life without Parole* (2021), Campaign for Fair Sentencing of Youth

APPENDIX H — The Sentencing Project, *Juvenile Life without Parole; Trends in Sentence Over Time*, April 14, 2011

APPENDIX I — Deborah Labelle & Anlyn Addis, *Basic Decency, Protecting the Human Rights of Children,* ACLU of Michigan (2012)

APPENDIX J — Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?,* 54 Wayne L. Rev. 1725 (2008)

APPENDIX K	*The Superpredator: The Child Study Movement to Today*, (2021) , Campaign for the Fair Sentencing of Youth
APPENDIX L	*House Legislative Analysis for 2019 Public Acts 97 through 112*, December 20, 2019
APPENDIX M	*Facts About Youth Behind Bars*, (2016), Michigan Council on Crime and Delinquency
APPENDIX N	The Sentencing Project, *Black Disparities in Youth Incarceration* (July 2021)

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APPENDIX A

Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*
106 J. of Personality & Soc. Psychol. 526 (2014)

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The Essence of Innocence: Consequences of Dehumanizing Black Children

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The social category "children" defines a group of individuals who are perceived to be distinct, with essential characteristics including innocence and the need for protection (Haslam, Rothschild, & Ernst, 2000). The present research examined whether Black boys are given the protections of childhood equally to their peers. We tested 3 hypotheses: (a) that Black boys are seen as less "childlike" than their White peers, (b) that the characteristics associated with childhood will be applied less when thinking specifically about Black boys relative to White boys, and (c) that these trends would be exacerbated in contexts where Black males are dehumanized by associating them (implicitly) with apes (Goff, Eberhardt, Williams, & Jackson, 2008). We expected, derivative of these 3 principal hypotheses, that individuals would perceive Black boys as being more responsible for their actions and as being more appropriate targets for police violence. We find support for these hypotheses across 4 studies using laboratory, field, and translational (mixed laboratory/field) methods. We find converging evidence that Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers. Further, our findings demonstrate that the Black/ape association predicted actual racial disparities in police violence toward children. These data represent the first attitude/behavior matching of its kind in a policing context. Taken together, this research suggests that dehumanization is a uniquely dangerous intergroup attitude, that intergroup perception of children is underexplored, and that both topics should be research priorities.

Keywords: dehumanization, racial discrimination, police bias, intergroup processes, juvenile justice

The most important question in the world is, "Why is the child crying?"
—Alice Walker

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Families, laws, and cultures try to protect children from the harshest realities adults face (Ariès, 1965; Lampinen & Sexton-Radek, 2010). It is troubling, therefore, to learn about contexts in which children experience harsh realities similar to those experienced by adults. In the U.S. criminal justice system, for example, thousands of children are sent to adult correctional facilities every year (Redding, 2010), and to chilling effect. Relative to peers sent to juvenile facilities, children who are sentenced as adults are twice as likely to be assaulted by a correctional officer, five times as likely to be sexually assaulted, and eight times as likely to commit suicide (Poe-Yamagata & Jones, 2007; Young & Gainsborough, 2000). These outcomes are particularly worrisome for Black children, who are 18 times more likely than White children to be sentenced as adults and who represent 58% of children sentenced to adult facilities (Poe-Yamagata & Jones, 2007). Given the near universal protection society attempts to afford children, why are Black children so vulnerable to being treated like adults?

When Black adults are treated more harshly than Whites, research often confirms that racial bias, explicit or implicit, is at least partially responsible (Dovidio, 2001). But racial prejudice has not previously been linked to treating individuals as if they are older than they are. In fact, racially disparate treatment of children has rarely been studied by social psychologists, and, when it has been, racial prejudice was not linked to estimations of maturity (Graham

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& Lowery, 2004; Rattan, Levine, Dweck & Eberhardt, 2012). What, then, might be an alternate explanation for the treatment of Black children as adults? In previous research, Harris and Fiske (2006) found evidence that members of dehumanized groups can receive fewer basic social considerations. As the perception of innocence is a central protection afforded to children (e.g., Giroux, 2000; Hendrick, 2003; Kitzinger, 2003), it follows that this social consideration may not be given to the children of dehumanized groups, such as Black Americans (Goff, Thomas, & Jackson, 2008), in equal measure as they are given to their peers. In the context of criminal justice, such dehumanization could explain some of the racial disparities in sentencing and even the disparate use of force by officers. This article, therefore, examines the possibility that the protections of childhood are diminished for Black children in contexts where they are dehumanized.

Dehumanization Versus Prejudice

Previous research suggests that, in contexts where individuals are dehumanized (defined as the "denial of full humanness to others;" Haslam, 2006, p. 252), social protections from violence can be removed or reduced—even when that dehumanization is not paired with explicit prejudice (Goff, Eberhardt, Williams, & Jackson, 2008). Consequently, in this article, we explore the possibility that, if human childhood affords strong protections against harsh, adult-like treatment, then in contexts where children are dehumanized, those children can be treated with adult severity.

This is consistent with previous formulations of dehumanization and infrahumanization, sometimes referred to as "a lesser form of dehumanization" (Castano & Giner-Sorolla, 2006, p. 805). These formulations assert that traditional prejudice and dehumanization take distinct routes to discrimination and predict distinct outcomes (Eyssel & Ribas, 2012; Leyens et al., 2000, 2001). Several researchers have argued in particular that dehumanization is distinct from prejudice because prejudice is a broad intergroup attitude whereas dehumanization is the route to moral exclusion, the denial of basic human protections to a group or group member (Opotow, 1990; Powell, 2012; Staub, 1989).

This conception of prejudice and dehumanization would predict that, whereas prejudice may prompt one to devalue a job candidate from a disliked group (e.g., Dovidio & Gaertner, 2000), prejudice would not predict endorsement of genocide or extreme violence toward that individual or group (Staub, 1989, 1990, 2000). Dehumanization, on the other hand, would. Consequently, although prejudice toward Black children might result in negative academic evaluations and social exclusion (Farkas, 2003; Lareau & Horvat, 1999; Skiba, Trachok, Chung, Baker, & Hughes, 2012), dehumanization of Black children might conflict with perceptions of children as needing protection. In other words, children may be afforded fewer basic protections in contexts where they are dehumanized, making them vulnerable to harsh treatment usually reserved for adults.

In this context, dehumanization serves to change the meaning of the category "children." Individuals tend to understand "children" as an essential category (i.e., biologically innate, stable, discrete, and natural), the principal characteristics of which are age (i.e., young) and innocence (Giroux, 2000; Haslam, Rothschild, & Ernst, 2000; Hendrick, 2003; Kitzinger, 2003).

Because dehumanization involves the denial of full humanness to others (Haslam, 2006), one would expect a reduction of social considerations afforded to humans for those who are dehumanized. This reduction violates one defining characteristic of children—being innocent and thus needing protection—rendering the category "children" less essential and distinct from "adults." This may also cause individuals to see Black children as more like adults or, more precisely, to see them as older than they are. As a result, dehumanization may reduce prohibitions against targeting children for harsh or adult treatment (Rattan et al., 2012). The present research tests the hypothesis that contexts where Black children are dehumanized reduce the human protections given to those children in two ways: making them seem older and decreasing the perception of "children" as essential—each rendering them less innocent and more vulnerable to harsh, adult-like treatment.

A History of Dehumanization

Historians of genocide often argue that dehumanization is a necessary precondition for culturally and/or state-sanctioned violence (Frederickson, 2002; Jahoda, 1999; Santa Ana, 2002)—a view echoed by some social psychological theorists (Opotow, 1990; Staub, 1989). The logic of this assertion is that dehumanizing groups morally excludes them (Opotow, 1990), making it permissible to treat people in a way that would be morally objectionable if they were fully human. U.S. history is replete with examples of this kind of moral exclusion of Black children. For instance, the policies of chattel slavery (mostly pertaining to peoples of African descent) permitted children to be separated from their parents and forced into labor at any age (Guttman, 1976). In 1944, a Black 14-year-old, George Junius Stinney Jr., became the youngest person on record in the United States to be legally executed by the state (electrocuted without the benefit of a lawyer, witnesses, or a record of confession; Jones, 2007). And, notoriously, in 1955, a 14-year-old Black boy named Emmett Till was dragged from his bed, disfigured, and lynched for allegedly whistling at a White woman (Crowe, 2003). What psychological context could explain this treatment of children? Again, there is reason to believe it may be contexts that provoke dehumanization.

A growing literature demonstrates that individuals tend to associate out-groups and out-group members with nonhuman animals more than they do members of their in-group (Boccato, Capozza, Falvo, & Durante, 2008; Capozza, Boccato, Andrighetto, & Falvo, 2009; Haslam, 2006; Loughnan & Haslam, 2007; Saminaden, Loughnan, & Haslam, 2010). More to the point, research by Goff and colleagues supports the hypothesized link between dehumanization and sanctioned violence (Goff et al., 2008). In this research, White participants who were subliminally exposed to images of apes before watching a video of police beating a Black man were more likely to endorse that beating, despite the extremity of the violence. Participants did not, however, endorse the same beating when the suspect was White or when they had not been primed with the ape image. In a follow-up study, Goff et al. coded newspaper articles about death-eligible criminal cases in Philadelphia for ape-related metaphors. They found that the frequency of ape-related imagery predicted whether or not criminals were executed by the state. Of importance, in neither study was racial prejudice (explicit or implicit) a significant predictor. That is, dehumanization uniquely predicted violence and its endorsement.

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The Specific Historical Connection Between Blacks and Apes

Although a general association between a group and "animals" is one form of dehumanization, there are reasons to believe that some animals are more strongly associated with some groups than others. For instance, Jews were frequently represented as vermin (particularly rodents) during the Holocaust of World War II (Jahoda, 1999). Similarly, in the context of United States immigration, Latinos are frequently referred to with insect-related language, such as "hordes of immigrants" that "scurry over the border," "infecting" U.S. culture (Santa Ana, 2002). Likewise, there is a long tradition of peoples of African descent being likened to nonhuman primates—what the philosopher Lott (1999) referred to as the "Negro/Ape metaphor."

This dehumanizing representation can still be found in depictions of soccer players of African descent, especially in Europe (Jones, 2002; Thompson, 2013), and of the first Black president of the United States (Apel, 2009). Consequently, the research conducted by Goff, Eberhardt, et al. (2008) tested the strength of an association between Blacks and great apes (e.g., gorillas, chimpanzees) in contrast to that between Blacks and big cats (e.g., lions, tigers, cheetahs). This research found that, though big cats were seen as more violent, more negative, and more strongly associated with Africa than were great apes, the Black/ape association predicted violence. This finding suggests that the strong historical association between Blacks and apes specifically—and not Blacks with simply any animal—may still influence the unique ways in which individuals dehumanize Blacks. Consequently, the present research uses the same methods as this previous work (Goff, Eberhardt, et al., 2008) to investigate the reduction in protections afforded to Black children when they are dehumanized.

Dehumanization at the Margins: Adolescence and Felonies

The transition from childhood to adulthood is gradual, resulting in most societies seeing adolescence as an indeterminate mix of adult and childlike qualities (Burton, Obeidallah, & Allison, 1996; Johnson, Berg, & Sirotzki, 2007). This ambiguity is even reflected in the views of the American Psychological Association (APA) on how children should be treated within the criminal justice system. For instance, in its amicus brief in *Roper v. Simmons* (2005), the APA argued in favor of abolishing the death penalty for children under 18, describing children as developmentally immature and less culpable for their actions. Conversely, in its amicus brief in *Hodgson v. Minnesota* (1990), the APA argued that children are mature enough to make the decision to have an abortion without parental consent. Most researchers have reconciled these viewpoints by postulating that children have developed the ability to make deliberate, unhurried decisions (such as medical decisions) but do not yet have fully developed the psychosocial skills needed for impulse control (key to avoiding criminal liability and violence; Spear 2000; Steinberg, 2008; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009; Steinberg & Scott, 2003). Given the intermediate position of adolescence between childhood and adulthood and the prediction that the protections of childhood would be reduced for a particular group of children in contexts where that group is dehumanized, it follows that dehumanization would be particularly consequential for adolescents, as those protections may already be waning. Recent research by Rattan et al. (2012) supports this conception of adolescence. In that research, participants perceived Black adolescent offenders as more deserving of adult treatment than an identical White adolescent offender, providing evidence for racial bias in the perceptions of juvenile offenders and for the labile nature of adolescence as a category.

Additionally, any context that provokes consideration of a child as an adult should be particularly susceptible to the effects of dehumanization. Within a juvenile justice context, then, felony cases may be particularly precarious because the serious nature of felonies allows prosecutors to raise the question of whether or not the suspect should be tried as an adult. Misdemeanors, on the other hand, do not. Consequently, a child felony suspect is most at risk of being misperceived as an adult because of her or his intermediate developmental stage and the severity of her or his offense. Therefore, we expected that perceptions of child felony suspects would be more affected by dehumanization than would perceptions of misdemeanor or younger suspects.

Overview of Studies

The present work tested the hypothesis that Black children enjoy fewer of the basic human protections afforded to their peers because the category "children" is seen to be a less essential category (specifically, less distinct from adults) when it is applied to Black children, particularly in contexts where Black children are dehumanized. We also expected that Black children would be seen as less innocent as well as older than their other-race peers. We expected that when children are seen as less distinct from adults, they would also receive fewer protections in both laboratory and field settings. Additionally, this could ultimately result in increased violence toward them relative to their peers in criminal justice contexts. Finally, we expected that the presence of dehumanization, and not traditional prejudice, would moderate each of these relationships. We expected in particular that the dehumanizing implicit association between Blacks and apes found in prior research (see Goff et al., 2008) would predict reductions in seeing "children" as an essential category when applied to Blacks and, thus, also predict age overestimations of Black children and decreases in perceptions of Black children's innocence.

Because several of our studies involved measuring perceptions in a criminal justice context and because boys are disproportionately represented in the juvenile justice system (71% of children arrested are boys Snyder, 2005), we chose to focus on male Black children in the portions of the present research examining criminal contexts, using them as targets in Studies 2, 3a, and 3b. We designed Study 1 to test whether Black children are afforded the privilege of innocence less than children of other races. Studies 2, 3a, and 3b utilize undergraduate and police populations to test the hypothesis that the presence of anti-Black dehumanization facilitates the perception of Black male children as both older than their age and less innocent than their peers. Of importance, Studies 3a and 3b seek to demonstrate these relationships in the domain of encounters with police, with actual police use of force toward children being used as the dependent variable of interest to test our third hypothesis. Finally, Study 4 tests three of our predictions in a single study by examining whether, first, the category "children" is less essentialized for Black male children than for White male

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children; second, this difference is exacerbated when Black children are dehumanized; and, third, essentialism mediates the relationship between dehumanization and harmful perceptions of Black male children.

Support for these hypotheses would represent an extension of previous research on intergroup conflict by demonstrating that dehumanization not only reduces the inhibitions against out-group violence (Goff et al., 2008) but also decreases other basic human protections, specifically the affordance of innocence to children (in age, responsibility, and essence). This, in turn, would provide evidence for the conceptual distinction between prejudice and dehumanization. Although these predictions are a logical extension of previous theorizing, social psychological research has yet to examine the role dehumanization might play in the perceptions of children or to contrast that effect with the effects of traditional racial prejudice. Consequently, the present research represents the first attempt to establish a unique contribution of dehumanization to the perceptions and treatment of children. It also represents an expansion of the ways in which essentialism may influence intergroup interactions, as the consequences of essentialized notions of age across groups have not yet been studied. Finally, because the present research uses field data to test our hypotheses regarding violence toward Black male children, it represents a translation of theoretical work on dehumanization and essentialism into the worlds where they are most consequential.

Study 1

In order to test our foundational premise, we simply asked participants about the innocence of children. Participants answered questions about how innocent children were in general (i.e., without specifying race) and how innocent White and Black children were.

Method

Participants. One hundred twenty-three students from a large public university participated in this study in exchange for course credit. Ninety-six percent (128) were female. The median age of participants was 19. When asked to report racial demographics, 111 responded "White," four responded "Black," and eight responded "other."

Design. Participants were randomly assigned to one of three between-subjects conditions. They were asked to report the perceived innocence of White children, Black children, or children generally (i.e., without race specified). To avoid ceiling effects, where the youngest children (i.e., newborns and toddlers) might invariably be seen as innocent, each survey asked participants to rate individuals within six age subgroups, ranging from birth to young adulthood: 0–4, 5–9, 10–13, 14–17, 18–21, and 22–25. Ratings of innocence were measured with a novel scale and served as the dependent variable. We predicted that participants would rate Black children as less innocent than White children and children whose race was unspecified, particularly for older targets.

Materials

Innocence scale. We constructed a scale to measure innocence after pretesting revealed seven characteristics that were highly associated with innocence in our subject population. Each characteristic was presented as an item in our seven-item scale, including "How much do ___ (e.g., 10- to 13-year olds) need protection?"; "How much do ___ need care?"; "How well can ___ care for themselves?" (reverse coded); "How much are ___ a danger to others?" (reverse coded); "How much are ___ a danger to themselves?" (reverse coded); "How cute are ___?"; and "How innocent are ___?"

Participants were prompted to respond to the set of seven questions for each of the six age subgroups within their assigned race. For example, a participant assigned to rate Black children was asked, "How much do Black 0- to 4-year-olds need protection?" Alternatively, a participant assigned to the race neutral condition was asked, "How much do 0- to 4-year-olds need protection?" The six age subgroups were presented in one of four randomized orders. Further, the administration of these four orders was counterbalanced across conditions. The innocence scale was acceptably reliable ($\alpha = .65$).

Procedure. Participants completed the seven-item innocence scale for each of the six age categories within their assigned racial group (White, Black, or race not specified).

Results

Analyses compared the perceived innocence of children of different races for each age group and aggregated across age ranges. We compared the overall ratings of innocence between races by conducting independent samples *t* tests on the average score for each participant,[1] meaning their general ratings of all target age ranges. Blacks were seen as less innocent than Whites and people generally. (See Table 1 for comparisons and significance at every age group and in the aggregate.) Further, for every age group after the age of 9 (i.e., 10–13 through 22–25), Black children and adults were rated as significantly less innocent than White children and adults or children and adults generally. Our analyses revealed no differences in ratings of innocence between Whites and people generally, either within an age group or overall.

Discussion

Study 1 provides evidence that children may not be given the privilege of innocence equally across race. From ages 0–9, children were seen as equally innocent regardless of race. However, perceptions of innocence began to diverge at age 10. At this point, participants began to think of Black children as significantly less innocent than other children at every age group, beginning at the age of 10. Interestingly, after the age of 10, the perceived innocence of Black children is equal to or less than the perceived innocence of non-Black children in the next oldest cohort. In other words, the perceived innocence of Black children age 10–13 was equivalent to that of non-Black children age 14–17, and the perceived innocence of Black children age 14–17 was equivalent to that of non-Black adults age 18–21. This provides preliminary evidence that Black children are more likely to be seen as similar to adults prematurely. What might be the consequences of this innocence gap in criminal justice contexts, where perceiving someone as not innocent has the most severe consequences?

[1] Using a Bonferroni correction for all *t* tests.

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Table 1
Ratings of Innocence for White Children, Black Children, and Children Without Race Specified

Age range	White	Black	Race unspecified
0–4	6.19 (.56)	6.15 (.45)	6.05 (.42)
5–9	5.31 (.63)	5.38 (.60)	5.30 (.57)
10–13	4.50 (.68)***	3.31 (.59)	4.39 (.61)***
14–17	3.33 (.71)*	2.99 (.71)	3.42 (.61)**
18–21	2.91 (.83)**	2.33 (.81)	2.74 (.83)*
22–25	2.77 (.85)***	2.03 (.86)	2.61 (.91)**
Aggregated	3.97 (.56)***	3.57 (.54)	4.08 (.52)***

Note. Age is in years. Data in parentheses are standard deviations.
* $p < .05$ (Significantly different from ratings of Black children. There are no differences between White and children whose race was not specified.)
** $p < .01$. *** $p < .001$.

Study 2

In Study 2 participants were asked to make evaluations within a criminal justice context, examining whether perceptions of innocence differed by target race and the severity of crimes committed. Because we were interested in testing whether being perceived as less innocent was unique to Black children (as opposed to outgroups in general), participants also rated Latino children. Latinos, similar to Blacks, are stereotyped as criminal and violent (Levy, Stroessner, & Dweck, 1998). If racial differences in the perceived innocence of children are due to stereotypical associations with crime or simply due to in-group bias, we should see similar perceptions of innocence for Black and Latino male children. However, if anti-Black dehumanization (i.e., a Black/ape association) facilitates racial differences in perceptions of innocence, we would expect Black male children to be uniquely perceived as less innocent.

In addition to determining whether Black children are perceived as less innocent than other children, we seek to test the hypothesis that contexts of Black dehumanization facilitate this racial disparity. Following evidence in Study 1 that the perceived innocence of Black children was similar to perceptions of older non-Blacks, Study 2 was also designed to test whether participants would overestimate the ages of Black children and whether dehumanization of Blacks predicts age overestimations. We expected, consistent with other investigations of severe intergroup conflict (Goff et al., 2008), that dehumanization would predict racial differences in age estimations but measures of racial prejudice would not. Consequently, Study 2 included measures of both explicit and implicit racial prejudice.

Finally, we predicted racial differences in perceived innocence and age accuracy would be especially pronounced when Black children were suspected of felonies (as opposed to misdemeanors), because felonies are the crimes that make children eligible for adult punishments in the justice system. As opposed to relatively benign misdemeanors that can more easily be rationalized as youthful indiscretions, felonies are more likely to motivate consideration of attributing adult culpability for one's actions, as reflected by the availability of adult sentencing in the juvenile justice system.

Method

Participants. Fifty-nine students from a large public university participated in this study in exchange for course credit. Fifty-eight percent (34) were female. The median age of participants was 19. When asked to report racial demographics, 53 responded "White," one responded "Black," two responded "Latino," and four responded "other."

Design. Participants were randomly assigned to a 2 (crime type: misdemeanor vs. felony) × 3 (race of target: White vs. Black vs. Latino) mixed-model design, with crime type as a within-subjects factor. As in Study 1, participants were assigned to assess males from a single racial group.

Materials

Age assessment task. Because Study 1 found that racial differences in assessments of innocence emerged beginning at age 10, participants were shown pictures of young males from one of three races (White vs. Black vs. Latino) age 10–17.[2] There were eight pictures of children age 10–17. Pictures were matched on attractiveness and racial stereotypicality within age ranges. Participants saw each picture on a separate sheet of paper, and each picture was paired with the description of crime type (either a misdemeanor or a felony, described in greater detail below). Participants were asked to estimate the age of the child—ostensibly a criminal suspect—in each picture. The actual age of each target was subtracted from the participants' age assessment. This score represented age overestimation. For each race of target, an average age overestimation score was created for misdemeanor suspects and felony suspects both within age ranges and overall.

Culpability scale. A novel culpability scale assessed participant's perceptions of each suspect's innocence in this criminal context. This scale consisted of four questions: "How responsible is he for his own actions?" "How much can he care for himself?" "How likely is he to persist in these negative behaviors?" and "How likely is it that he did NOT intend the negative consequences of his actions?" Participants responded to the set of four questions for each of the eight targets within their assigned race. This scale was designed to measure the perceived innocence of a child within a criminal justice context as opposed to abstract notions of innocence, and it had an acceptable reliability ($\alpha = .71$).

The Attitudes Towards Blacks Scale. This questionnaire (ATB Scale; Brigham, 1993) is a widely used assessment of explicit anti-Black prejudice. The questionnaire consists of 20 statements such as, "It is likely that Blacks will bring violence to neighborhoods when they move in."

Personalized Implicit Association Task. To test the possibility that omnibus implicit anti-Black attitudes predict reduced perceptions of Black innocence, we instructed participants to take the personalized Implicit Association Task (IAT; Olson & Fazio, 2004), a modified version of the original IAT (Greenwald, McGhee, & Schwartz, 1998). This task required participants to categorize stereotypically Black and White first names as Black or White and to categorize words that could be either positive or negative for a given respondent (i.e., *peanuts*) as good or bad. The

[2] Though we no longer include the youngest age groups from Study 1, we maintain our reference to the total set of the target population as children. As such, we maintain the appropriate distinction from adults, while using a set of stimuli that are plausible as potential criminal suspects.

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task is intended to measure whether participants are faster at categorization when Black names are paired with disliked items, as opposed to liked items, on the response instrument. Such response time disparities are interpreted as implicit negative attitudes. The names and words for the personalized IAT were taken from Olson and Fazio (2004).

Dehumanization IAT. Similar to the personalized IAT, the dehumanization IAT (Goff, Eberhardt, et al., 2008) is designed to capture a form of implicit bias against Blacks. The dehumanization IAT consists of Black/White, ape/great cat response key pairings. The choice of contrasting great cats with apes, again, reflects previous research that revealed great cats to be rated as more violent, more associated with Africa, and less liked by most individuals—minimizing the possibilities that a Black/ape association is due to associations between Blacks and violence, Africa, or general negativity (Goff et al., 2008). The human and animal names for the dehumanization IAT were taken from previous research (Goff, Eberhardt, et al., 2008).

Procedure. Participants were asked to respond to eight scenarios, each related to a different suspect. Four scenarios were matched with pictures of young males from each age of childhood where significant differences in innocence were found in Study 1 (i.e., 10–17). Of the eight scenarios, four described misdemeanors and four described felonies.

The misdemeanor crimes included cruelty to animals, possession of drug paraphernalia, malicious destruction of property, shoplifting, possession of stolen property, and making unspecified threats. The felony crimes included arson, breaking and entering, aggravated assault, intent to distribute narcotics, rape, and armed carjacking. To maximize realism, we paired offenders with age-appropriate crimes, such that we did not have 10-year-olds accused of rape or armed carjacking. An example of a scenario where a Black male is suspected of a misdemeanor is "*Kishawn Thompkins was arrested and charged with cruelty to animals. He attempted to drown a neighborhood cat in his backyard.*" After seeing a picture of a target paired with one of the scenarios, participants completed age and culpability assessments for that target. After these assessments were made, participants completed the ATB Scale, the personalized IAT, and the dehumanization IAT (the order of IATs was randomized).

We predicted that our predominantly White subject population would overestimate the age of Black criminal suspects relative to that of White and Latino suspects. We also predicted that participants would rate Black criminal suspects as more culpable (i.e., lacking in innocence) relative to White and Latino suspects. Finally, we hypothesized that implicit dehumanization, but neither explicit nor implicit anti-Black prejudice, would predict these racial differences.

Results

All patterns of data were consistent across ages, allowing us to collapse the data across age.

Age assessment. The actual age of the target from each scenario was subtracted from the participants' age assessment to create an age error score. Thus, positive numbers indicate age overestimations and negative numbers indicate age underestimations. To test for racial differences in age errors, we conducted a 2 (crime type: misdemeanor vs. felony) × 3 (race of children: White vs. Black vs. Latino) repeated measures analysis of variance (ANOVA), with crime type as the repeated measure variable.

This analysis revealed the anticipated two-way interaction, $F(2, 56) = 4.30$, $p < .05$, $\eta^2 = .13$ (see Figure 1A). Simple effects tests revealed that participants overestimated the age of Black felony suspects ($M = 4.53$, $SD = 4.05$) to a greater degree than that of Black misdemeanor suspects ($M = 2.19$, $SD = 2.90$), $F(1, 56) = 10.35$, $p < .005$, $\eta^2 = .23$. There was no difference in age errors between White suspects ($M_{\text{felony}} = 2.57$, $SD = 1.79$; $M_{\text{misdemeanor}} = 2.78$,

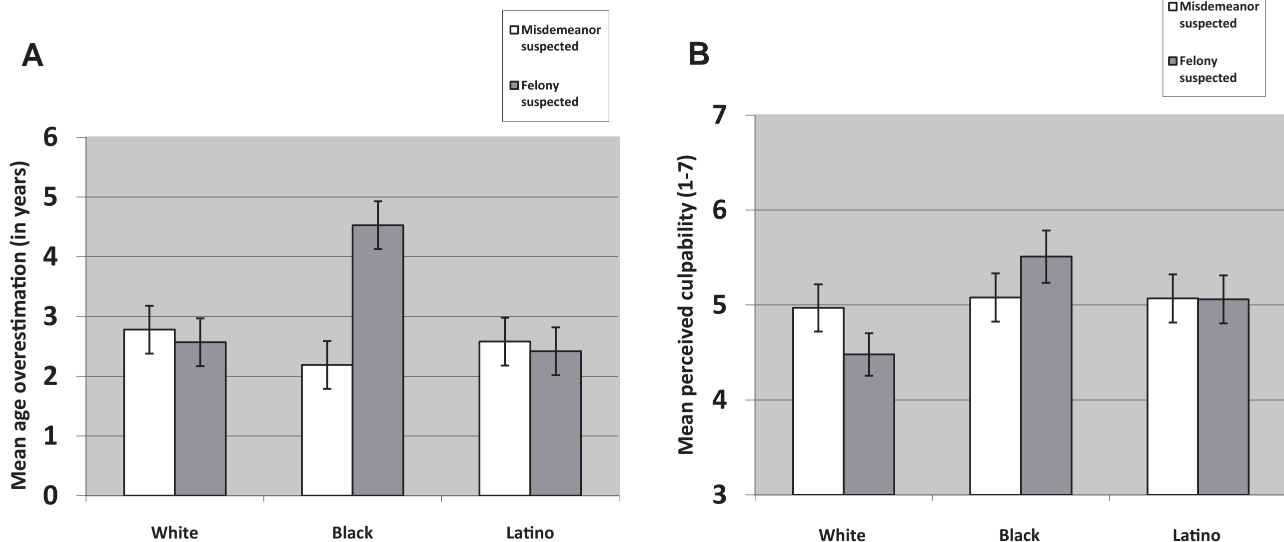

Figure 1. A: Participants' average age estimation accuracy for child suspects of different races (Study 2). B: Participants' average culpability rating for child suspects of different races (Study 2). Error bars represent standard errors.

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$SD = 2.27$), nor between Latino suspects ($M_{\text{felony}} = 2.42$, $SD = 2.11$; $M_{\text{misdemeanor}} = 2.58$, $SD = 2.63$). Simple effects tests also revealed that participants rated Black felony suspects as older than White felony suspects, $F(1, 56) = 7.08$, $p < .01$, or Latino felony suspects, $F(1, 56) = 8.44$, $p = .005$, but revealed no such effects for misdemeanor suspects ($Fs < 1$).

Culpability. The culpability scale was acceptably reliable ($\alpha = .65$). To test for racial differences in perceived culpability, we conducted a 2 (crime type: misdemeanor vs. felony) × 3 (race of children: White vs. Black vs. Latino) repeated measures ANOVA, with crime type as a repeated measure variable and race of target as a between-subjects variable.

This analysis revealed a main effect of race, $F(2, 56) = 4.57$, $p = .01$, $\eta^2 = .14$. Blacks were rated as more culpable than Latinos, and Latinos were rated as more culpable than Whites (see Figure 1B). This effect was qualified by the predicted interaction, $F(2, 56) = 17.17$, $p < .005$, $\eta^2 = .38$. Simple effects tests revealed that White targets were rated as less culpable when associated with felonies ($M_{\text{felony}} = 4.48$, $SD = 1.05$; $M_{\text{misdemeanor}} = 4.97$, $SD = 0.68$), $F(1, 56) = 18.93$, $p < .001$, $\eta^2 = .18$, whereas Black targets were perceived to be more culpable when associated with felonies ($M_{\text{felony}} = 5.51$, $SD = 0.45$; $M_{\text{misdemeanor}} = 5.08$, $SD = 0.54$), $F(1, 56) = 15.35$, $p < .001$, $\eta^2 = .17$. There was no difference in culpability for Latinos across crime type. Simple effects tests also revealed that Black felony suspects were viewed as significantly more culpable than either White felony suspects, $F(1, 56) = 85.30$, $p < .001$, or Latino felony suspects, $F(1, 56) = 17.05$, $p < .001$. No simple effects between target races approached significance for misdemeanor suspects ($Fs < 1$).

Age assessment and culpability. Again, we reasoned that there were two perceptual changes that might result from decreasing the protections of innocence afforded to Black children: by viewing them as older than they are (and relative to their peers) and by viewing them as more culpable/less innocent than their peers. However, it was not clear whether these outcomes were independent outcomes or were related. It would not be surprising if greater perceptions of culpability resulted in greater perceptions of age or vice versa. Consequently, we tested the relationship between respondents' age errors and their ratings of culpability. A simple correlation found that age errors were moderately related to ratings of culpability such that the older a child was rated, the more culpable the child was seen to be, $r(58) = .28$, $p < .05$.

Dehumanization IAT. Because we measured dehumanization after our manipulations (and because our manipulations affected implicit dehumanization scores),[3] we did not formally test the presence of dehumanization as moderating variable. However, the dehumanization IAT significantly predicted age overestimations of Black children. The more readily participants implicitly associated Blacks with apes, the higher their age overestimation for both Black misdemeanor suspects, $r(19) = .66$, $p < .005$, and Black felony suspects, $r(19) = .75$, $p < .001$. Similarly, the dehumanization IAT significantly predicted perceptions of the culpability of Black children. The more readily participants implicitly associated Blacks with apes, the higher their culpability ratings for both Black misdemeanor suspects, $r(19) = .57$, $p < .01$, and felony suspects, $r(19) = .51$, $p < .05$.

Anti-Black dehumanization did not predict age overestimations or assessments of culpability for Latino targets, $rs(19) < .23$, *ns*; nor did they predict age estimations for White targets, $rs(18) < .11$, *ns*. Implicit anti-Black dehumanization did, however, predict ratings of White culpability, $rs(18) < -.50$, $ps < .05$. In other words, the more participants associated apes with Blacks, the less they found White targets culpable for criminal misdeeds. Of course, with small numbers of observations, it is important to be cautious in our interpretations of these correlational data. Because participants saw pictures from only one of each racial group, we could not test whether or not dehumanization predicted differences between Black, White, and Latino targets within a particular individual.

Measures of prejudice. There were no differences in responses to the ATB ($\alpha = .82$) nor in responses to the personalized IAT, across conditions, $F(2, 56) < 1$. Further, these measures were not correlated with any other measures ($rs < .2$, *ns*). Again, this means that measures of prejudice could not be responsible for racial differences in age assessments or culpability.

Discussion

Study 2 aimed to build on the evidence from Study 1 that children of all races may not be afforded the privilege of innocence equally. Participants overestimated the age of Black targets and deemed Black targets more culpable for their actions than White or Latino targets, particularly when those targets were accused of serious crimes. The magnitude of this overestimation also bears repeating. Because Black felony suspects were seen as 4.53 years older than they actually were, this would mean that boys would be misperceived as legal adults at roughly the age of 13 and a half.

This racial disparity appears to be related to implicit dehumanization of Blacks. The more participants implicitly associated Blacks and apes, the greater the age overestimation and perceived culpability of Black children. It is important to note that Latinos were rated neither as more culpable nor as older than Whites and that (not surprisingly) anti-Black dehumanization did not predict either measure of innocence for Latino targets. This suggests that our findings do not represent a general out-group perceptual phenomenon. Rather, the implicit dehumanization of Blacks appears to be related to unique effects on the perception of Black male children. To test the possibility that the dehumanization of Black children predicts worse outcomes in the criminal justice system, we next turned to police officers, a subject population directly responsible for criminal justice outcomes of children.

Study 3a

Does implicit dehumanization facilitate racial disparities in the perception of child suspects in real-world policing contexts, as it does in undergraduate populations? Previous research has argued that it is important to examine a population that has actual experience with child offenders when conducting research on criminal justice outcomes (i.e., Steinberg & Scott, 2003). Consequently, we administered measures of implicit dehumanization and racial prej-

[3] The implicit dehumanization of Blacks was higher after participants evaluated Black suspects relative to non-Black suspects, $F(2, 56) = 3.98$, $p < .05$, $\eta^2 = .12$. The *D* score was higher for Blacks ($M = .50$, $SD = .46$) than for the next highest group, Whites ($M = .15$, $SD = .37$), $t(37) = 2.56$, $p < .05$. However, exploring the causes of dehumanization is beyond the scope of this paper. Here we were interested in the predictive power of dehumanization.

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udice to sworn police officers. We then compared these measures with career officer performance, exploring whether implicit dehumanization—and not racial bias—predicted racially disparate treatment of children outside of the laboratory. A replication of Study 2 within a police population, showing that the dehumanization of Black children predicts worse outcomes in the criminal justice system, would provide evidence that observed racial disparities in age overestimations and assessments of innocence are not simply due to inexperience with Black children, as might be the case in an undergraduate population. Independently, we sought to investigate our hypothesis that the presence of dehumanization would facilitate negative outcomes for children, as evidenced by age overestimations and racially disparate use of force against Black male children.

Method

Participants. Sixty police officers from a large urban police department (e.g., policing a population of more than 250,000 people) participated in this study in exchange for $50. The sample was 7% (4) female, with a median age of 38, and a median time on the police force of 6.5 years. Forty-four self-identified as "White," six responded "Black," eight responded "Latino," and two responded "other." Officers were recruited during roll call at the beginning of their shift and participated either after their shift was completed or on a separate day when off duty.

Design. Participants were randomly assigned to a 2 (crime type: misdemeanor vs. felony) × 3 (race: White vs. Black vs. Latino) mixed model design, with crime type as a within-subjects factor.

As in Study 2, age and culpability assessments served as the dependent variables. Measures of implicit and explicit prejudice were included to test their relationship to policing outcomes.[4]

Materials. The crime scenarios, ATB Scale, dehumanization IAT, personalized IAT, age assessment task, and culpability scale were identical to those used in Study 2.

Procedure. The protocol of Study 3a was a modified version of the Study 2 protocol. Participants completed the ATB Scale, the personalized IAT, and the dehumanization IAT. Then, participants were presented with 12 scenarios depicting male targets of a given race (White, Black, or Latino, based on condition) as criminal suspects. Finally, participants completed age and culpability assessments for each target.

After testing officers, the police department's Internal Affairs Bureau worked with researchers to link individual officer psychological data to data contained in that officer's personnel files. We used a double-blind coding technique in order to maintain participant confidentiality. Data gathered from personnel files included use of force history throughout the officer's career. "Use of force" incidents were rated in terms of level of severity taken from police academy training (and confirmed by pretesting with officers in the partner law enforcement agency). Severity levels range from verbal warnings (not included in the analysis), to a takedown/wrist lock, to kicking/punching with a closed fist, to striking with a blunt object, to the use of a police dog, to the use of restraints/hobbling the suspect, to use of a chemical agent (e.g., Mace), to use of a Taser, to use of deadly force (i.e., discharging a firearm or employing a carotid choke hold).[5]

Officers in this department are required to complete a use of force report every time physical contact has been made with a resident. All use of force records are required to contain the geographic location; the time of day; whether or not the suspect was impaired by drugs, alcohol, or mental illness; whether the suspect had a weapon; suspect age; as well as the officer's height and weight. These were entered into our data set for use as covariates. We predicted that dehumanization would predict racial disparities in the amount of force used against Black children (boys and girls), controlling for the covariates listed above.

We predicted a replication of Study 2, such that participants would overestimate the age of Black male children relative to White and Latino children. Similarly, we predicted that participants would rate Black targets as more culpable (i.e., lacking in innocence) than White and Latino suspects. We hypothesized that these racial differences would be predicted by implicit dehumanization. Further, we hypothesized that these racial differences would predict the disproportionate use of actual force against Black children during an officer's career.

Analytic strategy. To analyze these data, we added weights to each incident an officer had with a child under the age of 18 (boys and girls). Each incident was multiplied by a number representing its severity, using the highest level of force applied during the incident for categorization purposes. Consequently, we multiplied wrist locks by 1, punching by 2, and so on, up to 8 for the use of deadly force. This conversion resulted in a weighted score of total use of force incidents for each officer. We then created subscores for each suspect race.

To test for potential anti-Black bias, we computed difference scores (weighted use of force against Black minors minus use of force against all other minors) for each officer. It was not possible to compute ratios, because many officers had used force against only one racial group of minors; consequently, we used difference scores rather than attempt to divide by zero. Finally, because these weighted difference scores were skewed in their distribution, we performed a square root transformation on positive difference scores and a square root transformation on the absolute value of negative difference scores, then returning them to negative values.

Results

Again, all patterns of data were consistent across ages, allowing us to collapse data across them. Most officers had never used force against a child under the age of 18 (32 out of 60).

Age assessment. To test for racial differences in age estimation errors, we conducted a 2 (crime type: misdemeanor vs. felony) × 3 (race of children: White vs. Black vs. Latino) repeated

[4] Officers completed other measures that are theoretically unrelated to the current paper. Therefore, we do not discuss these measures here.

[5] It is important to mention that the use of K9 police dogs is considered a tactical decision (i.e., the officer has to call and request command staff approval for the use of a K9 unit). In addition, distance weapons (such as Tasers) are often deployed more readily than seemingly less severe tactics (i.e., wrist locks), due to the ability to deploy them without approaching a dangerous suspect. However, these rankings correspond roughly to several "use of force continuums" that other large urban departments use, and the training staff at the department from which data were collected affirmed that these weightings correspond to the "use of force levels of severity" that are taught at this department's training academy and during continuing training.

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measures ANOVA, with crime type as the repeated measure variable.

This analysis revealed a main effect of race that was qualified by the predicted two-way interaction, $F(2, 57) = 8.25$, $p < .001$ (see Figure 2A). Simple effects tests reveal that participants overestimated the age of Black felony suspects ($M = 4.59$, $SD = 4.73$) to a greater degree than that of Black misdemeanor suspects ($M = 2.46$, $SD = 2.16$), $F(1, 57) = 10.80$, $p < .005$, as well as all other suspects. There were no differences in age overestimations between Latino felony suspects ($M = 2.27$, $SD = 1.64$) and Latino misdemeanor suspects ($M = 3.10$, $SD = 1.70$), $F < 2$, *ns.* Similarly, there were no differences in age overestimations between White felony suspects ($M = -0.86$, $SD = 3.67$) and White misdemeanor suspects ($M = 0.41$, $SD = 2.69$), $F < 1$. Simple effects tests also revealed that White felony suspects were rated as significantly younger than both Black felony suspects, $F(1, 57) = 73.98$, $p < .001$, and Latino felony suspects, $F(1, 57) = 24.10$, $p < .001$. Black felony suspects were also rated as older than Latino felony suspects, $F(1, 57) = 12.09$, $p = .001$.White misdemeanor suspects were also rated as younger than both Black misdemeanor suspects, $F(1, 57) = 10.44$, $p < .005$, and Latino misdemeanor suspects, $F(1, 57) = 17.05$, $p < .001$. Black and Latino misdemeanor suspects, however, did not differ in age ratings ($F < 1$).

Culpability. Again, the culpability scale had acceptable reliability ($\alpha = .77$). To test for racial differences in perceived culpability, we conducted a 2 (crime type: misdemeanor vs. felony) × 3 (race of children: White vs. Black vs. Latino) repeated measures ANOVA, with crime type as the repeated measure variable.

This analysis revealed the predicted interaction, $F(2, 57) = 7.53$, $p = .001$ (see Figure 2B). Simple effects tests revealed that White targets were rated as less culpable when associated with felonies, $F(1, 57) = 7.45$, $p < .01$, whereas Black targets were rated as significantly more culpable when associated with felonies, $F(1, 57) = 7.55$, $p < .01$. There was no difference in culpability for Latinos across crime type.

Simple effects tests also revealed a significant difference between White targets suspected of felonies and both Black targets, $F(1, 57) = 19.38$, $p < .001$, and Latino targets, $F(1, 57) = 10.47$, $p < .005$. No differences emerged between Black and Latino felony suspects ($F = 1.04$, *ns*) or between any misdemeanor suspects (Fs ≤ 1.81, *ns*).

Age assessment and culpability. Again, we tested the relationship between participant age errors and ratings of targets' culpability. Here, again, we observed a moderately strong relationship between age errors and ratings of culpability such that the older an officer thought a child was, the more culpable that child was rated for their suspected crime, $r(59) = .46$, $p < .001$. This, again, suggests the dangers to children of being perceived as older than they are.

Dehumanization IAT. To test for an interaction of between-subjects variables, suspect race and subject dehumanization score, and the within-subjects variable, crime type, on both age estimation errors and ratings of culpability, we followed established methods for testing interactions including within-subjects variables (Judd, Kenny, & McClelland, 2001). We calculated the difference between the age assessment and culpability scores for targets suspected of felonies and targets suspected of misdemeanors. We then entered these variables into separate regression analyses with mean-centered dehumanization scores and target race as predictors. The crime type × target race × dehumanization of Blacks interaction was not a statistically significant predictor of age assessments ($\beta = .21$, $p = .31$). Considering the magnitude of the β statistic, it may be the case that our small sample size prevented the ability to statistically confirm this effect. Conversely, the crime type × target race × dehumanization of Blacks interaction was a statistically significant predictor of culpability assessments ($\beta = .51$, $p < .01$), as is consistent with our hypothesis of dehumanization as a moderator.

Given our concerns about lack of power contributing to our inability to find an interaction for age assessment above, we chose

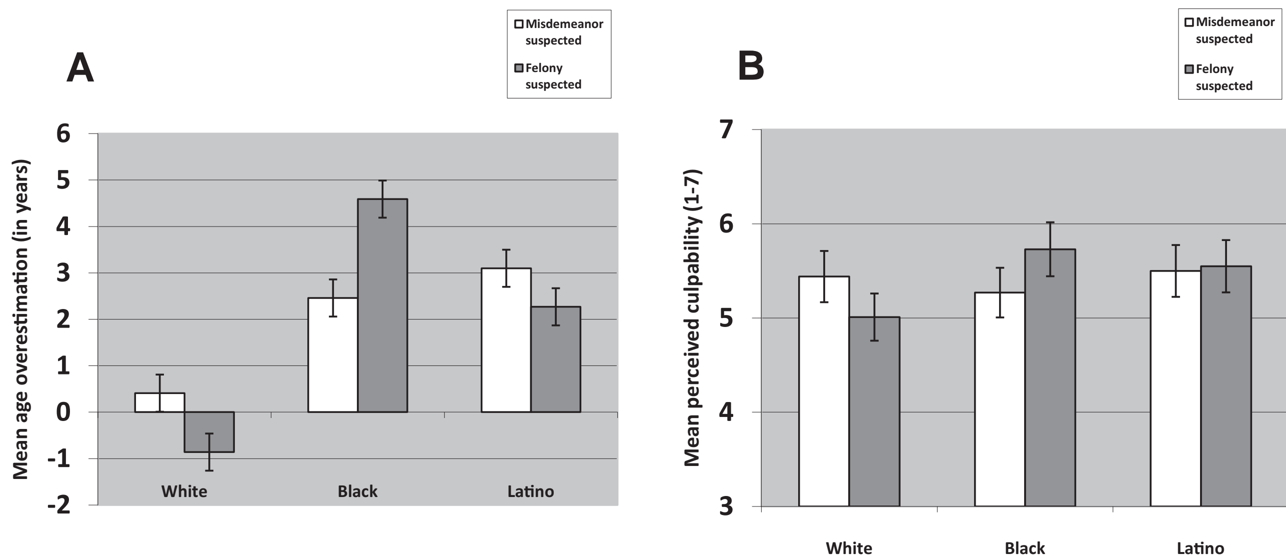

Figure 2. A: Officers' average age estimation accuracy for child suspects of different races (Study 3a). B: Officers' average culpability rating for child suspects of different races (Study 3a). Error bars represent standard errors.

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to examine whether the dehumanization IAT predicted both age overestimations and perceived culpability of Black children in particular. Though it is important to be cautious of overinterpreting correlations from relatively small samples, the more quickly participants associated Blacks with apes, the higher was their age overestimation for both Black misdemeanor suspects, $r(19) = .87$, $p < .001$, and Black felony suspects, $r(19) = .84$, $p < .001$. Similarly, the dehumanization IAT significantly predicted perceptions of the culpability of Black children. The more readily participants implicitly associated Blacks with apes, the higher were their culpability ratings for both Black misdemeanor suspects, $r(19) = .72$, $p < .001$, and Black felony suspects, $r(19) = .81$, $p <$ .001. As in Study 2, implicit anti-Black dehumanization was unrelated to perceptions of Latinos' age or culpability, $rs(16) < .2$, *ns*. However, perceptions of White targets' age were related to implicit anti-Black dehumanization, $rs\ (21) < -.70$, $ps < .001$. It was also related to perceptions of White suspects culpability for felony, $r(21) = -.53$, $p = .01$, but not misdemeanor cases, $r(21) < .1$, *ns*.

Officer performance data. The overall mean weighted use of force score was 5.1 ($SD = 12.20$, $median = 0$). To test for potential anti-Black bias, we computed transformed difference scores (weighted use of force against Black minors minus use of force against all other minors) for each officer. This resulted in unskewed data that ranged from −5.1 to 7.62 with a mean of .26 ($SD = 2.09$, $median = 0$). Of importance, in officer performance, anti-Black dehumanization scores predicted racial disparities in police use of force.

We conducted a regression analysis with scores on the dehumanization IAT as the predictor variable and racial disparity in use of force (measured via the transformed weighted use of force difference scores) as the dependent variable.[6] We included several covariates in the analysis, including scores on the personalized IAT; scores on the ATB Scale; the total number of use of force incidents per officer; the neighborhood where the officer was assigned; the total number of use of force incidents the officer reported during daytime shifts (i.e., 6 a.m.–2 p.m.), evening shifts (i.e., 2 p.m.–10 p.m.), and nighttime shifts (i.e., 10 p.m.–6 a.m.); the total number of suspects who were impaired by alcohol; the total number of suspects who were impaired by drugs; the total number of suspects who were impaired by mental illness the total number of suspects who resisted arrest physically; officer gender; and officer ethnicity.

Our analyses indicated that the implicit dehumanization of Blacks was a significant predictor of racial disparities in the use of force against child suspects ($\beta = .41$, $t = 3.39$, $p = .001$, $R^2 =$ .17), even controlling for other measures of bias (ATB Scale: $\beta =$ .03, *ns*; personalized IAT: $\beta = 0$, *ns*). Again, the more officers implicitly associated Blacks with apes, the more officers had used force against Black children relative to children of other races. Further, controlling for responses to the ATB Scale and personalized IAT, the use of force difference score correlated with age overestimations and with perceptions of culpability, though only for participants who saw Black suspects, all $rs(15) \geq .60$, $ps < .01$.

Measures of prejudice. There were no differences in responses to the ATB Scale ($\alpha = .78$), nor in responses to the personalized IAT, across conditions. Further, these measures were not correlated with any of the principal dependent variables.

Discussion

Study 3a aimed to replicate the findings of Study 2 in a population—police officers—whose judgments are consequential to experiences of children in the criminal justice system. In this study, participants, despite being better versed in dealing with criminal suspects, overestimated the age of Black and Latino child crime suspects. White children, on the other hand, were not subjected to such overestimations. Again, the magnitude of the Black felony age overestimation bears repeating, as Black 13-year-olds were miscategorized as adults by police officers (average age error = 4.59).

Unlike Study 2, this study adds the ability to test within-subject racial differences. Whereas participants rated children of only one race in Study 2, here we were able to link our attitude measures to disparities in use of force toward citizens of different races. Consequently, Study 3a provides evidence that anti-Black dehumanization predicts racially disparate treatment of Black children in contexts where measures of racial bias do not. Rather, we have provided evidence that the representations of Blacks as less than human continue to cause contemporary harms in the lives of Black children. This is an important step in understanding racial disparities in the criminal justice system. Further, these data provide a rare look into the psychological processes of officer behavior.

The observed associations between dehumanization and violent outcomes for Black children provide further support for our hypothesis that Black children, in contexts of dehumanization, are prematurely treated as adults. Again, the implicit dehumanization of Black children predicted the extent to which police officers overestimate the age of Black suspects, how culpable those Black suspects are perceived to be, and the extent to which officers were more likely to use force on Black suspects than suspects of other races throughout their career, controlling for how much suspects resist arrest or are located in high-crime areas. It is important to highlight that these racial disparities were not predicted by traditional measures of explicit or implicit racial prejudice. Instead, these disparities may be a result of exposure to dehumanizing representations of Blacks. These findings are of particular interest because the subject population is one that is empowered to affect the lives of children. This finding is consistent with previous work documenting that Black children are disproportionately treated like adults in sentencing (Poe-Yamagata & Jones, 2007; Young & Gainsborough, 2000). However, after Study 3a, we were cautious of overgeneralizing from a sample of 60 officers, only 28 of whom had used force against children. Study 3b, therefore, sought to replicate the field component of Study 3a with a larger sample.

Study 3b

Study 3b sought to replicate the real-world findings of Study 3a with a larger sample and without the possible confounding effects of the age-assessment task. We again sampled from police officers and explored the relationship between dehumanization and police behavior.

[6] Computing difference scores regarding Latino children did not reveal racially disparate use of force toward Latino children.

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Method

Participants. One hundred sixteen police officers from a large urban police department participated in this study in exchange for $50. Five percent of the officers (6) were female. The median age of participants was 37. When asked to report racial demographics, 82 responded "White," 9 responded "Black," 10 responded "Latino," 5 responded "other," and 10 did not respond. Officers were from the pool assigned to patrol duty and were recruited during roll call at the beginning of their shift, participating when off duty.

Design. Participants completed a battery of psychological tests including the ATB Scale, the personalized IAT, and the dehumanization IAT. After testing officers, we paired individual officer personnel data with their psychological testing data as in Study 3a.

Materials

Measures of prejudice, dehumanization, and use of force. Participants completed the ATB Scale ($\alpha = .87$), the personalized IAT, and the dehumanization IAT as in studies above. Use of force was calculated as in Study 3a.

Procedure. Participants completed a battery of survey questions and implicit measures. As we did in Study 3a, we then obtained the personnel records of participating officers to examine the relationship between attitudes (explicit and implicit) and use of force against Black children.

Results

Use of force weighting procedures were identical to those employed in Study 3a. This resulted in unskewed data that ranged from −3.18 to 8.00 with a mean of .14 ($SD = 1.49$, $median = 0$). Most officers (53%) had not used force against anyone under the age of 18 during their careers. The mean weighted use of force score for all races of suspects was 3.80 ($SD = 9.16$, $median = 0$). Weighted scores ranged from 0 to 58. Officers' mean weighted use of force score against White suspects was 0.59 ($SD = 1.88$). For Latino suspects, it was 0.62 ($SD = 2.28$). For Black suspects it was 2.18 ($SD = 8.71$; see Figure 3).

As in Study 3a, we conducted a regression analysis with scores on the dehumanization IAT as the predictor variable and the weighted use of force difference scores as the dependent variable. The covariates in Study 3b were the same as those in Study 3a. Our

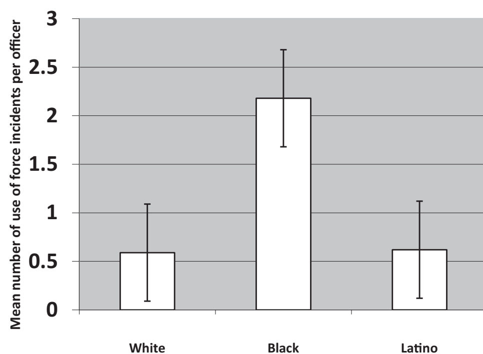

Figure 3. Officers' average weighted use of force against suspects under 18 (Study 3b). Error bars represent standard errors.

analyses indicated that the implicit dehumanization of Blacks was a significant predictor of racial disparities in the use of force against children, controlling for the aforementioned contextual variables ($\beta = .57$, $t = 6.13$, $p < .001$, $R^2 = .57$). The more officers implicitly associated Blacks with apes, the more frequently they had used force against Black children relative to children of other races throughout their career. Of the covariates, only the use of drugs by suspects ($\beta = .37$, $t = 1.94$, $p = .06$) and mental impairments ($\beta = -.17$, $t = 2.01$, $p = .05$) were also related to racial disparities in the use of force against children. That is, higher rates of drug use and lower rates of mental illness among the residents an officer encountered predicted higher rates of racial disparities in officers' use of force. Of importance, none of the traditional measures of prejudice, either explicit ($\beta = .11$, $p = .18$) or implicit ($\beta = .28$, $p = .21$), predicted the disproportionate use of force against Black children.

Discussion

The results of Study 3b provide further evidence that the implicit dehumanization of Blacks is related to Black children's disproportionate (as compared to their White peers) experiences of violent encounters with police officers.

Having established in Studies 1–3 that Black male children are seen as less innocent than their peers, that they are perceived as older, and that their greater dehumanization predicts these outcomes, we next turned our attention to the possibility that perceivers may adjust the very nature of childhood in order to exclude Black male children from its protections. That is, Study 4 was designed to address the seeming paradox of Black children receiving fewer of the benefits of childhood when childhood is seen as an essential category (Haslam et al., 2000).

Study 4

Can a reduction in the tendency to see a social category as comprising essential characteristics explain the effect of implicit dehumanization on the racially disparate perceptions of children? Study 4 attempted to answer this question by asking participants to complete age and culpability assessments of Black and White male targets after being primed with dehumanizing words, which we hypothesized would decrease perceived essentialism of childhood. Participants were subliminally primed with either names of great apes or names of big cats. Previous research has found that priming with great apes (but not big cats) leads to the endorsement of police violence toward Black (but not White) criminal suspects (Goff, Eberhardt, et al., 2008). Perhaps the racial disparities we see in the treatment of children who are criminal suspects can be explained by the presence of such dehumanizing associations. Studies 2 and 3a provided evidence that age overestimations of Black child suspects occurred to the degree that Blacks were implicitly dehumanized. These studies also demonstrated that dehumanized Black child suspects were perceived to be more culpable (i.e., less innocent). Studies 3a and 3b provided evidence that implicit dehumanization predicts racially disparate perceptions of Black children in the world. Perhaps then, because negative perceptions of Black children were predicted by implicit dehumanization—and not bias—priming participants with these negative associations will lead to similarly negative perceptions. We sus-

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pected that dehumanizing associations between Blacks and apes predict reduced perceived essentialism of Black children. Implicit dehumanization was associated with racial differences in age assessments and culpability in Studies 2 and 3a, but we expected that essentialism would mediate the relationship between dehumanization and our principal dependent variables (age assessments and culpability). That is, we suspected that dehumanizing Blacks would cause Black children to be seen in less essentialized terms, which, in turn, would increase age overestimations of Black children. Study 4 was designed to test these hypotheses.[7]

Method

Participants. Eighty-two participants from a large public university participated in exchange for course credit. Seventy percent of the participants (57) were female. The median age of participants was 19. When asked to report racial demographics, 42 responded "Asian," 30 responded "White," 0 responded "Black," 2 responded "Latino," and 8 responded "other."

Design. Participants were randomly assigned to a 2 (race of target children: Black vs. White) × 2 (prime: ape vs. great cat) × 2 (crime type: misdemeanor vs. felony) mixed model design, with crime type serving as the within-subjects variable.

Materials

Priming task. The ape-priming task has been used in previous research (Goff, Eberhardt, et al., 2008) to prime dehumanizing stereotypes of Blacks. It utilized the same set of animal words as did the dehumanization IAT. However, instead of having participants categorize the names of apes and great cats, we subliminally primed participants with the names of one or the other via parafovial priming visual priming as described by Bargh and Chartrand (2000). Participants were told that they were to stare at a fixation point in the middle of a screen and press *D* if a flash appeared on the left of that fixation point and *K* if a flash appeared on the right of the fixation point. "Flashes" were actually names of apes or great cats (i.e., monkey, gorilla, tiger, lion) displayed for 30 milliseconds at 6° from the fixation point.

Essentialism scale. The essentialism scale (Haslam et al., 2000) consists of eight items designed to assess whether a population views social categories as essentialized. The eight items ask about various aspects that contribute to perceptions of essentialism, including discreteness (having clear boundaries), uniformity (similarity to other group members), informativeness (how much group membership tells us about group members), naturalness (how natural or artificial group categorization is), immutability (how easy it is to change group membership), stability (how stable is the existence of the category itself throughout history), inherence (does the category have an underlying reality despite surface differences of its members), and necessity (does the category have features deemed necessary for membership). Participants respond on a 9-point Likert scale, with an answer of 1 indicating "strongly disagree" and an answer of 9 indicating "strongly agree." See the Appendix for the full scale.

Participants were asked to rate children along these eight dimensions. An example of the prompt participants received asked them "to think carefully about the general category 'children'. Don't think about the life course of an individual child but about the category itself." In addition, a picture of a group of either Black or White children was attached via watermark to the top left corner of the paper survey. This served as a prime, focusing participant's attention on either Black or White children. The pictures were matched via pretesting in the perceived age, attractiveness, and racial stereotypicality of each group of children.

Crime scenarios. The crime scenarios were a reduced version of those from previous studies. Out of concerns that the length of the experiment would fatigue participants, we asked participants to respond to six scenarios (two for each age category), each related to a child suspect from the same assigned racial group.

Age Assessment and Culpability Scale. These tasks were identical to those in previous studies.

Procedure. Participants were told that their first task was an "attentional vigilance task," as per previous research (Eberhardt, Goff, Purdie, & Davies, 2004; Goff, Eberhardt, et al., 2008), and were primed with either ape words or big cat words. Participants then completed the essentialism scale for the categories "children" and "adults" within their assigned racial group. Participants then read the crime scenarios for the same racial group as the essentialism scale they completed. Finally, participants completed age and culpability assessments for each of the children in the crime scenarios.

We predicted that the ape prime would increase the age overestimations and culpability assessments for Black male but not White male targets. We expected, consistent with Studies 2 and 3b, that the effect of the ape prime on the assessments of Black targets' age and culpability would increase with the seriousness of the suspected crime. Finally, we predicted that perceived essentialism would mediate the effects of implicit dehumanization on the assessment outcomes.

Results

Essentialism. Participant essentialism scores were submitted to a 2 (race of target: Black vs. White) × 2 (prime: ape vs. great cat) between-subjects ANOVA.

Analyses revealed a main effect of target race, $F(1, 78) = 14.71$, $p < .001$, such that White children were seen as a more essentialized group than were Black children. This was qualified by the predicted two-way interaction, $F(1, 78) = 6.45$, $p = .01$ (see Figure 4A). Simple effects tests revealed that the ape prime led to lower ratings of Black childhood essentialism than did the cat prime, $F(1, 78) = 6.69$, $p = .01$, whereas prime had no effect on the essentialism ratings of White children ($F = 1.05$, *ns*).

Age assessments. To test for differences in age assessments, we conducted a 2 (race of target: Black vs. White) × 2 (prime: ape vs. great cat) × 2 (crime type: misdemeanor vs. felony) repeated measures ANOVA, with crime type as the repeated measure variable.

[7] Previous research has found that age is an essentialized category, though to a lesser degree than other social identities such as gender, ethnicity, race, and disability (Haslam et al., 2000). However, in this prior research, age was evaluated with the category framework "young" and "old." We felt that it could be the case that the categories young and old are more subjective than "children" and "adults." Consequently, this prior research may underappreciate the degree to which childhood is an essentialized category. Thus, we pretested the perceived essentialism of the categories young, old, children, and adults. We found that the categories children and adults were essentialized to a greater degree than the categories young and old.

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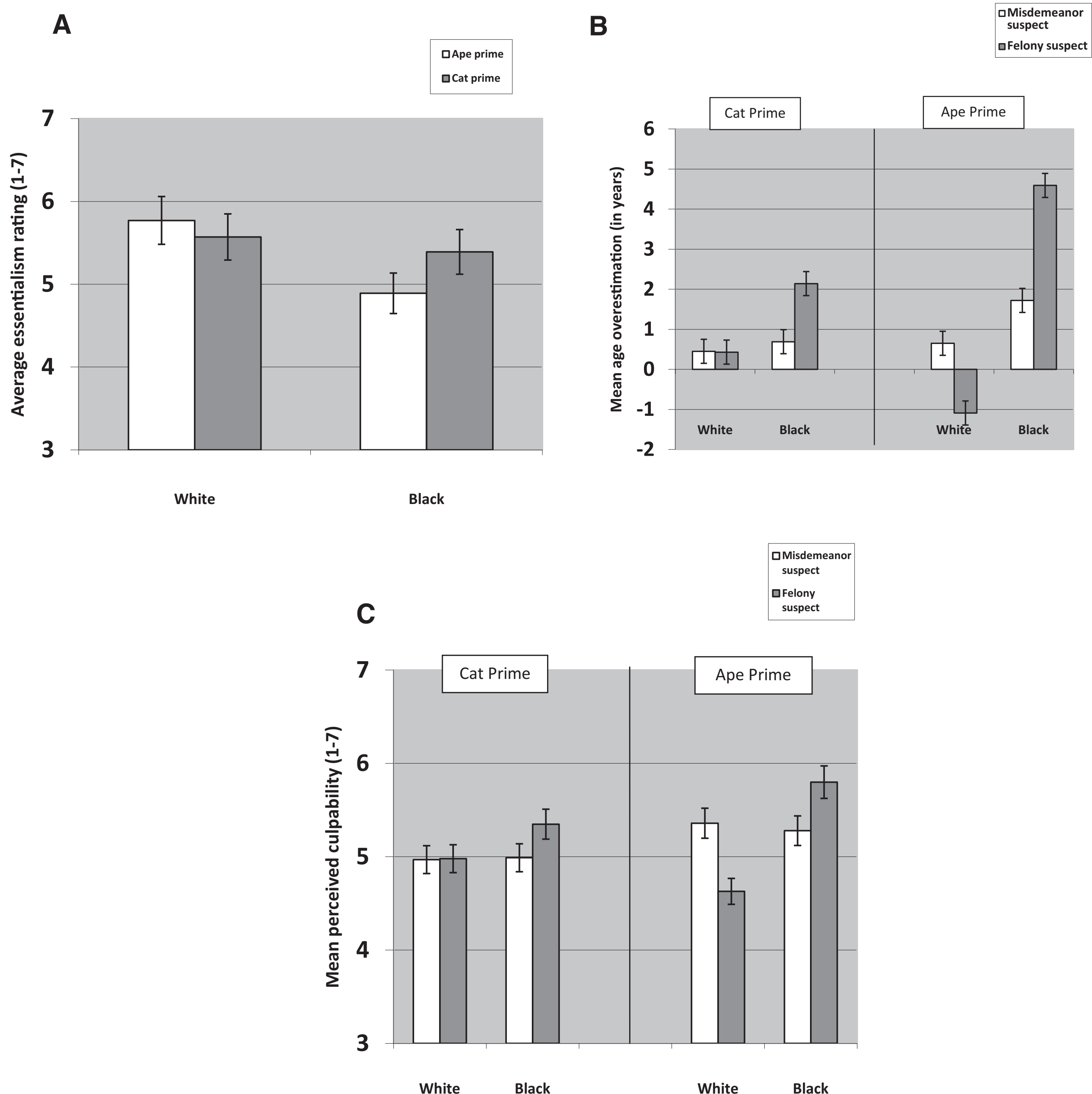

Figure 4. A: Participants' average essentialism rating for children of different races (Study 4). B: Participants' average age estimation accuracy for youth suspects of different races (Study 4). C: Participants' average culpability ratings for child suspects of different races (Study 4). Error bars represent standard errors.

This three-way ANOVA revealed a main effect of target race such that Black targets were perceived as older than were White targets, $F(1, 78) = 18.15$, $p < .001$. This effect was qualified by the predicted three-way interaction, $F(1, 78) = 9.33$, $p < .005$. Subsequent analyses revealed that, consistent with Study 2, in the absence of the ape prime, the crime type only influenced Black age estimates, $F(1, 78) = 8.11$, $p = .005$, and not White age estimates ($F < 1$, *ns*). However, after an ape prime, participants underestimated White suspects' age when they were suspected of a felony relative to a misdemeanor, $F(1, 78) = 11.16$, $p < .005$, whereas Blacks suspects had significantly greater age overestimations when suspected of a felony relative to a misdemeanor, $F(1, 78) = 31.81$, $p < .001$.

In other words, consistent with the previous studies, the age estimation gap between felony and misdemeanor suspects for Blacks increased in contexts of Black/ape implicit dehumanization, while working in the opposite direction for Whites (see Figure 4B).

Culpability. Again, the culpability scale had acceptable reliability ($\alpha = .68$). To test for differences in perceived culpability, we

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conducted a 2 (race of target: Black vs. White) × 2 (prime: ape vs. great cat) × 2 (crime type: misdemeanor vs. felony) repeated measures ANOVA, with crime type as the repeated measure variable.

This three-way ANOVA revealed a main effect of target race, $F(1, 78) = 12.96$, $p = .001$, such that Black targets were perceived as more culpable than were White targets. There was also a marginal main effect of prime, $F(1, 78) = 3.55$, $p = .06$, such that targets were seen as more culpable after participants were primed with apes than after they were primed with great cats. These main effects were qualified by the predicted three-way interaction, $F(1, 78) = 7.19$, $p < .01$.

Subsequent analyses suggest that, for participants who receive the cat prime, crime type had a larger influence on the culpability assessments of Black targets, $F(1, 78) = 4.44$, $p < .05$, than of White targets ($F < 1$). As was the case with age errors, after an ape prime participants had lower ratings of White culpability for felony suspects, relative to misdemeanors suspects, $F(1, 78) = 18.23$, $p < .001$. Conversely, participants had higher ratings of culpability for Black felony suspects, relative to misdemeanors suspects, $F(1, 78) = 9.77$, $p < .005$.

In other words, similar to the patterns of age overestimation, implicit dehumanization was associated with an increased culpability gap between felony and misdemeanor suspects for Blacks but was associated with the opposite for Whites, leading to the perceptions of reduced culpability for White children (see Figure 4C).

Age assessment and culpability. As we did in Studies 2 and 3a, we tested the relationship between age errors and ratings of culpability. Again, we observed a moderately strong relationship between age errors and ratings of culpability such that the older participants rated a target, the more culpable they were rated for their suspected crimes, $r(81) = .41$, $p < .001$.

Mediational analyses of essentialism. Because after receiving an ape prime participants reported higher age overestimations of Black children suspected of felonies than of White children suspected of felonies, we followed the bootstrapping method outlined by Preacher and Hayes (2004) to test whether or not the essentialism scale functioned as the predicted mediator of the three-way interaction: specifically, the interaction of target race and prime received (as the predictor) on age overestimations of children suspected of felonies. To conduct these tests, we used the SPSS macro designed by Hayes (2012) for such bootstrapping analyses.

We created 1,000 bootstrap samples by randomly sampling observations with replacement from the original data set. We then calculated a 95% confidence interval of the indirect effect of this interaction on age estimations. For essentialism to mediate this effect on age overestimations, the 95% confidence interval should not include zero. This calculation revealed essentialism as a mediator, because the 95% confidence interval [.67 to 2.94] did not include zero. The direct effect of the interaction of target race and prime on age estimations remained significant, however ($p < .001$), indicating that the mediation was partial.

We then conducted bootstrapping analyses to test whether or not essentialism functioned as the mediator between the interaction of target race and prime received (as the predictor) on participant ratings of the culpability of felony suspects. We calculated a 95% confidence interval of the indirect effect of this interaction on culpability. This again revealed essentialism to be a mediator, because the 95% confidence interval [.15 to .68] did not include zero. The direct effect of the interaction of target race and prime on culpability remained significant, however ($p < .01$), indicating that the mediation was partial.

Next, we wanted to investigate this interaction more fully, by testing ratings of essentialism as the mediator of the effect of the prime on age overestimations of Black felony targets specifically. To do so, we conducted bootstrapping analyses to test whether or not essentialism functioned as the mediator between the effect of prime received (as the predictor) on the age overestimations of Black felony suspects. We calculated a 95% confidence interval of the indirect effect of the ape prime on age overestimations. Here again, essentialism was a mediator because the 95% confidence interval [.66 to 3.25] did not include zero. The direct effect of prime on age estimations was no longer significant after controlling for perceived essentialism ($p = .29$), indicating that perceptions of essentialism fully explain the effect of the ape prime on the age overestimations of Black felony suspects.

Finally, we conducted the complementary analyses for culpability ratings, testing ratings of essentialism as the mediator of the effect of the prime on the culpability ratings of Black felony targets. To do so, we conducted bootstrapping analyses to test whether or not essentialism functioned as the mediator between the effect of prime received (as the predictor) on the culpability ratings of Black felony suspects. We calculated a 95% confidence interval of the indirect effect of the ape prime on culpability ratings. Here again, essentialism was a mediator because the 95% confidence interval [.05 to .47] did not include zero. Again, the direct effect of prime on culpability ratings was no longer significant after controlling for perceived essentialism ($p = .19$), indicating that perceptions of essentialism fully explain the effect of the ape prime on the culpability ratings of Black felony suspects.

Discussion

Study 4 provides evidence that reductions of perceived essentialism of Black children can help explain the effect of implicit dehumanization on the racially disparate perceptions of Black and White boys. Contexts where Blacks are implicitly dehumanized can facilitate perceivers thinking of Black children as a less essentialized group. This means that Black children are less likely to be afforded the full essence of childhood and its definitional protections. As a result, Black boys were more likely to be seen as older and more responsible for their actions relative to White boys. This study ties together findings from Studies 1–3 demonstrating that males of all races are not equally afforded the privilege of innocence—resulting in violent inequalities—and suggests that such racial inequalities in perceived innocence may be due to similar inequalities in the ways children of different racial groups are afforded the essence of childhood.

General Discussion

> There can be no keener revelation of a society's soul than the way in which it treats its children.
>
> —Nelson Mandela

Taken together, the studies presented provide a disturbing portrait of the effects of racism on Black children in the United States. Study 1 provides evidence that Black children are afforded the privilege of innocence to a lesser extent than children of other races. Studies 2–3 build on these findings by demonstrating that

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Black boys are seen as more culpable for their actions (i.e., less innocent) within a criminal justice context than are their peers of other races. In addition, Black boys are actually misperceived as older relative to peers of other races. Further, the above research provides evidence that, in undergraduate and police populations, these racial disparities are predicted by the implicit dehumanization of Blacks. These findings demonstrate that dehumanization of Blacks not only predicts racially disparate perceptions of Black boys but also predicts racially disparate police violence toward Black children in real-world settings.

Finally, Study 4 demonstrates that implicit dehumanization can facilitate these racial discrepancies. Participants who were primed with dehumanizing associations for Blacks showed a reduced belief in the essential distinction between Black children and Black adults. This loss of essentialism led to decreased perceptions of the innocence of Black boys. In policing contexts, this loss of protections may result in violent outcomes (Study 3a).

Limitations

Despite the consistent support of our hypotheses across four studies, these data are not without limitations. The present research focuses on the plight of Black boys, sidestepping the complications that might arise from a race/gender intersectional approach to this topic. Girls, particularly Black girls, represent a growing share of children in the criminal justice system (Guevara, Herz, & Spohn, 2006). Consequently, it is important for future work to fill this gap.

In addition, despite the richness of the data sets utilized in Study 3a, the data linking anti-Black dehumanization to police violence toward Black children are predominantly correlational. It is reasonable to suspect that the inference we hypothesize (that racially disparate treatment occurs where dehumanization is present predicts) is reversed in police officers. That is, it is plausible that negative interactions with Black children disproportionately produce implicit anti-Black dehumanization. Though Study 3a provides experimental evidence that racial differences in age overestimation and culpability follow from the presence of dehumanizing stereotypes, this is merely suggestive of a causal direction with regard to dehumanization and actual violence. Future research should endeavor to clarify the relationship between dehumanization and racial disparities in police use of force.

Conclusions

The present research provides four important theoretical and practical contributions to the study of intergroup relations. First, Study 4 provides novel insights into the processes underlying the perceived essentialism of social groups. Previous research has demonstrated that global perceptions of the essentialism are malleable (Morton, Postmes, Haslam, & Hornsey, 2009). However, we have demonstrated that the malleability of perceptions of essentialism is further nuanced. Specifically, we have provided evidence that perceptions of the essential nature of children can be moderated by race. For those who hold dehumanizing implicit associations between Blacks and apes—even when they do not endorse traditionally prejudiced attitudes—Black children are seen as a decreasingly essentialized group. For the same individuals, White children were seen as an increasingly essentialized group. Future essentialism research should attend to the implications of dehumanization on the essentialism of social groups. It stands to reason that one cannot possess essential human characteristics if one is not seen as fully human. It may be the case that other strongly essentialized identities, such as gender and sexual orientation (Haslam et al., 2000), are moderated by race and its potential dehumanizing associations.

Second, the present findings also advance previous research that suggests that racial and gender essentialism exacerbate intergroup biases and discrimination (Keller, 2005; Morton et al., 2009 Williams & Eberhardt, 2008) but essentialism regarding sexual orientation attenuates it (Dar-Nimrod & Heine, 2011; Jayaratne et al., 2006). Researchers suggest this is because race and gender biases stem from conceptions of groups as distinct. Essentializing those group differences, then, magnifies the conflict. Anti-gay prejudice, on the other hand, often stems from moral disgust (Hebl, Foster, Mannix, & Dovidio, 2002), an emotion that is often intensified by the notion that an individual chose his or sexual orientation. Essentializing sexual orientation reduces this notion of choice, thereby reducing anti-gay prejudice (Kahn & Fingerhut, 2011). In the present findings, however, reducing essentialist perceptions of the category "children" imperils Black targets. This suggests that if individuals are members of "protected" categories (e.g., children, elderly, mentally challenged), essentializing those categories may serve a protective function in intergroup conflicts. Similarly, the reverse may be true for individuals who belong to reviled categories (e.g., child predators, drug addicts, and murderers). Future essentialism research may benefit from expanding attention to multiple categories in intergroup contexts.

Third, a novel implication of the dehumanizing representations of Blacks presented in this paper is that Black boys can be misperceived as older than they actually are and prematurely perceived as responsible for their actions during a developmental period where their peers receive the beneficial assumption of childlike innocence. This finding suggests that dehumanization may affect other-person perception functions in the service of permitting severe out-group derogation and antagonism. Importantly, though the data were inconsistent, it appears that anti-Black dehumanization may have a flip side—a kind of pro-White "humanization"—as the dehumanization IAT predicted decreased age estimations and culpability for White suspects. Given previous findings that dehumanization also seems implicated in racial disparities in death penalty outcomes (Goff et al., 2008), this provides evidence of an urgent need to explore further the consequences of intergroup dehumanization in the most consequential settings.

Finally, it is worth noting that the data reported in Studies 3a and 3b represent the first time that racial attitudes data have been used to predict racial disparities in policing on this scale. These findings, therefore, represent an important step toward understanding racial disparities in law enforcement—and in the world more generally—providing evidence that psychological explorations of police behavior on the streets can yield important insights in this arena.

Closing Remarks

Racially differential treatment of children is an important yet underexplored arena within social psychology. The present findings suggest how urgently field and laboratory work are needed to fill in this research gap. In addition, they suggest that if, as Alice Walker says, "The most important question in the world is, "Why is the child

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crying'?" then, for Black children, the most important answer may be that they cry because they are not allowed to be children at all.

Sociologist Michael Kimmel (2008) has suggested that, for middle-class White males, the period of time when boys are not held fully responsible for their actions can extend well into their late 20s. In contrast, the present research suggests that Black children may be viewed as adults as soon as 13, with average age overestimations of Black children exceeding four and a half years in some cases (i.e., Studies 2 and 3a). In other words, our findings suggest that, although most children are allowed to be innocent until adulthood, Black children may be perceived as innocent only until deemed suspicious.

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APPENDIX B

Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L Rev 679 (2002) (Excerpted)

THE CHILD AS OTHER: RACE AND DIFFERENTIAL TREATMENT IN THE JUVENILE JUSTICE SYSTEM

*Kenneth B. Nunn**

INTRODUCTION

Adolescence may be described as a period of transition from childhood to adulthood, when those yet to become adults gain greater physical and mental abilities than children, but continue to lack the wisdom and judgment possessed by mature adults. This symposium has been given the title *The End of Adolescence.* Many of the articles in this volume focus on a growing trend to shorten the period of adolescence, or to eliminate it entirely. But insofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an "end of adolescence." For to have an "end" suggests there was a "beginning," and there was no beginning of adolescence for African American youth. The concept of a group of young people who were entitled to special treatment because they were impetuous and immature was never extensive enough to include African American children.

Indeed, there was no "adolescence" as such in the United States until about 1830.[1] Prior to that time, children were viewed as the property of their parents and were mainly valued as a source of cheap labor.[2] One historian claims that "[i]n labor scarce America the services or wages of a child over ten was one of the most valuable assets a man could have."[3] While adolescent children were valued, and perhaps even loved by their families, there was no social category that recognized their existence, and they had no political or social rights.[4] This predominately materialistic view of childhood began to change in the early nineteenth century. Due to a variety of factors—increased wealth for the American white middle-class, increased urbanization,

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1. Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1129 (1999).

2. *Id.*

3. MARY ANN MASON, FROM FATHERS PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 5, 6 (1994).

4. *See* VIVIANA A ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985).

greater industrialization, and the rise of transcendentalist thought—new attitudes about children and society's obligation to them began to arise. By 1830, the view that childhood was a distinct stage of life committed to learning and development had come into vogue.[5] As a consequence, white child labor became disfavored, and the first child labor laws were enacted.[6]

When adolescence began for white children in 1830, African American children remained slaves.[7] They, like African American adults, were property, and a much lower class of property than that to which white children were relegated prior to 1830.[8] "[T]he idealization of white children that occurred in the 1830s did not affect [B]lack children at all."[9] Black[10] children who were living in slavery had no legal rights.[11] Their connection to their family was not even respected. They could be separated from their parents and sold away whenever the slaveholder so desired.[12] African American children's only socially recognized function was to work at hard labor for the economic benefit of whites. Even after the end of slavery, the social distinction between white and Black children remained. In fact, within a few years of the Civil War, Southern legislatures enacted "apprenticeship" statutes that allowed former slaveholders to force African American children back into virtual slavery.[13] Although most apprenticeship statutes were repealed by the 1870s, African American children continued to work on farms and in factories in much greater numbers and at much greater risks than white children.

The different perception and treatment of African American children thus has deep historical roots in the United States. Indeed, the

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5. *Id.*; JACQUELINE S. REINIER, FROM VIRTUE TO CHARACTER: AMERICAN CHILDHOOD, 1775-1850 72-73, 134-38 (1996); Hansen, *supra* note 1, at 1129.

6. Hansen, *supra* note 1, at 1130.

7. For treatments of the conditions of Black children during slavery, see generally, WILMA KING, STOLEN CHILDHOOD (1997) and MARIE JENKINS SCHWARTZ, BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH (2000).

8. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. J. 187, 208, 211 (1987).

9. Hansen, *supra* note 1, at 1142-43.

10. I use "Black" and "African" interchangeably throughout this article to refer to persons who are of African descent. "Black" denotes racial and cultural identity rather than mere physical appearance and is, therefore, capitalized. *See* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology, and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n.7 (1993). When it is necessary to distinguish African people resident in the United States from African people elsewhere, I will use the term "African American." I utilize this convention to emphasize the connectedness of all members of the African diaspora.

11. Burnham, *supra* note 8, at 204.

12. *Id.* at 203-04.

13. Hansen, *supra* note 1, at 1143.

racial disparities in the vision of childhood is so glaringly apparent that it changes the nature of the research hypothesis of this symposium. The question for children of African descent in the United States is not "why the end of adolescence," but rather "why never the beginning?" In this Article, I will address this revised research question by analyzing the way African American children are perceived in American culture at large. I argue that African American children are not afforded the same treatment as European American children, and consequently never enjoyed the benefits of adolescence because they are viewed differently by white society.[14] African American children are viewed as children of "the other," and as "others," they may be treated in ways that would be unthinkable if white children were involved.[15]

The "other" is a concept that has been addressed in a variety of sources, but it is most commonly associated with postmodern thinking and analysis.[16] As I explain elsewhere in this Article, the "other" is the reflection or antithesis of the self.[17] Whatever qualities the self is thought to have, the "other" has the opposite. In this way, the "other" is a tool for defining the self and the reality with which the self engages. The quality of otherness that engulfs African American children is such that African American children define the boundaries of childhood, adulthood, delinquency, and crime.

The juvenile justice system is rife with racial disparities between white and non-white children.[18] By virtually every means of measurement, African American, Latino, and Native American children receive much harsher treatment than do European American children.[19] They are more likely to be arrested, charged, to receive more severe

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14. *See infra* notes 119-130 and accompanying text.

15. *See infra* notes 122-128 and accompanying text.

16. *See infra* notes 80-85 and accompanying text.

17. *See infra* note 130 and accompanying text.

18. *See generally* JANICE JOSEPH, BLACK YOUTHS, DELINQUENCY AND JUVENILE JUSTICE (1995); MINORITIES IN JUVENILE JUSTICE (Kimberly Kempf Leonard, Carl E. Pope & William H. Feyerham, eds., 1995); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a State-Wide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 405 (1996) (finding "clear disadvantages for nonwhites at multiples stages" of Florida's juvenile justice system); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Overenforcement*, 34 U.C. DAVIS L. REV. 1005, 1020-27 (2001) (discussing various studies finding race discrimination in the juvenile justice system); Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* (Building Blocks for Youth, 2000), *reprinted in* 8 KY. CHILDREN'S RTS. J. (2000), (concluding that "[m]inority youth are more likely than White youth to become involved in the system with their overrepresentation increasing at each stage of the process").

19. *See* Poe-Yamagata & Jones, *supra* note 18, at 4.

sentences, and to stand trial as adults.[20] I trace this disparate treatment to the process of "othering," which has deep historic and cultural roots.[21] When children in the juvenile justice system are viewed as the children of the "other," the juvenile justice system is employed as an instrument of repression and control. Viewing the juvenile justice system as a means of repression and control provides a greater explanation for the racial disparities that exist within it than can be provided by theories of either retribution or rehabilitation.

In this Article, I will focus on the treatment of African American children as the "other" in the juvenile justice system. As previously stated, African American children are not the only ones who may be treated as the "other." Latino, Native American, Asian, and even white children may be "othered" in the appropriate social context. My concern here, however, is with African American children. I focus on their condition because I believe it is exemplary of how all children who are perceived as children of the "other" are treated and because, in some ways, the treatment of African American children, in a bipolar racial hierarchy, is unique.[22]

In Part I of this Article, I will describe the extent and nature of the racial disparities that exist in the juvenile justice system. Next, I will discuss the concept of "otherness" in Part II. In Part III, I will discuss the child as "other," which will be followed by a discussion in Part IV of the impact of the "other" in the juvenile justice system. Finally, I conclude that if white children were its predominant subjects, the juvenile justice system would look entirely different. It would focus on rehabilitation and reeducation rather than its present emphasis on repression, isolation, and control.[23]

II. Racial Disparities in the Juvenile Justice System

The juvenile justice system is organized as a modified version of the criminal justice system. Originally, juvenile courts were conceived of as an alternative to criminal prosecution. The intent was to provide a means to keep youthful offenders out of the criminal justice system, which was thought to exert inappropriate influences over juveniles and potentially endanger them.[24] In addition, the purpose of the juvenile justice system was explicitly rehabilitative and reformative unlike

20. *Id.* at 1-3.
21. *See infra* notes 80-130 and accompanying text.
22. *See infra* notes 116-130 and accompanying text.
23. *See infra* sec. IV.
24. *See* Mary J. Clement, The Juvenile Justice System: Law and Process 10-22 (2d ed. 2002).

the criminal justice system, which had a predominately punitive purpose.[25]

Actual juvenile court procedures vary from state to state, but in general, the juvenile justice system can be said to involve six steps: intake, detention, petitioning, waiver, adjudication, and disposition.[26] At the intake stage, juvenile offenders are referred to the juvenile justice system instead of being directed to social service, medical, or family interventions.[27] While most cases are referred by law enforcement, referrals may also be made by parents, victims, schools, social workers, and probation officers.[28] At the detention stage, the initial decision to detain the child in a secure facility pending adjudication is made by the court. The decision to file either formal charges or a delinquency petition is the next step in the process, followed by an adjudicatory hearing. At the adjudicatory hearing, a juvenile court judge acts as the finder of fact and renders a decision as to the child's involvement in the alleged offense following the presentation of witnesses and evidence. At any time prior to a finding of delinquency, a waiver petition may be filed, requiring a hearing to determine whether juvenile court jurisdiction may be waived and the child may be transferred to an adult court for prosecution. At the disposition stage, a judge determines the appropriate mix of services and sanctions to address the child's adjudication of delinquency. Typical disposition orders include placement in a secure facility, residential placement, probation, counseling, drug abuse treatment, or restitution.

A. *Racial Disparities and the Stages of the Juvenile Process*

Racial disparities have been found at each stage of the juvenile justice system.[29] Indeed, researchers have demonstrated that racial disparities actually intensify with each successive stage of the juvenile justice system.[30] The overrepresentation of African American youth in the juvenile justice system begins with the decision to arrest. The Office of Juvenile Justice and Delinquency Prevention reported that 2,603,300 juvenile arrests were made by state and federal authorities in 1998.[31] African American youth were overrepresented in the num-

25. *Id.* at 19.

26. *Id.* at 130.

27. *See* Poe-Yamagata & Jones, *supra* note 18, at 4.

28. *Id.* at 8.

29. *Id.* at 1.

30. *Id.* at 4.

31. Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 1998* (1999).

ber of arrests, at 26% of the total.[32] African American youth were also overrepresented in the referral population.[33] Of 1,755,100 delinquency cases referred for prosecution in 1997, 66% were white, 31% were African American, and 3% were members of other groups.[34] Because African American youth only account for 15% of the country's population under the age of eighteen, the proportion of Black youth shunted into the juvenile justice system is more than twice the percentage of African American youth in the population.[35]

African Americans are overrepresented, as well, at the next stage in the juvenile justice process—the decision to detain. Figures show that African American children are detained in locked facilities at a greater rate than they are present in the referral population. In 1997, 44% of African American children referred to juvenile court were detained, while only 31% of the referral population was African American.[36] The treatment of African American detainees may be contrasted to the treatment of white detainees. While Black children are overrepresented among detainees in respect to their proportion of the referral population, white children are underrepresented.[37] This pattern of disparity is repeated across all offense categories, but it is most extreme in drug cases.[38] In drug offense cases, African Americans amounted to 55% of those detained, but only 32% of the referral population.[39] The disparate treatment of African American youth at the detention stage is pervasive and readily apparent. Even when charged with the same offense, African American youth are more likely to be detained pretrial than white youth. In summary, "for youth charged with comparable offenses—whether person, property, drug, or public order offenses—minority youth, especially African American youth, were locked up in detention more often than white youth."[40]

Following intake and the decision whether to detain a juvenile suspect, a decision must be made whether to formally charge the youth with the commission of a delinquent act.[41] This charging decision is

32. *See* FEDERAL BUREAU OF INVESTIGATION, *Crime in the U.S. 1998*, Table 43 (1998).

33. Poe-Yamagata & Jones, *supra* note 18, at 8.

34. *Id.*

35. *Id.*

36. *Id.* at 9.

37. White youth were 66% of those referred and only 53% of these cases were detained across all offense categories. *Id.*

38. *Id.*

39. *Id.*

40. Poe-Yamagata & Jones, *supra* note 18, at 10.

41. *See generally*, SANFORD J. FOX, JUVENILE COURTS IN A NUTSHELL § 32, 153-59 (3d ed. 1984).

typically made by a prosecuting attorney.[42] In 1997, statistics revealed that prosecuting attorneys were more likely to file formal delinquency petitions against African American youth than against white youth.[43] White youth were involved in 66% of juvenile court referrals and 63% of petitioned cases.[44] This means that cases involving white youth were less likely to be petitioned than they were to be referred. African American youths, on the other hand, were involved in 31% of referrals and 34% of petitioned cases.[45] This means there is a greater probability that African Americans will be formally petitioned than referred.

Another point of significant disparity in the juvenile justice system involves the critical decision of whether or not the jurisdiction of the juvenile court will be waived and youthful offenders will be prosecuted in adult court. Prosecution in adult court leads to harsher overall treatment and more punitive sanctions than are available in juvenile court. About 8,400 petitioned delinquency cases, or about 1% of all petitioned cases, were waived from juvenile court to adult court in 1997.[46] Cases involving African American youth were disproportionately waived to adult court.[47] Almost half (46%) of waived cases involved African Americans, compared to 34% of petitioned cases.[48] Half of the cases (50%) waived to adult court were brought against white offenders, a lower proportion than the 63% of petitioned cases that involved white youth.[49] African American youth were substantially more likely to be waived in cases involving drug offenses and public order offenses. While 39% of petitioned drug cases involved African Americans, 63% of waived drug cases involved

42. Some jurisdictions allow juvenile petitions to be filed by probation officers, or even by any adult person. *Id.* at 154-55. However, the better practice reflected in most model provisions to restrict charging decisions to prosecuting attorneys. *Id.* at 155. *See also* ISA-ABA JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCE APPROACH 244 (Robert E. Sheppard ed., 1996) (petitions alleging delinquency should be prepared and signed by the prosecuting attorney).

43. Poe-Yamagata & Jones, *supra* note 18, at 11.

44. *Id.*

45. *Id.*

46. *Id.* at 12.

47. *Id.* The proportion of Blacks, Hispanics, Native Americans, or Asians transferred to criminal court was five times or more the proportion of these groups in the general population in Connecticut, Massachusetts, Pennsylvania, and Rhode Island and more than twice the proportion in the general population in the additional states of Arkansas, Florida, Maryland, and New Jersey. *Id.* at 17.

48. Poe-Yamagata & Jones, *supra* note 18, at 17.

49. *Id.*

African Americans.[50] For public order offenses, African Americans were charged in 33% of petitioned cases and 56% of waived cases.[51]

Racial disparities are also evident at the disposition, or juvenile sentencing stage, of the juvenile justice system. Juvenile court judges are more likely to place African American youth in residential placement facilities, and less likely to place African American youth on probation in comparison to similarly situated white youth.[52] Although 32% of cases adjudicated delinquent involved African Americans, a larger proportion of those cases (36%) were ordered into residential placement facilities than received probation (31%).[53] Overall, white youth were underrepresented among cases receiving residential placement and overrepresented among cases receiving probation.[54] The disparity between white and Black children is present across all offense categories, but is even more substantial in the case of drug offenses.[55] In cases where juveniles were adjudicated delinquent due to drugs, African Americans made up 53% of those placed in residential facilities and only 34% of those placed on probation.[56] By contrast, white youth comprised 45% of those placed in residential facilities and 64% of those placed on probation.[57]

The cumulative affect of racially disparate treatment throughout the juvenile justice system becomes clear upon entry into practically any secure juvenile housing facility in the United States.[58] The vast majority of those housed in these facilities are persons of color. Youth of color represented almost two-thirds of the detained and committed youth held in 1997.[59] More African American youth are in secure residential placements than are juveniles from any other racial or ethnic group.[60] In 1997, 40% of the juveniles in locked residential facilities were African American, a percentage that is almost three times the percentage of African American youth in the population.[61] As is the

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50. *Id.*

51. *Id.* at 13 (Figure 5b).

52. Poe-Yamagata & Jones, *supra* note 18, at 14.

53. *Id.* (Figure 7).

54. *Id.* White youth made up 64% of adjudicated cases, 60% of residential placements, and 66% of cases receiving probation.

55. *Id.*

56. *Id.* at 15.

57. *Id.*

58. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MINORITIES IN THE JUVENILE JUSTICE SYSTEM 4 (1999) (showing a disproportionate number of children of color were in residential placement in nearly all states in 1997).

59. Poe-Yamagata & Jones, *supra* note 18, at 18.

60. *Id.* (Table 9, showing comparisons).

61. *Id.*

case throughout the juvenile justice system, the racial disparity in secure housing is driven by drug offenses. African Americans constitute the vast majority, that is 56%, of the juveniles in custody for drug crimes.[62]

One reason for the large number of African American youth in secure facilities is that the admission rate for African American youth is substantially higher than it is for white youth. African American youth with no prior placements are admitted to state public institutions at a rate six times higher than that for similarly situated white youth.[63] African American youth with one to two prior admissions are seven times more likely to be placed in state public institutions.[64] This means that African American youth are much more likely to be placed in residential placements than similarly situated white youth.

In addition to making up a disproportionate number of juveniles in custody, African American youth are also held in custody longer than white youth. On average, African American youth remain in custody sixty-one days longer than white youth.[65] For drug offenses, the average stay of African American juveniles was ninety-one days longer than the average stay of white juveniles.[66] This disparity in the length of stay strongly suggests that African American youth are punished more severely than white youth for similar crimes.[67]

These racial disparities begin early in the juvenile justice process and build as the process continues.[68] Because African American children are more likely to be arrested, more likely to be detained, more likely to have their cases petitioned, less likely to be placed on probation, more likely to be ordered into secure facilities, and more likely to receive longer commitments, it can be no surprise that African Americans are found in juvenile facilities in such large numbers. The stark racial disparities that are evident in juvenile detention and residential housing facilities may be traced to discretionary decisions made at early stages in the juvenile justice process.[69]

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62. *Id.* at 19 (Table 10).

63. *Id.* at 20 (Table 12).

64. *Id.*

65. Poe-Yamagata & Jones, *supra* note 18, at 21.

66. *Id.*

67. *Id.* Using length of stay as the measure of punishment, Latino youth appear to be punished even more severely than African American youth. Overall, the average length of stay for Latino youth in 1993 was 306 days, 162 days more than white youth and 71 days longer than African American youth. *Id.* at 21.

68. *Id.* at 4.

69. *Id.*

B. *Making Meaning of Juvenile Injustice*

Why are these discretionary decisions made in such a way that is so plainly adverse to the interests of African American youth? Why are there so many examples of racial disparities throughout the juvenile justice system that negatively impact African Americans? While racial disparities and differential outcomes are clearly evident, it is more difficult to attribute the cause of these disparities to racial discrimination or to the racial bias of particular actors in the juvenile justice system.

In part, this is due to the standard of proof required to ascertain racial bias and the quality of available evidence to support a claim of racial bias. As white Americans are increasingly reluctant to admit and address claims of bias, a high burden of proof is required for both formal and informal bias claims.[70] In general, individuals raising claims of racial bias must identify a "smoking gun," either an admission of bias or a clear cut example of race discrimination with no reasonable explanation.[71] This high burden of proof requires relatively specific evidentiary support.[72] To establish racial bias as the cause of the racial disparities in the juvenile justice system under such standards "requires analysis of detailed data providing information on specific offense classifications, criminal history, and other factors used in decision making."[73] This magnitude of proof is not yet available in regard to the discretionary decisions of individual actors in the juvenile justice system.

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70. *See* Girardeau Spaun, *Pure Politics*, 88 MICH. L. REV. 1971, 1973 (1990) (arguing that the Supreme Court had responded to a conservative shift in majoritarian attitudes about race discrimination by subtly incorporating contemporary attitudes into the constitutional & statutory provisions that govern discrimination claims). *See also* Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173 (1997) (showing how affirmative action policies revolve around knowledge claims of conservatives that discrimination no longer exists).

71. Julian Abele Cook, Jr. & Tracey Denise Weaver, *Closing Their Eyes to the Constitution: The Declining Role of the Supreme Court in the Protection of Civil Rights*, 1996 DET. C.L. MICH. ST. U.L. REV. 541, 565 (1996) (claiming Supreme Court decisions have imposed burden of producing a "smoking gun" and left "no effective way . . . to combat subtle racial discrimination through the judicial process.").

72. As Professor Laurence Tribe has described,

> [the Supreme Court's approach to race discrimination] sees contemporary racial discrimination not as a social phenomenon—the historical legacy of centuries of slavery and subjugation—but as the misguided, retrograde . . . behavior of individual actors in an enlightened, egalitarian society. If such actors cannot be found—and the standards for finding them are tough indeed—then there has been no violation of the equal protection clause.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988).

73. *Id.* at 4. The authors of this report point out, however, that many studies, including their own, "suggest that processing decisions in many states and local juvenile justice systems are not racially neutral." *Id.*

The racial disparities alone are disturbing and shocking. When African American youth represent 40% of the incarcerated youth nationwide and in some areas almost 90% of incarcerated youth are children of color, something is seriously wrong.[74] When African American boys consistently receive worse treatment at the hands of police, counselors, psychologists, probation officers, and judges, something is seriously wrong. As juvenile justice advocate James Bell states, "the nexus of color and adolescence have converged in a way that have juveniles being confined in numbers that cannot be accounted for by criminal activity alone and should give pause to any civil society."[75]

Some have argued that a great degree of racial disparities may be traced to the shift toward more punitive sanctions in the juvenile justice system.[76] They argue that the target of the juvenile justice system is not so much African American youth as it is that African Americans have become unintended victims—the collateral damage—of the war on crime.[77] The real target, they claim, is the rising violence and threat to property that has become endemic to American streets.[78] This threat has led to more punitive sanctions, less focus on rehabilitation, and consequently greater numbers of delinquent youth being detained.[79]

But the question remains: Why is it acceptable for African American youth to be viewed as merely collateral damage? Why is the cost of requiring the mass incarceration of African American children not considered too high a price to pay for the safety and security of the

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74. *See* James Bell, *Throwaway Children: Conditions of Confinement and Incarceration*, *in* THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE AND JUVENILE INJUSTICE 189 (Valerie Polakow ed., 2000) (reporting percentage of minority youth incarcerated in California as 86%, and in Texas as 76%).

75. *Id.* at 188-89.

76. Barry Feld makes a version of this argument in at least two places. He argues that courts and legislatures have been legitimately concerned with rising levels of juvenile violence, particularly homicide. Because African American youth disproportionately commit violent crimes, tougher measures that focus on these crimes are likely to have an unfortunate, but unintentional, racially disproportionate effect. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 978 (1995). *See also* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver, Policy and Practice: Persistence, Seriousness and Race*, 14 LAW AND INEQ. 73, 106 (1995).

77. *See* Podkopacz & Feld, *supra* note 76.

78. Feld and Rasmussen detail the concerns that motivated tougher juvenile justice policy, notwithstanding its disproportionate impact on African American youth. They claim that "the proliferation of firearms and the corresponding dramatic rise in homicide by mid- to late-adolescents, the disproportionate overrepresentation of minority youth as perpetrators and victims of violence, and increasing arrests of younger juveniles for violent crimes certainly justify public concerns." *Id.* at 105.

79. *See infra* notes 153-160 and accompanying text.

ican youth indirectly influenced juvenile court outcomes by shaping predictions of dangerousness and assessments of the need for juvenile court intervention.[179]

James Bell explains how assumptions about African American youth can result in their disproportionate arrest, detention, and incarceration in the juvenile justice system:

> [T]here are assumptions about youth of color that contribute to their overrepresentation in the system. These beliefs hold that minority youth are prone to violence and criminal activity, they are not in school or working, and worst of all they expect to be incarcerated and therefore are not uncomfortable with being securely confined. Such assumptions reflect an expectation of failure that in turn is internalized by the young people who do in fact fail.[180]

The social history of the juvenile court system challenges the notion that recent changes in the assumptions and practices of the juvenile justice system announce the end of adolescence. Rather, these changes may simply illustrate the juvenile justice system's adjustment to focus on children who were never privileged enough to be perceived as adolescents in the first place. Other people's children, African American children in particular, were always treated as dangerous and threatening to the prevailing social order.

B. *Otherness and the Transformation of the Juvenile Court*

Within the last decade, a majority of states have moved to change their juvenile justice policies.[181] By and large, these changes have shifted the focus of juvenile courts from the rehabilitation of youthful offenders to securing retribution and imposing punishment.[182] Legislators have sought to make juvenile justice systems tougher by limiting the jurisdiction of juvenile courts and allowing juvenile courts to impose more punitive sanctions on juvenile offenders.[183] Between 1992 and 1995, forty states and the District of Columbia restricted the jurisdiction of the juvenile court by enlarging the category of cases that may be waived or transferred to adult court.[184] During the same period, thirty-one states changed sentencing laws to allow juvenile courts to impose more severe sentences.[185] In particular, legislators have enacted provisions permitting juvenile courts to impose sentences that

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179. *Id.* at 175.
180. Bell, *supra* note 74, at 189.
181. Coupet, *supra* note 167, at 1319.
182. *Id.*
183. *Id.*
184. *Id.* at 1319.
185. *Id.* at 1322.

will hold juvenile offenders beyond the age of majority, eliminating what was seen as a major loophole in the juvenile court's ability to deter older juveniles from committing offenses.[186] Additionally, forty-seven states and the District of Columbia have made juvenile court proceedings more accessible than they were previously, undermining the veil of confidentiality traditionally afforded to juvenile proceedings.[187] Since 1996, eleven states enacted new laws either allowing or requiring courts to notify school authorities of serious juvenile charges.[188]

These changes were motivated by the wide-spread public perception that the juvenile justice system, as it was traditionally organized and operated, was not protecting the public from juvenile crime.[189] The belief that a failing juvenile justice system placed the public at risk persisted, notwithstanding the fact that since 1994 juvenile crime rates have, in fact, declined.[190] This belief that the juvenile justice system was in crisis was only partially based on reality. Although violent juvenile crime remained relatively constant over the previous two decades,[191] it rose rapidly between 1986 and 1994 when it peaked at 1,230,000 reported cases.[192] Concurrent with this spike was a significant increase in juvenile homicides, located mostly in a few urban jurisdictions.[193] Sensationalized media accounts of inner-city violence played against this backdrop of a real and troubling increase in juvenile homicide to create an exaggerated threat to public safety.[194] According to Feld, "[t]he intersection of race, guns, and homicide fanned the public and political 'panic' that, in turn, led to the recent get-tough reformulation of juvenile justice waiver and sentencing policies."[195]

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186. *Id.* at 1322-23.

187. Coupet, *supra* note 167, 1323-24.

188. *Id.* at 1324 n.110.

189. FELD, *supra* note 168, at 208.

190. Statistics reported by the National Center for Juvenile Justice show a 33% drop in violent juvenile crime rates between 1993 and 1997, measured by juvenile arrests for violent index crimes. Howard N. Snyder & Melissa Sickmund, National Ctr. for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 62 (1999). *See also* PETER J. ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 26 (1999) (stating juvenile violent crime "dropped more than 16 percent in 1995, 1996, and 1997").

191. *See* Snyder & Sickmund, *supra* note 190, at 75.

192. *Id.* at 62; FELD, *supra* note 168, at 200-02.

193. Peter Elikann notes that the rise in the juvenile homicide rate was not a national phenomenon and was "very highly concentrated," since a third of the killings took place in just 10 counties and "84 percent of the nation's counties had no juvenile homicides whatsoever." ELIKANN, *supra* note 190, at 26.

194. FELD, *supra* note 168, at 208.

195. *Id.* at 202-03.

Conservative politicians, pundits, policy makers, and the media contributed to the myth that juvenile offenders posed an enormous threat to the well being and safety of the community. Like all other types of social control, the juvenile justice system is highly politicized.[196] Playing to the "get tough on crime crowd" helps politicians win elections.[197] Consequently, there is great pressure to exploit juvenile crime, and even create a crime wave where none previously existed, in order to reap the political benefits. Feld describes how politicians and the media manipulated public fears in order to build support for more draconian juvenile justice measures:

> Within the past decade, the prevalence of guns in the hands of children, the apparent randomness of gang violence and drive-by shootings, the disproportionate racial minority role in homicides, and media depictions of callous youth gratuitous violence have inflamed public fear. Politicians have exploited those fears, decried a coming generation of "superpredator"suffering from "moral poverty," and demonized young people in order to muster support for policies under which youth can be transferred to criminal court and incarcerated.[198]

The transformation of the juvenile justice system became possible and more urgent through the invocation of otherness. Central to the development of the myth of a juvenile justice system in crisis was the concurrent development of the myth of the "superpredator." According to some pundits and criminologists, juvenile crime was fundamentally changed in the 1990s by the arrival of a new kind of juvenile delinquent whom they called the "superpredator." More so than ordinary juvenile delinquents, the "superpredator" is characterized as immoral, remorseless, and violent to the extreme. Former Drug Czar William Bennett and his coauthors described the "superpredator" in these lurid terms:

> America is now home to thickening ranks of juvenile "superpredators"—radically impulsive, brutally remorseless youngsters, including ever more pre teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.[199]

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196. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 760 (1995) (describing the criminalization of conduct as a political function that determines "who shall wield state power, against whom, and for what purposes").

197. Coupet, supra note 167, at 1332.

198. FELD, *supra* note 168, at 208.

199. JOHN J. DIIULIO, JR., WILLIAM J. BENNETT & JOHN P. WATERS, BODY COUNT 27 (1996).

What is interesting about the myth of the "superpredator" is its reliance on racist imagery and stereotypes. There is little difference between the description of mainly inner city African American youth as "superpredators" and the historic representations of African Americans as violence-prone, criminal, and savage.[200] As Katheryn Russell has astutely observed, "Blacks are the repository for the American fear of crime."[201] When most Americans think of crime they think of a Black face.[202] Many white Americans believe African Americans are the cause of crime, and that when African Americans enter a neighborhood, as residents or visitors, crime will surely follow.[203] Consequently, it is not surprising that some would believe African American youth constituted a class of "superpredators," the control of which necessitated a radical transformation of the juvenile justice system. Indeed, in the minds of many, "superpredator" is simply a code word for young Black males.[204]

This outcome is precisely that which the theories of otherness would predict. Thus, otherness effects not only the perceptions that officials have within the juvenile justice system, it also effects the very structure of the system. Although Barry Feld does not employ the concept of otherness in his analysis, his description of the transformation of the juvenile court succinctly captures the role that the otherness of African Americans played in bringing about harsher juvenile justices policies. According to Feld,

> [t]he recent transformation of the juvenile court provides a graphic illustration of the conversion of public fear of and hostility toward other people's children into harsh and punitive social control practices. The mass media depict and the public perceive the "crime problem" and juvenile courts' clientele primarily as poor, urban [B]lack males. Politicians have manipulated and exploited these racially tinged perceptions for political advantage with demagogic pledges to "get tough" and "crack down" on youth crime, which has become a "code word" for [B]lack males.[205]

VI. CONCLUSION

The transformation of the juvenile courts does not signal the end of innocence. Rather it signals the continuation of historic perceptions

200. *See* Nunn, *Rights Held Hostage*, *supra* note 10, at 64 n.10 and accompanying text describing stereotype of the "Black savage".

201. KATHERYN K. RUSSELL, THE COLOR OF CRIME xiii (1998).

202. *Id.*

203. *See* Nunn, *Trial as Text*, *supra* note 196, at 770 n.142 (citing sources).

204. *See* FELD, *supra* note 168, at 337. *See also* JEROME G. MILLER, SEARCH AND DESTROY (1996).

205. FELD, *supra* note 168, at 337.

and policies toward African American youth. African American youth never enjoyed adolescence in its full sense because they were never perceived as the social equals of white children. Consequently, African Americans in the juvenile justice system have always experienced discriminatory treatment. The changes in the juvenile court system are not changes in the way that adolescence is perceived, but changes in the perception of what class of children are serviced by the juvenile court. With the understanding that the predominate clientele of juvenile courts, at least in large urban areas, are African American males, the idea of a juvenile court focused on rehabilitation and the protection of the child became an unnecessary luxury. Driven by the image of African American "superpredators," the juvenile justice system was transformed into a harsh and punitive system of social control. For African American youth, however, this transformation only represented an intensification of the oppression that they have always endured in the juvenile justice system.

The distinctions between African American and European American children in the juvenile justice system and the subsequent change of the juvenile justice system to a retributive model can be explained by the concept of otherness, as it has been articulated by a number of intellectual traditions. The transformation of the juvenile court needed and commanded its own other, the "superpredator." The "superpredator" was constructed as the ultimate other, as possessing all the characteristics that innocent young children do not. The "superpredator" was "brutally remorseless," incorrigible, and savage. And because the "superpredator" was the antithesis of childhood, it was slyly constructed as young, Black, and male. This racially characterized "superpredator" was in fact a monster, and only the most serious and determined efforts could address the threat that the "superpredator" posed.

The transformation of the juvenile court would not have occurred were it not viewed in this way as a necessary instrument to address the threat posed by the other. If the public perceived the juvenile justice system as means of addressing the needs of white children, "our" children in the public voice, then the juvenile court would be entirely different because at some level there is an understanding that "our" children will someday grow up and become "us." But the children of the other will never become "us," they will remain "them." As a result, they will receive discriminatory treatment no matter what theoretical justification underlies the policies of the juvenile justice system.

One day, when the current crisis is over, when the public's lust for punishment has been satiated, and when the public realizes that far

too many white children have been swept along by punitive policies intended for Blacks, the rehabilitative focus of the juvenile justice system will return. When it does, African American children may benefit to some degree. But, by and large, most African American children will not notice the difference. They will still be arrested, detained, and incarcerated at higher rates. As children of the other, they will be feared and controlled, rather than valued and loved.

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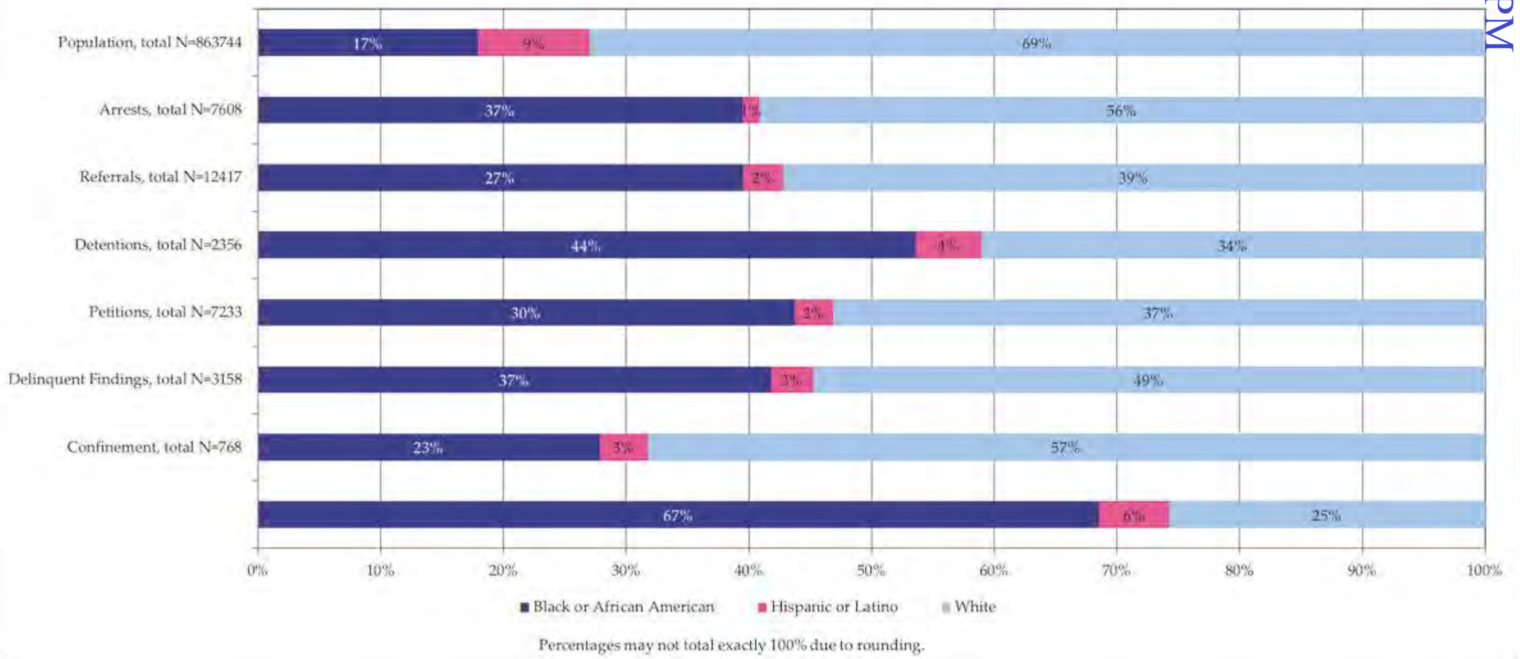
APPENDIX C

Percentage of Minorities at Stages of the Juvenile Justice System, All Reporting Counties, 2020.
Michigan Committee on Juvenile Justice, State Advisory Group.



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APPENDIX D

Weemhoff & Staley, *Youth Behind Bars,* May 2014
Michigan Council on Crime and Delinquency

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Examining the impact of prosecuting and incarcerating kids in Michigan's criminal justice system

YOUTH BEHIND BARS

By

MICHELLE WEEMHOFF

and

KRISTEN STALEY

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TABLE OF CONTENTS

2 – Executive Summary

4 – Introduction

5 – Pathways into Michigan's Adult Criminal Justice System

6 – Consequences of Harsh Policies

7 – Lawmakers are Listening: Research Drives National Policy Change

9 –Youth in Michigan's Adult Justice System

26 – Policy Recommendations

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EXECUTIVE SUMMARY

In the mid-1990s, Michigan became part of a national trend to get tough on youth crime. Although crime rates were steadily declining, the state passed a series of harsh laws that funneled thousands of youth into the adult criminal justice system. In addition to automatically considering all 17-year-olds as adults, Michigan broadened juvenile prosecutors' discretion to automatically file in criminal court, expanded the number of juvenile offenses requiring an adult sentence, and allowed children *of any age* to be criminally convicted and sent to prison.

Most youth in the adult system are there for non-violent offenses. From 2003 to 2013, over 20,000 Michigan youth were placed on adult probation, detained in jail, or imprisoned for a crime committed when they were younger than 18 years old.[a] The majority of these cases included non-violent offenses. Some were as young as 10 years old and a disproportionate number were youth of color.

Processing youth in the adult system is harmful to them and bad for public safety. The trend to criminalize children was quickly met with the reality that processing youth in the adult system is detrimental to public safety and youth well-being. Youth in prison face extreme risk of violence, sexual assault, and self-harm.[2] Without access to rehabilitative services, young people exiting adult prison are more likely to reoffend and reoffend more violently compared to their counterparts in the juvenile justice system.[3]

Michigan's adult probation and prison systems are not equipped to address the unique needs of youth. The majority of the youth sent to adult court in the past decade never received an education higher than the 11th grade or completed a GED. Over half entered the system with known drug or alcohol abuse issues and mental health concerns, and approximately 1,500 young people had at least one dependent.

A small number of youth tried as adults are girls, who often enter the system with histories of violence and sexual victimization. Because so few girls are on probation or in prison, there are essentially no services for this vulnerable population.

Young people leave the adult system without adequate support to keep them from returning. Once youth leave the corrections system, the lifelong consequences of an adult conviction are devastating. Nearly all youth in prison will eventually return to the community but will find significant barriers to employment, education, housing, and public benefits—the key elements to a successful future. Without effective reentry and support services, young people may find themselves in a revolving door to prison.

Contrary to sentiments of the mid-1990s, public opinion in Michigan and across the country has shifted toward becoming "smart on crime." In an effort to protect public safety, improve child outcomes, and save money, leaders nationwide are re-evaluating previous policy decisions and making significant changes to youth transfer laws. It is time for Michigan to join them.

Keeping in line with contemporary research and opinion, *Youth Behind Bars* offers a series of "smart" recommendations to safely reduce the number of young people exposed to the adult criminal justice system.

[a] Michigan law considers a youth to be younger than 17; however, for the purposes of this report, youth are considered under age 18 based on lines drawn by the U.S. Supreme Court, U.S. Federal Legislation, and the United Nations.

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RECOMMENDATIONS FOR SAFE REDUCTION OF YOUTH IN THE ADULT SYSTEM:

1. Raise the age of juvenile court jurisdiction to 18. This alone would impact 95 percent of the children currently being sent into adult corrections.

2. Remove youth from adult jails and prisons.

3. Require oversight and public reporting on youth in the adult system.

4. Require judicial review of all transfer cases.

5. Develop policies to reduce the overrepresentation of youth of color in the adult system.

6. Provide effective legal representation to youth.

7. Offer developmentally appropriate and rehabilitative alternatives to youth in the community.

8. Restrict the use of segregation.

9. End the option to sentence youth to life without the possibility of parole.

10. Effectively partner with families and victims at all stages of the criminal justice system.

RUSS MARLAN, EXECUTIVE BUREAU ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS:

There's been an evolution in the criminal justice system. We're moving from a model that gets tough on crime to one that is smart on crime and uses what works.

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> The practice of treating children as if they were fully mature adults … has particularly inequitable consequences in the realm of criminal justice.
>
> – GOV. WILLIAM MILLIKEN, ET AL. AS AMICI CURIAE, *MICHIGAN V. CARP* (2014).

INTRODUCTION

Between 1988 and 1996, Michigan became part of a national trend to get "tough on crime" by enacting punitive laws that expanded ways to prosecute, convict, and incarcerate youth in the adult criminal justice system. In addition to including all 17-year-olds in the adult system, Michigan lawmakers created new laws—self-proclaimed as the "toughest in the nation"—to crack down on perceived youth violence. They eliminated a minimum age limit on who could be sent to adult prison, allowed prosecutors to file certain juvenile cases in adult court without judicial oversight, and expanded adult sentencing options for youth of all ages. A 400-bed youth prison was created and juvenile record expungement was limited. Additionally, the reforms proposed zero tolerance policies in schools and reintroduced judicial discretion to detain status offenders for skipping school and violating curfew.[4]

Despite being contrary to research and public opinion, these harsh policies serve as the foundation for how Michigan treats young people in the justice system. In 1997, the privately-operated "punk" prison, Michigan Youth Center, was constructed, housing hundreds of boys who had committed mostly low-level, non-violent offenses. During its operation, a lawsuit was filed claiming numerous instances of abuse and neglect. A few years later, Michigan charged and convicted one of the youngest Americans ever as an adult, 11-year-old Nathaniel Abraham.

But things are changing. Over the last decade, Michigan has seen a steady decline in the number of young people arrested for violent offenses. The Michigan Youth Center was shut down in 2005 in response to a shrinking population and and extremely high costs of operation. These changes galvanized public discussion, questioning whether adult prison was the best place to deal with youth.

Moreover, policy makers are now shifting their focus to be "smart on crime," recognizing that harsh policies do little to repair the harm caused to communities and victims. Over the past ten years, nearly half of states limited the ways in which youth can be prosecuted, convicted, and incarcerated as adults. These states cite public safety, cost-savings, and improved outcomes for youth as the impetus for change.

Michigan has not reviewed how its policies, enacted decades ago, could be updated to reflect current research and best practices. In fact, no statewide entity currently tracks how many youth are being tried in adult criminal court, what offenses are being committed, nor monitors the impact of probation, prison, and parole on public safety and individual outcomes.

The Michigan Council on Crime and Delinquency (MCCD) embarked on this study to help inform sound public policy by answering three important questions:

1. What are the pathways that lead youth into Michigan's adult criminal justice system?
2. What impact does conviction and incarceration have on young people and their families?
3. What policy changes should be enacted to safely reduce the number of young people being treated as adults?

The findings in this report uncover some of the answers and, more importantly, encourage dialogue among all stakeholders dedicated to promoting public safety, wisely investing public dollars, and improving outcomes for children.

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Pathways into Michigan's Adult Criminal Justice System

The most common way for a young person to enter the adult system is simply based on age. Michigan is one of only ten states that automatically prosecute all 17-year-olds as adults. [5]

However, regardless of age, Michigan's justice system provides no right to be treated as a juvenile.[6] In other words, a youth of *any age* can be tried and sentenced as an adult.

A youth who is 14, 15, or 16 years old may be *waived* into adult court and out of the juvenile system.[7] There are two ways to waive jurisdiction: *traditional waiver* and *automatic waiver.*

Traditional waiver occurs after a judge in the juvenile court[b] conducts a two-part hearing, determining if waiver is in the best interest of the public and the youth. The judge must consider a number of factors in making this determination; however prior delinquency history and the seriousness of the offense must be considered more heavily than any other factor.[8] A traditionally waived youth must receive an adult conviction and sentence.[9]

Automatic waiver allows a prosecutor to bypass the juvenile court altogether and directly file a case in adult criminal court, but only if a youth is accused of committing one of 18 "specified offenses."[10] An automatically waived youth must receive an adult conviction if found guilty; however, sentencing is slightly different. Twelve of the 18 specified offenses require an adult sentence, and the remaining six permit adult sentencing as an option.[11]

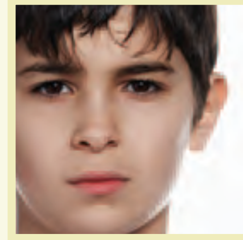
Once waived into adult court, there is no ability to "reverse" or petition the court to change that waiver.[12] Michigan is one of only five states allowing prosecutorial discretion to automatically waive a case but provides no opportunity to reverse it.[13]

Michigan also allows youth of any age to be tried and sentenced as an adult via *designated proceedings.* A designated youth stays in juvenile court, but is given an adult conviction if found guilty.[14] These youth are eligible for a *blended sentence,* allowing the court to enter a juvenile disposition or an adult sentence.[15]

Once tried as an adult, that youth must be tried as an adult for any future felony charges, even if the offense would not normally warrant transfer to adult court. This applies even if they were never convicted of the original offense.[16]

An adult sentence can be extreme in Michigan. A person convicted in the adult system must serve 100 percent of his or her minimum sentence, with no opportunity for good time or earned credits.[17] A person 14 years or older may also be sentenced to life in prison without the possibility of parole. While Michigan law no longer requires this sentencing, pursuant to *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the state still allows it as an option.[18]

[b] Juvenile delinquency cases are primarily processed in the Family Division of Michigan Circuit Courts. For brevity, it is hereinafter referred to as "juvenile court."



MICHIGAN'S HARSH LAWS:

- Michigan automatically prosecutes all 17-year-olds as adults.
- For some offenses, a prosecutor can choose to skip juvenile court altogether and file directly in adult criminal court.
- A youth of any age can be tried as an adult and sent to prison.
- Once tried as an adult, even if not convicted, that youth can never be tried in juvenile court again.
- Michigan allows youth as young as 14 to be sentenced to life in prison without the possibility of parole.

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CONSEQUENCES OF HARSH POLICIES

As a result of these harsh policies, youth under the age of 18 in Michigan may be placed in adult prisons and jails, with extraordinarily harmful consequences.

Incarceration threatens a youth's safety and well-being.

National research shows that youth in adult prisons and jails are twice as likely to be beaten by staff, five times as likely to be sexually assaulted, and 36 times more likely to commit suicide than peers in the juvenile justice system.[19] Because of these high risks, prisons often place youth in segregation or restraints; unfortunately, this only serves to increase the risk of depression, anxiety, and self-harm.[20]

Youth incarceration actually increases violent crime.

The Centers for Disease Control and Prevention found that youth exiting the adult system are 34 percent more likely to reoffend, reoffend sooner, and escalate to more violent offenses than their counterparts in the juvenile justice system.[21]

Incarcerating youth is expensive and ineffective.

The average cost of housing a prisoner in Michigan is about $34,000 a year,[22] with an average sentence served of 4.3 years.[23] Further, a young person convicted in the adult system can expect to suffer a lifetime earnings loss of about 40 percent, translating into to a significant loss of state tax revenue.[24]

An adult conviction has lifelong consequences.

The vast majority of youth entering prison will eventually be released back into the community. Once they leave the system, an adult criminal conviction creates immense barriers to finding housing, employment, and education.[25]

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Lawmakers are Listening: Research drives policy change

There is a growing body of adolescent development research confirming that teens are different from adults, and that treatment is more effective when development is a primary consideration.

As part of normal development, teens are more inclined to take risks, act impulsively, and succumb to peer pressure—characteristics often associated with delinquency.[26] While the cognitive capacities of adolescents are very close to an adult level by age 16, their ability to reason and exercise sound judgment, particularly in emotional situations, improves well into one's early to mid-twenties.[27] Because development continues into young adulthood, youth are very amenable to rehabilitative programs and behavior modification during these formative years. Many jurisdictions are now using risk and needs assessments to drive individualized case planning and prioritizing diversion and community-based programs for low-risk cases.[28]

Policymakers around the country are using this research to develop best-practices for kids in the justice system. States are reevaluating their transfer policies, and the federal government has confirmed that youth should only be in the adult system as a last resort.

In recent years, the U.S. Supreme Court has made clear that children under 18 must be treated differently from adults in the criminal justice system.

In 2005, the Court abolished the juvenile death penalty in *Roper v. Simmons*,[29] setting a precedent that distinguished different standards of culpability between adolescents and adults. In 2010, *Graham v. Florida*[30] eliminated the sentence of juvenile life without parole for non-homicide offenses. Most recently, in the joint cases of *Miller v. Alabama* and *Jackson v. Hobbs*[31], the Court deemed mandatory sentences of life without parole for those under age 18 as cruel and unusual punishment and unconstitutional.

Throughout all of these decisions, the Supreme Court expressed a common sentiment: youth under the age of 18 are fundamentally different from adults, and important mitigating factors such as the child's age, immaturity, home environment, and the potential for rehabilitation, must be considered when imposing a criminal sentence on a youth.

In addition to limiting who can be processed in the adult system, the federal government has also imposed new standards for protecting children incarcerated as adults. In 2009, the national Prison Rape Elimination Act (PREA) Commission[c] determined that "more than any other group of incarcerated persons, youth incarcerated with adults are at the highest risk for sexual abuse."[32] Based on this finding, the U.S. Department of Justice established the Youthful Inmate Standard within the 2012 PREA regulations, requiring all youth under age 18 to be separated by sight and sound from adults in jails and prisons and restricting the use of isolation to achieve that separation.

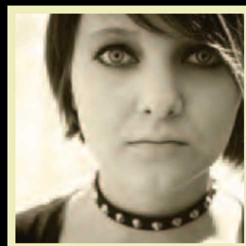
The last ten years have seen significant reforms on the state level as well. Since 2006, nearly half of the states enacted legislation to limit when a youth can be transferred to the adult system. Forty states now require 17-year-olds to be initially processed in the juvenile justice system. Since 2011, eleven states passed laws limiting the authority to house youth in adult jails and prisons; four expanded their juvenile court jurisdiction; twelve changed their transfer laws making it more likely that youth will stay in the juvenile justice system; and eight amended their mandatory minimum sentencing laws to account for the developmental differences between youth and adults.[33]

[c] In 2003, Congress passed the Prison Rape Elimination Act (PREA), which created an investigative commission charged with developing national standards to prevent and ultimately eliminate sexual abuse in our nations' jails, prisons, and detention facilities.

PARENT OF AN INCARCERATED YOUTH:

"If we know of effective options for working with youth, why are we sending any of them to adult prison?"

YOUTH ENTERING THE SYSTEM HAVE EXPERIENCED SIGNIFICANT TRAUMA, INSTABILITY, AND ARE AMONG THE MOST VULNERABLE.



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Youth in Michigan's Adult Justice System

Since 2003, a shocking 20,291 youth were convicted as adults and placed on probation, sent to jail, or imprisoned for a crime they committed before turning 18 years old.[34] As of November 2013, when data was collected, one in three (6,764) of these former youth were *still* under the jurisdiction of the Michigan Department of Corrections (MDOC) on adult probation, in prison, or under parole supervision.[35]

Fortunately, data from recent years indicates that these numbers are dropping. Between 2008 and 2012, arrests of youth under 18 declined by 34 percent.[36] As a result, fewer young people are entering adult court or ending up in adult corrections. From 2003 to 2013, the rate of youth entering MDOC jurisdiction decreased by 56 percent.

Despite this optimistic trend, Michigan's antiquated laws still stand. There are thousands of people in the adult corrections systems that were transferred in as a child—and more enter each day. And, as the report's findings will show, the adult system is ill-equipped, ineffective, and too expensive to handle the complex treatment and needs of this young population.

INDIVIDUALS CURRENTLY UNDER THE JURISDICTION OF THE MDOC

offense committed between 2003 – 2013

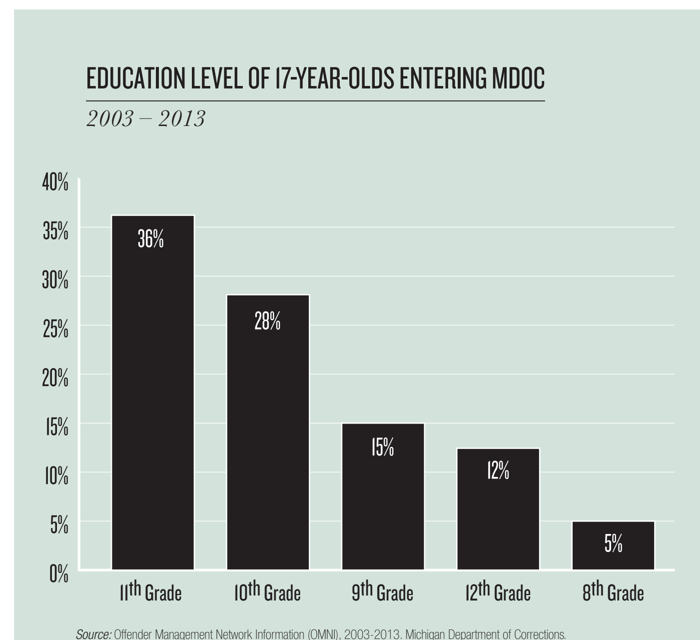
Age when offense was committed	Currently on probation	Currently in prison	Currently on parole
11 years old	2	0	0
12 years old	1	2	1
13 years old	4	12	4
14 years old	10	59	12
15 years old	25	210	43
16 years old	83	536	143
17 years old	1298	3108	1211
TOTAL	1423	3927	1414

Source: Offender Tracking Information System, Michigan Dept. of Corrections (Nov. 2013)

Young people who have committed crimes should be held accountable for their actions. Nonetheless, it is important to acknowledge the strikingly difficult life circumstances these youth share in order to properly design rehabilitative services and prevent future reoffending.

Based on research of Michigan youth in adult prison from 1985 to 2004, this young population experiences an exceptionally high rate of violence. Seventy-eight percent had a friend who was killed, and 48 percent had a family member that was killed.[37] They also have great instability in their home lives. Eighty-one percent had parents with substance abuse issues, and 44 percent spent time in child welfare or foster care and were placed out of the home an average of 11 times.[38] A great number had family members in prison: 45 percent had a father in prison; 25 percent had a mother in prison; and 19 percent had a sibling in prison.[39] Additionally, many had only one parent or needed to depend upon public assistance: 78 percent lived in a single mother household and 47 percent relied upon public benefits.[40]

These same data points are not available for youth under the MDOC jurisdiction in more recent years; however, it is known that youth entering the adult system in the past decade were almost all behind in school—many by at least two grade-levels. This is especially true for 17-year-olds, who make up the majority of the population. While most 17-year-olds in Michigan are entering their senior year of high school and looking toward graduation, 28 percent of the same-aged peers who enter the adult criminal justice system had an educational-level no higher than tenth grade, 15 percent only had ninth grade, and 5 percent had an eighth grade or lower education.[41]



Source: Offender Management Network Information (OMNI), 2003-2013. Michigan Department of Corrections.

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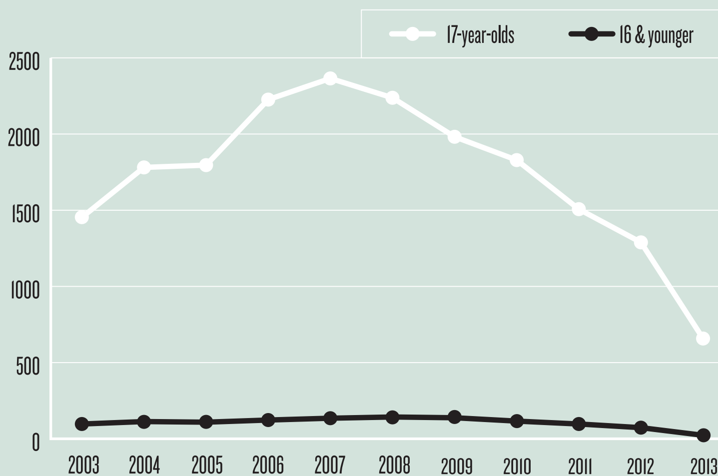
> 17-year-olds comprise the majority of youth in the adult system despite committing mostly non-violent offenses.

Furthermore, substance abuse and mental health issues are of serious concern. More than half of the population (10,782 youth) had known drug abuse problems; almost one-fourth had previously been treated for mental health issues; and 40 percent of youth entering prison had been formerly committed to a juvenile facility.[42]

Young people entering the adult system fall into two main categories: 17-year-olds who are automatically considered adults and youth who are 16 years old or younger who have been transferred into the adult system either by a waiver or designated proceeding.



Source: Offender Management Network Information, 2003-2013. Michigan Department of Corrections.

17-year-olds

In the last ten years, 95 percent of all youth entering adult jail, prison, or probation were 17 years old at the time of their offense—totaling 19,124 young people.[43] By the end of 2013, there were 5,617 former 17-year-olds still under the jurisdiction of the MDOC (probation, prison, or parole). Of that population, 55 percent were in prison.[44]

Most 17-year-olds entering the criminal justice system committed non-violent offenses—nearly 60 percent were non-violent and did not include a weapon.[d] Additionally, 58 percent of those entering the system at age 17 had no prior juvenile record.[45]

Nearly 68 percent of all 17-year-olds who entered MDOC in the last decade came from some of the most populated counties: Wayne, Oakland, Macomb, Kent, Kalamazoo, Genesee, Saginaw, Muskegon, Berrien, and Ottawa. The top four counties account for half (51 percent) of the 17-year-old population.

Youth of color are overrepresented among 17-year-olds in the adult corrections system. Fifty-three percent of all those currently under MDOC jurisdiction for an offense committed at 17 are youth of color; however, only 23 percent of Michigan's statewide 17-year-old population are youth of color.[46]

Seventeen-year-olds sentenced to prison receive a range of sentence lengths, but many are given long terms. Nearly 25 percent of those currently in the system received sentences with a maximum term of 15 years or more, and 16 percent have sentences with a maximum term of 20 years or more.[47] At a rate of $34,299 per year, a 20-year sentence for one person equates to $685,980. When considering all the 17-year-olds serving this term or longer, the figure adds up to over $2.1 billion.

[d] Based on the FBI's Uniform Crime Reporting, violent crimes include those offenses that involve force or threat of force.

Youth 16 and younger charged as adults come from only a few Michigan counties, with a disproportionate impact on youth of color.

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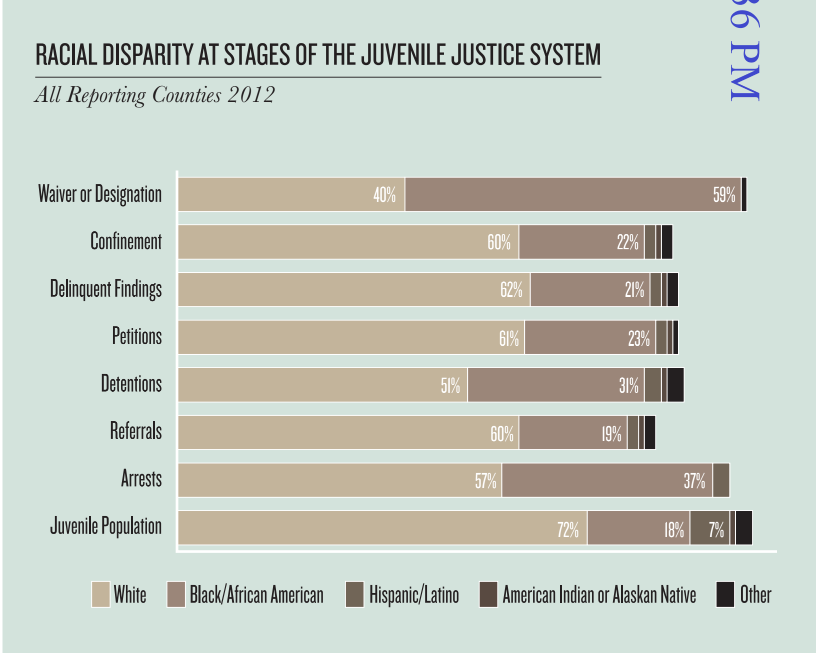
Transferred Youth: 16-years-old and younger

In the last decade, 75 percent of all youth under age 17 charged as adults[e] (3418) came from ten of 83 Michigan counties, Berrien, Wayne, Calhoun, Kent, Muskegon, Saginaw, Oakland, Ingham, Allegan, and Macomb.[48] The majority of transferred cases were for serious offenses; however, 25 percent were non-violent charges and did not include a weapon.

Youth of color are disproportionately prosecuted or convicted as adults. In 2012, 59 percent of youth who were waived or designated as adults were Black or African American, even though Black youth only make up 18 percent of the youth population statewide.[49]

There is concern that racial and ethnic disparity may be even more pronounced than is currently reported. Michigan's justice system has no standard procedure for collecting race and ethnicity information. In turn, many people are miscategorized compared to how they would self-identify. For example, individuals who self-identify as Latino, Arab American, or biracial may be categorized as White. Moreover, race and ethnicity are reported differently at each stage of the system, including the courts, law enforcement, jails, community corrections and the MDOC, making it nearly impossible to assess the extent of inequitable treatment at key decision points.



[e] This includes all designated and waived youth.

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Michigan prosecutors have broad discretionary power to charge youth 16 and younger as adults.

Michigan law grants prosecutors broad discretion regarding when and how to use transfer mechanisms (designation, traditional, or automatic waivers) to try a youth as an adult.[50] Of special concern are automatic waivers. Michigan is one of only 15 states allowing automatic waiver by a prosecutor.[51] Automatic waivers occur when a youth is accused of one of 18 specified offenses. The prosecutor then has the option to directly file the case in adult court, bypassing the juvenile court altogether.

Specified offenses were determined by the Michigan Legislature in 1996 to include the most serious crimes. In the past ten years, only 29 percent of all youth under MDOC jurisdiction aged 16 or younger at the time of the offense were convicted of one of the 18 specified offenses.[52] It seems the majority of youth (71%) received an adult conviction for a broader range of offenses, not necessarily those deemed most serious.

State prosecutors, judges, and other court officials revealed that a wide range of factors are considered before deciding to seek transfer and it is clear that the decision to try a youth as an adult is not made lightly—often used as a last resort. Internal policies do govern their use of these legal mechanisms, and the personal philosophy of the head prosecutor or presiding juvenile judge tends to play a large role in the types of and frequency that cases are waived or designated.

A number of interviewees expressed concern with the broad level of open-ended discretion. There is no uniform statewide guidance on how to apply these complex polices to their caseloads. Interviews also indicated there is little external governance over the decision-making process. Thus, transfer laws are applied differently from county to county and from case to case. For example, a number of jurisdictions reported weighing each case individually, using mitigating factors such as age, culpability, family dynamics, and other personal characteristics, to help make the decision. On the other hand, many reported that the decision to transfer is based mainly on a youth's past record or the seriousness of the current offense.

Other interviewed officials noted that prosecutors, by nature of their role in the adversarial court process, view cases on behalf of law enforcement and victims. "There's a political component to this power," cautioned one juvenile defense attorney. "Prosecutors get elected for being 'tough on crime.'" Yet, there is no requirement to consider the impact of the decision on the accused youth or the availability of rehabilitative services in the adult system. For example, if a case is waived into adult court and the youth is *not* convicted, that young person will always be considered an adult in court. In other words, once an adult, always an adult—regardless of conviction.[53]

IS THERE A FINANCIAL INCENTIVE TO TRANSFER YOUTH TO THE ADULT SYSTEM?

Most juvenile justice services in Michigan are funded through the County Child Care Fund (CCF),[54] a 50 percent cost-share between the state and counties. The CCF can be used toward community-based programs as well as out-of-home placement. However, once a youth is convicted as an adult, all costs are born by the state and the counties pay nothing.

During a number of interviews for this report, county officials acknowledged that this payment structure creates a financial incentive to transfer youth and indicated that "other" counties may use transfer as a cost-saving measure. No officials believed this was the case in their own county; however, many reported that a lack of available local resources is an influencing factor when deciding whether to transfer or sentence a youth to the adult system.

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FRANK VANDERVORT,
CLINICAL PROFESSOR OF LAW,
UNIVERSITY OF MICHIGAN
LAW SCHOOL:

*"They say juvenile justice
is more expensive but
it's actually more expensive
to send a child to prison
for 20 years
with no rehabilitation."*

SINCE 1996, 75 CHILDREN UNDER THE AGE OF 14 HAVE BEEN CONVICTED AS ADULTS

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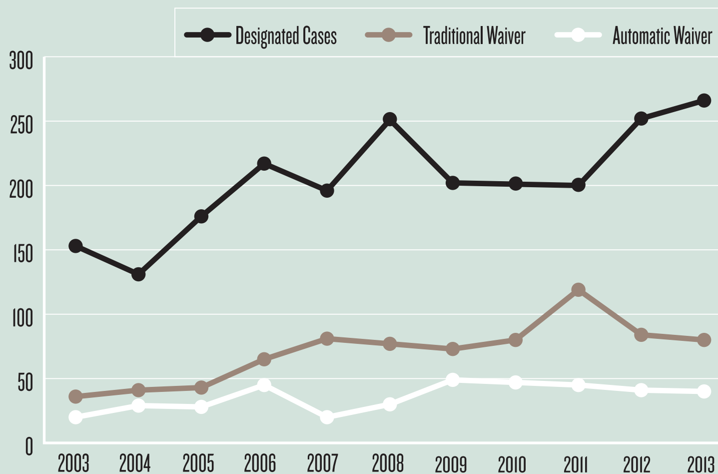
Designation is the most common way to try children of any age as adults.

From 2003 to 2013, a total of 3,418 youth[f] under 17 years old were prosecuted as adults, either through traditional waiver, automatic waiver, or designation proceedings. [55] The most frequently used method is a designated proceeding, accounting for 66 percent of all such cases.



In a designated proceeding, a youth of *any age* may be tried, or designated, in the same manner as an adult while staying under the jurisdiction of the juvenile court.[56] Michigan is one of only 22 states without a minimum age of transfer. Since 1996, when the state eliminated a lower age threshold, 75 children under the age of 14 have been convicted as adults.[57]

Prosecutors' decision-making power applies when making the choice to designate a case. Since 2003, prosecutors filed 2,245 cases for youth to be designated and tried as adults. These proceedings can include those youth who have committed a specified offense. However, with designation, there is judicial review—only 660 of those cases, about 29 percent, were actually granted by a judge.[58]

All designated youth will receive an adult criminal conviction if found guilty. However, the juvenile judge may impose a blended sentence, including juvenile disposition, an adult sentence including prison or jail, or delay imprisonment and place the youth on probation.[59] Anecdotally, it appears these youth more frequently receive juvenile dispositions rather than adult sentences; yet without clear data, it is impossible to track the actual sentences or long-term outcomes of these cases.

Designation proceedings were born out of the concern that young kids were increasingly being recruited by older criminals to commit violent crimes.[60] "Many criminal court judges were perceived as lenient on waiver kids, considering young age more of a factor than the violent crime," explained one former state legislator who served during the 1996 juvenile reforms. "Designation created a way for the juvenile court to keep the case and gave the juvenile judge more authority to impose a harsher sentence."

Nonetheless, interviews proved that convicting youth at such young ages is a big concern for many who work in juvenile court. While these children are eligible for blended sentencing options, they are still tried and convicted as adults. They face lifelong criminal records and risk of adult prison time.

[f] The number of transfers are higher than the actual youth under 17 in the adult system, as not all cases end with a conviction.

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Michigan's defense attorneys receive little specialized training or resources for complex youth cases.

Michigan's public defense delivery system[g] has been characterized as one of the worst in the nation, fraught with inconsistent funding, under-resourced attorneys, and a lack of oversight.[61] Still, the majority of youth charged as adults, including transferred youth and 17-year-olds, depend upon the public defense system for legal representation.

When facing an adult conviction that could remain on record for the rest of a child's life, informed and experienced legal counsel is crucial. Yet, nearly all persons interviewed felt that a lack of training and resources leave defenders in Michigan ill-equipped to handle these complex cases. Defending a young person at risk of ending up in adult corrections requires a diverse range of knowledge. To effectively argue a case, attorneys should be familiar with not only criminal, juvenile, family, and education law, but adolescent development research, trauma-informed practices, child welfare issues, and a host of other topics. In fact, every recent Supreme Court case dealing with young people in the adult system has been successfully argued using these secondary research sources.[62] However, there is no statewide infrastructure providing attorneys with access to this type of information or research.

Most youth in adult court never proceed to trial and, instead, accept a plea agreement. For youth who are 16 or younger, 73 percent plead guilty and 86 percent of 17-year-olds plead guilty.[63] Negotiating a plea agreement requires that youth have the capacity to appreciate the nature of the charges and weigh the consequences of their decisions. Even with quality legal representation, research shows that young people, especially children under 15, are significantly less likely than adults to understand court proceedings or effectively assist their attorney in their own defense.[64]

Despite these findings, youth tried as adults are not required to have a competency evaluation. In 2013, Michigan established new juvenile competency laws for youth processed in juvenile court; however, the law does not extend to youth in the adult system.[65] Due to lack of aggregate data, it is unclear how many youth tried as adults in Michigan are evaluated for competency on an annual basis.

[g] In 2013, the state created the Michigan Indigent Defense Commission, tasked with establishing standards and oversight of public defense delivery systems.

HOLMES YOUTHFUL TRAINEEE ACT

The Holmes Youthful Trainee Act (HYTA) is a sentencing option available to youth between the ages of 17 and 20 who have been charged with certain offenses. If the youth agrees to plead guilty, following successful completion of the punishment imposed, the charges will be set aside and there will be no public criminal record. A sentence can include jail, prison, or probation, none of which may exceed three years. Youth charged with a traffic offense, a major controlled substance offense, or a felony for which the maximum punishment is life imprisonment are not eligible for HYTA sentencing.[66]

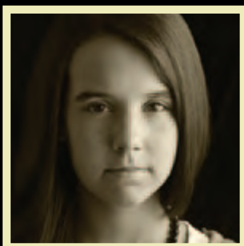
It is unknown how many HYTA youth received probation or jail as a sentence. However, as of March 2014, there were 338 young people serving a HYTA sentence in prison, most frequently from Wayne, Oakland, and Macomb Counties. When the HYTA offenders are in prison, they are housed primarily in a separate unit at the Thumb Correctional Facility until the age of 22, at which point they can be transferred to the general population.[67]

Many stakeholders agree that HYTA provides young people with an opportunity to not be burdened with a lifelong record for a teenage mistake. However, interviewees expressed concerns that spending up to three years in prison as part of a probationary term does not align with the rehabilitative spirit of the law. Regardless of whether or not a person leaves with a clean criminal record, three years in prison can be extremely dangerous and can greatly affect a young person emotionally, mentally, and physically for the rest of their lives. Moreover, there is no MDOC supervision or reentry services for most HYTA youth to assist with their return to the community.

HONORABLE FAYE HARRISON, CHIEF JUDGE PRO TEM, PROBATE COURT, 10TH JUDICIAL CIRCUIT COURT FAMILY DIVISION:

Jails are no good for kids—they are not going to get the same degree of education, mental health services, anything. It's designed to be an adult facility, not a long-term residential program for kids.

THE ADULT SYSTEM CAN'T SUPPORT YOUTH



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Youth under the age of 18 often spend time in adult jail.

A young person under 18 years old may be placed in an adult jail awaiting a hearing, as part of a sentence, if found in contempt of court, or considered a "menace to others." [68] In the last ten years, 10,531 young people received jail as part of their sentence for a crime they committed under age 18—over half of the entire youth population in the adult system.[69] On average, a youth served 145 days in jail as part of his or her sentence and an average of 35 days awaiting a hearing—equivalent to the typical number of annual school days in Michigan.[70]

Young people are particularly vulnerable in jail settings. National research shows that youth make up only one percent of the jail population, yet they accounted for 21 percent of inmate-to-inmate victimization in jails in 2005 and 13 percent in 2006.[71]

Michigan's laws have yet to align with federal PREA regulations, although it is likely to have changed in practice among the state's prisons and jails. Currently, the federal Juvenile Justice Delinquency Prevention Act provides that a youth under juvenile court jurisdiction placed in jail (this includes those awaiting a designated trial) must be separated from the adult population physically and from sight and sound.[72] However, for youth under adult criminal court jurisdiction who are placed in an adult jail, there is no state requirement yet to separate them from adults.[73]

PREA standards make it cumbersome for many jails to accommodate younger populations without using isolation, which can cause even greater trauma and upheaval. Even if a jail can accommodate youth without the use of isolation, adult jails are not equipped for long-term stays of youth who are still developing mentally, physically, and emotionally and require age-appropriate educational and mental health services.

Some juvenile detention centers also house youth with adult charges. According to one juvenile detention official, youth facing adult charges remain in detention for 10-12 months, compared to 18-27 days for youth in the juvenile court.[74] While the services in a juvenile detention center are designed for youth, detention, like jail, is intended to provide short-term care; as a result, there are fewer services designed to meet long-term educational, mental health, or programming needs. Furthermore, youth charged as adults do not get appointed a juvenile probation officer to facilitate services while in detention such as school work, visitations, or medication reviews.

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Girls in the adult system do not receive adequate treatment.

While girls make up about 30 percent of the juvenile justice population at any given time, in the last ten years they accounted for only 10 percent of youth (2,016 girls) tried as adults in Michigan.[75] As of November 2013, only 227 women were under the jurisdiction of the MDOC for offenses committed prior to their 18th birthdays. Of that population, 79 were in prison, 116 were on probation, and 32 were on parole. Three of these girls were currently under 18—two were on probation and one was in prison for running away from a juvenile facility.[76]

The majority (86 percent) of the girls charged as adults over the last decade were 17 years old at the time of their offense. Seventy percent had no juvenile record and 58 percent of the offenses were non-violent.[77]

Girls in the justice system often have severe histories of trauma, physical violence, sexual exploitation, and substance use.[78] Stakeholders noted that girls tried as adults may have become system-involved through boyfriends or gangs, or are victims of human trafficking or domestic violence. Over the past decade, 45 percent of girls entered the corrections system with known drug abuse, 26 percent had known alcohol abuse, 31 percent had received mental health treatment, 40 percent had only a 10th grade education or lower, and 13 percent had at least one dependent.[79]

Girls incarcerated in adult prison are housed at MDOC's Women's Huron Valley Correctional Facility. While MDOC has made efforts to develop gender-specific programming for the female population, programming is not designed to be youth-specific given the small number of incarcerated girls. Even after they are over the age of 17, interviewees suggested that there are far fewer female-specific programs in the community; as a result, women may be forced to stay longer in jail or prison because they cannot attend local rehabilitative programs.

There is a lack of age-appropriate community-based services for youth serving adult probation.

As of November 2013, the MDOC actively supervised 1,423 individuals on probation in the community for offenses committed prior to age 18. Of this population, five were 16 years old and 21 were 17 years old.[80]

Among youthful probationers, 91 percent were 17 years old at the time of their offense. The majority, 71 percent, committed non-violent offenses, and about two-thirds had no previous juvenile record. Additionally, 93 percent spent an average of 24 days in jail prior to conviction.[81]

The sentencing judge determines the conditions of probation.[h] This can include jail confinement, substance abuse treatment, community service, high school completion, restitution, fines, court costs and supervision fees, electronically-monitored home confinement, or finding and keeping employment.[82] The judge also sets the length of probation, with a maximum of five years for felony offenses and two years for misdemeanors.[i] In the last decade, almost half (49 percent) received some jail time as part of their probation conditions.

Many of these young people enter the justice system undereducated and with serious substance abuse and mental health issues. Among 17-year-olds on probation in the last ten years (the largest age group on probation), the overwhelming majority (77 percent), never completed high school nor a received a GED; 27 percent had an education level no higher than 10th grade and 15 percent only reached 9th grade. Additionally, prior to entering the corrections system, 51 percent had known drug abuse issues, 24 percent had alcohol abuse problems, and 23 percent previously received treatment for a mental health issue.[83]

Despite their young age, youth in adult probation cannot access the rehabilitative programs offered through the juvenile court. Interviews indicated that very few community-based programs available through adult probation are designed to meet the specific needs of youth.

Thus, it is not surprising that prior research discovered an alarming 54 percent of youth probationers aged 16 or younger escalated to prison as a result of a probation violation, either due to technical violations or because of a new sentence.[84] However, current statistics do suggest this number is dropping. MDOC's population of as of November 2013 revealed only 16 percent of individuals in prison for an offense committed at 16 or younger were there as a result of a probation violation.[85]

[h] While it is the responsibility of the department to supervise adult felony probationers in Michigan, courts retain legal control over the offender's status.

[i] Lifetime probation is authorized for some drug offenses.

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Adult prisons are ill-equipped to address the developmental, educational, and mental health needs of youth.

As of November 2013, there were 3,927 people in prison for a crime committed before age 18. Of that population, 50 of those individuals were 17 or younger at the time the data was collected.[86] Male youth are generally placed at the Thumb Correctional Facility (TCF), which has one youthful offender unit with approximately 120 beds.[j]

MDOC does not have a separate policy directive specifically addressing youthful offenders in prison. Other than separating all youth under age 18 by sight and sound from adults (as required under the PREA regulations), MDOC treats youth in much the same way as adult inmates. However, youth present different challenges and issues than the adult population. As a result, they tend to be more disruptive, experience high rates of victimization and mental health concerns, and are often placed in isolation.

Youth in prison are more disruptive than adults.

Youth in adult prisons are more disruptive than either adults in prison or youth in juvenile facilities.[87] According to national research, youth in adult prisons are more likely to commit a violent infraction, including threatening a correctional officer, possessing a weapon, rioting, fighting, and committing an assault with or without a weapon.[88] This behavior is often attributed to the impulsive behavior of teens, the extreme stress of confinement, and high rates of mental illness.[89]

"When TCF first brought on the youthful offenders on October 1, 2005, things were very rocky," noted a TCF employee. "Large numbers of youth were allowed to be on the yard at one time . . . or meander[ing] between dayrooms. This caused chaos and brought on more opportunities for fights and disturbances within the youthful offender population."[90]

In an effort to reduce fighting, TCF developed a daily schedule to keep youth occupied throughout the day. The schedule includes three one-hour segments each day for education, structured programming and recreation time.

At its worst, there were 307 incidents of misconduct during the month of December 2008; after instituting the new schedule, misconduct incidents declined to only 88 in the month of December 2010—the last year for which data was collected.

MDOC has also developed a youthful offender curriculum for staff at TCF to train them on adolescent development, cultural awareness, anger management, Attention Deficit Hyperactivity Disorder, and suicide awareness and prevention.[91] From 2009 to 2012, sixty-three corrections officers, management, and other staff participated in this 16-hour youthful offender-training program.[k] Unfortunately, according to the most recent legislative report, no staff received this training in 2013-2014.

YOUTH IN PRISON CONTINUE TO FALL BEHIND IN EDUCATION

In the past ten years, about 82 percent of youth in prison had no high school diploma nor had they completed a GED. In fact, while the majority of youth in prison are 17 years old, 32 percent entered with only a 10th grade education, 20 percent had a 9th grade education, and 10 percent had an 8th grade education or lower.[92]

Prior research indicates that youth only receive about eight hours of education a week while in Michigan's prisons.[93] According to an interviewee, there are currently 25 youthful offenders participating in GED classes.[l]

[j] Some youth may be housed in Woodland Center Correctional Facility due to need of acute mental health care. Female youthful offenders are housed at the Women's Huron Valley Correctional Facility.

[k] The training was originally designed to be 24 hours in length but was reduced to 16 hours in 2012.

[l] Trade programs are also available, such as Building Trades, Food Tech ,or Job Readiness. TCF also offers personal development programs, including Man 2 Man, Mo Money, and Current Events/Real Talk.

PATRICIA CARUSO,
FORMER DIRECTOR OF
THE MICHIGAN DEPARTMENT
OF CORRECTIONS,
2003-2011:

People who are treated inhumanely become more inhumane—this is especially true for young people in prison.

YOUTH FACE EXTREME RISK OF VIOLENCE AND VICTIMIZATION WHILE IN ADULT PRISON.

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Young people are at the greatest risk of violence and victimization in prison.

In 2013, a class action lawsuit, *John Doe v. Michigan Department of Corrections,* was filed on behalf of over 500 youthful prisoners, ages 14 to 17, "who are, were, or will be confined in adult prisons in Michigan and who have been or will be subjected to sexual and physical assaults and abuse, sexual harassment, and degrading treatment from adult prisoners as a result of incarceration in adult prisons."[94]

The complaint describes sexual assaults, with many of the plaintiffs reporting violent rapes, of which MDOC staff members may have been aware. At least two plaintiffs allege they were coerced into sex with female MDOC officers. In the case of one plaintiff, the complaint alleges that an MDOC staff member opened a youth's cell to allow an adult prisoner to assault him. That same youth alleges that he was put into solitary confinement for reporting sexual abuse.

The case argues that having young prisoners in contact with adult prisoners resulted in the youth getting more punishment, degrading treatment, solitary confinement, and being deprived of rehabilitative programming and educational services. Additionally, it asserts that MDOC staff failed to separate juvenile prisoners from adult prisoners by sight and sound as required by federal PREA law; failed to adequately supervise juvenile prisoners; failed to properly train, monitor, discipline, or regulate prison staff; and still fails to implement proper policies and procedures to identify and house youth in prison.

Interviewed family members and advocates reported awareness of similar experiences of youth while in prison. For example, youth were reported to be restricted in chains, threatened with violence, or left in isolation for weeks or even months at a time. They also reported allegations of sexual harassment, particularly towards those who have severe mental health needs. Youth were also said to be more likely to join gangs for protection or turn to prostitution within prison to "pay" for their safety.

Youth in prison are in great need of mental health treatment.

National research indicates that 68 percent of youth in the adult criminal justice system have at least one psychiatric disorder and 43 percent have two or more types of disorders.[95] Those sentenced to prison were far more likely to have a disruptive behavior disorder, a substance use disorder, or co-morbid affective and anxiety disorders than those with lesser sentences.[96]

All youth entering Michigan prisons under 17 are automatically admitted into Outpatient Mental Health Treatment to monitor their needs, whether or not they have a mental health diagnosis. Each youth receives a psychosocial evaluation and a behaviorally-based treatment plan, which could include medication, group therapy, crisis intervention, family support, and case management services. The plans are reviewed with the youth and clinical team at least every 90 days. Despite their similar needs to 16-year-olds, 17-year-olds only receive an individualized treatment plan if they have a mental health diagnosis.[97]

Although the MDOC recognizes that young people in prison need some form of mental health treatment, interviewed stakeholders almost unanimously agreed that MDOC is neither designed nor equipped to provide adequate mental health services for youth.

Of all youth entering prison in the past ten years, 60 percent had known drug abuse issues, 25 percent had issues with alcohol abuse, and 22 percent were treated for a mental illness before entering prison. Interestingly, these numbers change slightly when accounting for age; one-third of all youth 16 or younger received mental health treatment before going to prison.[98]

Youth who need more intensive psychiatric care or are at risk of harming themselves may be transferred to Woodland Center Correctional Facility for inpatient treatment, where they may participate in a crisis stabilization program, acute services treatment, or rehabilitation treatment. Despite significant research showing that segregation can further exacerbate mental health conditions, psychiatrists are permitted to order the use of "therapeutic seclusion" and/or "therapeutic restraints."[99]

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Isolation is harmful.

Solitary confinement[m] has been documented as one of the most traumatic and dehumanizing penalties that a person can endure. The MDOC uses segregation to isolate inmates who pose safety, security, or escape risks. Among persons interviewed, it was noted that youth who are at risk of suicide may end up tied down in 4 or 5 point restraints to either a metal bed or a concrete slab in an observation cell.

On any given day, there are approximately 982 people in segregation statewide, including 44 people with severe mental illness or developmental disabilities.[100] In total, MDOC inmates spent 358,590 days in isolation from 2012-2013, equating to nearly ten years of segregation during only one calendar year.[101]

TCF recently created isolation cells in the youthful offender unit in order to create sight and sound separation from isolation units used for adults. On a single day of data collection, six youth were in segregation[n] (out of an estimated 50 youth in TCF); sixty additional isolation beds were available.[102]

[m] Solitary confinement, isolation, and segregation are all used interchangeably.

[n] This is a point-in-time figure and does not represent the daily average number of youth in segregation at the Thumb Correctional Facility.

JUVENILE LIFE WITHOUT PAROLE

Michigan is home to 363 people serving a life sentence without the possibility of parole for crimes committed before age 18—the second largest population in the nation.

In 2012's *Miller v. Alabama* ruling, the U.S. Supreme Court declared *mandatory* sentencing of youth to life in prison without the possibility of parole to be unconstitutional. Under current Michigan law, juvenile life without parole (LWOP) is permitted, though no longer mandatory, as a sentence for those 14 years or older.[103] This sentence may only be given after the judge considers the mitigating factors required by *Miller.*[104] The law does not apply retroactively to those youth who are currently in prison; however, there is ongoing litigation among Michigan's courts to settle the matter.[105]

According to national research, nearly 80 percent of youth serving LWOP experienced family violence and more than half grew up in neighborhoods with consistent violent crime. About 20 percent reported experiencing sexual abuse and about half had been physically abused prior to their prison sentence.[106]

Michigan youth serving LWOP are predominantly African American (69%), which is greatly disproportionate to the overall state population of only 15 percent.[107] There is also a large racial discrepancy among those offered plea arrangements. Cases with white victims were 22 percent less likely to be offered a lower sentence than those cases with victims of color.[108]

Michigan LWOP youth also reportedly received poor defense and often did not understand the judicial proceedings. Thirty-eight percent of their defense attorneys had been disciplined for unethical conduct, compared to only 5 percent of attorneys defending other cases.[109] Nearly one-third of these youth reported not understanding the meaning of "parole" and rejected plea agreements that would have resulted in a lesser sentence.[110]

FORMERLY
INCARCERATED
YOUTH:

*When I got out of prison,
I had nowhere to live
and no one to help me.
I didn't know how to be
a man in the
real world.*

YOUTH HAVE LIMITED OPTIONS UPON RETURNING HOME

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An adult conviction has lifelong consequences.

Regardless of the age a person enters prison, the vast majority of prisoners do not stay for a lifetime. Of the 3,927 people currently in Michigan prisons for a crime committed before age 18, about 61 percent have a maximum sentence of five years or less; 98 percent will return to their community and family within 10 years.[111]

Once released from prison, these individuals are placed on parole supervision, which typically lasts from one to four years. At of the end of 2013, there were 1,414 individuals on parole for offenses committed as youth.[112]

Currently, Michigan does not collect data specific to recidivism rates of those who entered prison as youth. However, national research indicates that this population is at high risk to reoffend, in part due to the criminal education received while in prison. Because youth enter at such an impressionable age, it stands to reason that they would need additional resources and support to remain crime-free when reentering the community.

While many youth are looking forward to the opportunity to be productive citizens, they quickly realize that a number of challenges exist as a direct result of having an adult conviction.

Individuals face immense barriers to securing housing, finding employment, and continuing their education.[113]

Additionally, parental rights can be terminated, all federal student loans are prohibited for certain convictions, joining the military is off limits, and many will be restricted from receiving professional or driver's licenses.[114]

To reduce recidivism overall, the state implemented the Michigan Prisoner Reentry Initiative (MPRI) in 2005. The model installed regional community coordinators to assist people on parole to find housing, gain employment, and access public benefits. MPRI was successful at preventing individuals from returning to prison; at the highest estimate, 38 percent fewer parolees returned to prison because of the aid received via MPRI.[115] Unfortunately, state and local funding for reentry has diminished so significantly that people of all ages are struggling to connect with the resources they need upon release.[116]

MPRI initially targeted youth leaving prison as a special population for reentry services. In 2009, MDOC contracted with Professional Consulting Services (PCS) to design reentry services for youthful offenders and young people imprisoned as Holmes Youthful Trainees (HYTA). Prior to release, PCS worked with young people and their families to identify individual needs and arrange services for housing, education, mental health, and more. Despite successful outcomes, the MDOC discontinued reentry services for most HYTA youth in December 2013.

However, MPRI did not create a special reentry designation for those who enter prison as youth and leave as adults, which is the case for the vast majority of youthful offenders. Once a youth turns 18, he or she qualifies for adult reentry services, and there is no recognition of the unique circumstances of the youthful offender. For people who entered prison at age 17 or younger, they are less likely to have completed high school, driven a car, opened a bank account, or even gone grocery shopping on their own. A youth's support network of family and friends is often strained or lost while in prison. Moreover, the prospect of living independently can be overwhelming, especially for those who spent their lives in juvenile justice or foster care institutions prior to prison. Without effective reentry and support services, these young people often find themselves in a revolving door to prison.

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VICKI SEIDL,
SENIOR ATTORNEY,
JUVENILE DIVISION,
KENT COUNTY
PROSECUTOR'S OFFICE:

Michigan should consider shifting 17-year-olds to the juvenile system in order to comply with federal standards and get us in line with other states.

POLICY RECOMMENDATIONS

Prosecuting, sentencing and incarcerating young people as adults is proven to do more harm than good. The most effective way to reduce youth involvement in adult corrections is to intervene as early as possible with age-appropriate care. A solution to the current approach can build on Michigan's broad range of juvenile justice services—both public and private—which have the capacity and willingness to serve youth of all risk levels.

MCCD is committed to increasing dialogue among all stakeholders as we work together to promote public safety, wisely invest taxpayer dollars, and improve outcomes for children. As such, MCCD offers the following recommendations as next steps to safely reduce the number of and effectively treat youth in the adult system.

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1.

Raise the age of juvenile court jurisdiction to 18.

Nearly every stakeholder interviewed felt strongly that Michigan should align with the national standard and raise the age of juvenile court jurisdiction to 18. Michigan remains one of the few remaining states that automatically prosecute all 17-year olds as adults. This policy is increasingly at odds with state laws and national and international policies that declare adulthood to begin at age 18.

States that have recently raised the age of juvenile court jurisdiction have reported little to no cost impact, in large part due to effective diversion and community-based treatment for low-risk offenders. In fact, research estimates that including 17-year-olds in the juvenile justice system could result in a $3 savings benefit for the correctional and judicial systems for every $1 spent.[117]

While the majority of stakeholders agree that raising the age make senses, the greatest barrier appears to be the funding structure. In Michigan's juvenile justice system, the county and the state share the cost of all juvenile services, including long-term placement and community-based programs. When youth are processed in the adult system, the state bears 100 percent of the cost and the county pays nothing. A change in policy would require that costs be shifted from the state to the county level to accommodate services for 17-year-olds.

Although some counties would need to make adjustments to their services and detention facilities if 17-year-olds were included in the juvenile population, the long-term benefits far outweigh the short-term costs. When fewer youth enter adult prison, the risk to public safety decreases due to lower reoffending rates and youth are less likely to be victims of violence and sexual assault and suicide.

2.

Remove all youth from adult jails and prisons and provide access to rehabilitative services available in youth-serving systems.

Jails and prisons are proven to be more dangerous for youth due to physical and sexual violence and do little to strengthen a child's potential for rehabilitation. Youth in adult corrections have the same needs as those in the juvenile justice system; yet they cannot access age-appropriate rehabilitative programs offered in youth-serving systems. The MDOC recognizes that adult facilities are not designed to meet the developmental, educational, and mental health needs of young people. On the other hand, Michigan's juvenile facilities and community-based programs generally provide age-appropriate therapy and mental health services, drug treatment, education, and vocational training. Unlike the adult system, juvenile justice specializes in holding youth accountable for their actions while also providing individualized treatment to youth with high risks and high needs.

3.

Require oversight and public reporting on youth in the criminal justice system and in adult prisons.

Michigan does not currently require the courts or MDOC to systematically monitor and publicly report on youth as they move through the adult criminal justice system. Reporting on the number and type of waivers, the types of offenses, and aggregate characteristics of youth would help to monitor its occurrence and hold stakeholders accountable. Additionally, tracking outcomes (i.e., the success or failure of the youth after disposition) is critical to determining what works to reduce recidivism, treat young people, and keep communities safe. By tracking the youth who enter the adult system, state legislators and other system stakeholders will be better able to target resources toward prevention services.

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4.

Require judicial review of all transfer cases and allow equal consideration of mitigating factors in each case.

The role of the judge is to make fair and impartial decisions based on the facts of each case; yet Michigan law allows prosecutors unfettered discretion to waive youth charged with certain offenses into adult court without a judicial hearing. No standards, guidance, or protocols are imposed on prosecutors when making this decision. Imposing judicial review (in the form of "reverse waiver" hearings) would encourage a balanced approach without limiting the ability of prosecutors to pursue harsher punishment for serious crimes.

In making the decision to transfer a case, the judge must consider a number of factors; however, the statute requires prior delinquency history and the seriousness of offense be considered more heavily than any other factor.[118] Rather, the judge should have the authority to equally weigh all factors, including the child's development, mental health concerns, educational needs, and family support, instead of prioritizing a youth's history of delinquency and severity of the offense above else. This limitation restricts judicial review, weakening the ability to review the case on an individual, case-by-case basis. Additionally, given the lack of age-appropriate services at most adult facilities, the judge should be required to consider the availability of rehabilitative services when deciding to transfer a case.

5.

Develop policies and procedures aimed at reducing the overrepresentation of youth of color in the adult system.

Racial disparity exists at every level of the justice system, but it appears to be amplified among youth who are transferred to the adult system. A first step to addressing this issue is to consistently track demographic information statewide and allow self-identification of race and ethnicity. With a better understanding of the actual characteristics of the youth inside the adult system, community-based interventions can be better targeted to effectively reduce justice involvement among youth of color.

6.

Strengthen the quality of legal representation by offering training to court-appointed counsel and requiring a competency evaluation for youth who are transferred.

Youth transferred to the adult system almost always receive court-appointed counsel even though there is little to no training or specialized resources available to attorneys representing this population. Most youth end up accepting a plea agreement; yet, it is unclear whether youth have the capacity to fully appreciate the charges or understand the consequences of their decision to plea. In order to strengthen legal representation, statewide standards should be established and training offered to all court-appointed counsel. Additionally, every youth under age 18 should be evaluated for competency in criminal court to ensure that his or her constitutional rights are upheld.

7.

Expand the availability of community-based and reentry options for youth convicted as adults.

Research shows that community-based programs under the juvenile court are highly effective at reducing recidivism and at a much lower cost than prison or placement. Yet similar programs are not offered to young people serving probation or parole. Reentry planning and services do not recognize that youth who are returning to the community have needs that may differ from other adult parolees. Moreover, reentry funding has been dramatically cut from the MDOC budget, even though it is clear that these services are directly related to a reduction in state recidivism rates. In order to increase the availability of effective community-based programs, it is imperative that funding, particularly for reentry services, be restored and sustained.

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8.

Restrict the use of segregation.

Solitary confinement can cause extreme psychological, physical, and developmental harm. For young people, who are still developing and more vulnerable, this can cause irreparable damage, especially for those with disabilities or histories of trauma and abuse. In order to comply with PREA regulations, and ensure the safety and well-being of children, Michigan's prisons and jails should significantly restrict the use of segregation. In situations when an individual must be removed from a group, it is recommended that separation be used sparingly and only for short periods of time.

9.

Eliminate the option to sentence youth to life without parole and other extremely lengthy sentences.

Because adolescents are still developing, they are highly amenable to rehabilitation. Yet Michigan is one of the few jurisdictions in the world that allows young people to serve life in prison without the possibility of parole for offenses committed prior to their 18th birthdays. Equally concerning are the very long sentences imposed on youth 17 years old or younger. Nearly 25 percent of those currently in the system received sentences with a maximum term of 15 years or more, and 16 percent have sentences with a maximum term of 20 years or more. The option to sentence juveniles to life without parole should be abolished and lengthy sentences for youth should always allow for regular parole review.

10.

Establish procedures for effectively partnering with families and victims.

Whenever possible and safe, it is preferable to treat youth in the context of their families and communities. Providing services to the whole family can help bolster support for their child and improve dynamics within the home. Likewise, engaging victims provides an opportunity for youth to make amends and repair harm they may have caused. If a youth is removed from the home, it is important that family members and victims are informed and, when appropriate, encouraged to engage in the child's treatment plan and reentry process.

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ENDNOTES

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[2] Robert Hahn, et al., Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,* 56 MMWR RECOMMENDATIONS & REP. RR-9 (2007); MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT (2006).

[3] *Id.*

[4] Governor John Engler, Address to the Prosecuting Attorneys Association of Michigan, Mackinac Conference (July 27, 1995).

[5] MICH. COMP. LAWS § 712A.2(a). Michigan has considered 17-year-olds as adults for over a century, *see* Mich. Pub. Acts 1907, Ex. Sess. No. 6 § 1; for a listing of other states' age of juvenile jurisdiction *see* OJJDP STATISTICAL BRIEFING BOOK (2012) *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2011.

[6] People v. Hana, 504 N.W.2d 166 (1993).

[7] MICH. COMP. LAWS § 712A.4(1)(traditional waiver); MICH. COMP. LAWS § 764.1f (automatic waiver).

[8] MICH. COMP. LAWS 712A.4(4)(a)-(f). The following are the six factors that the court must weigh during a traditional waiver hearing:

1. The seriousness of the offense in terms of community protection, including the use of a weapon, the impact on the victim, and the existence of aggravating factors;
2. The culpability of the youth, including the level of participation in planning or carrying out the offense or other mitigating or aggravating factors;
3. Prior offense records, including detention, police arrests, school records, or any other evidence indicating delinquent behavior;
4. History of treatment and willingness to participate in available programming;
5. Adequacy of available treatment or punishment in the juvenile justice system; and
6. The dispositional options available.

[9] MICH. COMP. LAWS § 712A.4

[10] MICH. COMP. LAWS § 712A.2(a)(1). The specified juvenile offenses include: arson of a dwelling, assault with intent to murder, assault with intent to maim, attempted murder, conspiracy to commit murder, solicitation to commit murder, first degree murder, second degree murder, kidnapping, first degree criminal sexual conduct, armed robbery, carjacking, assault with intent to rob, assault with intent to commit great bodily harm, bank/safe robbery, escape from a juvenile facility, first degree home invasion, and drug possession or delivery of more than 1000 grams.

[11] MICH. COMP. LAWS § 769.1. The other option is to make the youth a state ward under the Department of Human Services.

[12] People v. Conat, 605 N.W.2d 49 (Mich. Ct. App. 1999).

[13] OJJDP STATISTICAL BRIEFING BOOK *supra* note 5.

[14] MICH. COMP. LAWS § 712A.2d

[15] MICH. COMP. LAWS § 712A.18(1)(m)

[16] MICH. COMP. LAWS § 712A.4(5); MCR § 3.950(D)(2)

[17] MICH. COMP. LAWS § 791.233

[18] MICH. COMP. LAWS § 769.25

[19] Jeffrey Fagan, et al., *Youth In Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy,* 40 JUV. & FAM. CT. J. 1, 1 (1989); NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA (2007).

[20] Hahn, *supra* note 1.

[21] *Id.*

[22] The average daily prisoner cost in Michigan is $93.97 a day or $34,299 a year. *Cost per Prisoner per Day,* MICH. DEP'T OF CORR., https://www.michigan.gov/midashboard/0,4624,7-256-60564_60567_60618---,00.html (last visited May 1, 2014).

[23] THE PEW CTR. ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS (2012).

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[25] LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO RE-ENTRY A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 18 (2004).

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[69] MICH. DEP'T OF CORR., *Offender Management Network Information (OMNI), 2003-2013.*

[70] *Id.*

[71] DEVON B. ADAMS, ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006 (2007); ALLEN J. BECK & PAIGE M. HARRISON,

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BUREAU OF JUSTICE STATISTICS, NCJ 214646 SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (2006).

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[73] MCR § 3.950(E)(2)

[74] Interview with Washtenaw County Detention Center Administrator, Feb. 27, 2014.

[75] MICH. DEP'T OF CORR., *Offender Management Network Information (OMNI), 2003-2013.*

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[84] SARRI *supra* note 3.

[85] MICH. DEP'T OF CORR., *Offender Tracking Information System (OTIS), 2003-2013.* This current number reflects a point-in-time data set, November 21, 2013.

[86] *Id.*

[87] Margaret E. Leigey & Jessica P. Hodge, *And Then They Behaved: Examining the Institutional Misconduct of Adult Inmates Who Were Initially Incarcerated as Juveniles,* 93 PRISON J. 3, 272 (2013); Kuanliang et al., *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence,* 35 CRIM. JUST. & BEHAV. 9, 1186 (2008)(finding that even after controlling for gang affiliation, education level, time served, conviction for a violent offense, and sentence length, juvenile inmates were significantly more likely to have committed the specific misconduct than adult inmates).

[88] *Id.*

[89] *Id.*

[90] Memo from Michigan Department of Corrections staff at Thumb Correctional Facility, May 25, 2010 (on file with author).

[91] MICH. DEP'T OF CORR., TRAINING REPORT FOR STAFF WITH YOUTHFUL OFFENDERS (2014). The training modules are a sixteen (16) hour program consisting of:

Youthful Offenders: ADHD (Attention Deficit Hyperactivity Disorder)

Youthful Offenders: Adolescent Development

Youthful Offenders: Anger Management

Youthful Offenders: Behavioral Observation and Recording

Youthful Offenders: Cultural Awareness

Youthful Offenders: Effective Communication

Youthful Offenders: Offender Rights

Youthful Offenders: Suicide Awareness and Prevention

[92] MICH. DEP'T OF CORR., *Offender Management Network Information (OMNI), 2003-2013.*

[93] Ng *supra* note 37.

[94] Summons and Complaint for Petitioner, John Doe v. Mich. Dep't of Corr., No. 13-1196-CZ (22nd Mich. Cir. Dec. 9, 2013).

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[99] MICH. DEP'T OF CORR., MENTAL HEALTH POLICY DIRECTIVE, NO. 04-06-183 (2013).

[100] MICH. DEP'T OF CORR., ADMINISTRATIVE SEGREGATION REPORT (2014).

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[103] Mich. Pub. Acts No. 22-23 (2014).

[104] Miller v. Alabama, 132 S. Ct. 2455 (2012). These factors include a youth's age, immaturity level, failure to appreciate risks and consequences, family

and home environment, circumstances of the offense and extent of participation, competency and inabilities to deal with police or prosecutors, and the possibility of rehabilitation.

[105] Mich. Pub. Act No. 23 (2014), stating no retroactivity. *But see* Hill v. Snyder, E. D. Mich. No. 10-14568 (2013)(ruling that the *Miller* findings should be applied retroactively in Michigan). There are also 3 LWOP cases that have recently been argued in front of the Michigan Supreme Court and are awaiting a decision: Mich. v. Carp, No. 146478; Mich. v. Davis, No. 146819; and Mich. v. Eliason, No. 147428.

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[111] MICH. DEP'T OF CORR., *Offender Tracking Information System (OTIS), 2003-2013.* This current number reflects a point-in-time data set, November 21, 2013.

[112] *Id.*

[113] LEGAL ACTION CENTER *supra* note 25.

[114] MICH. COMP. LAWS § 712A.19b (allowing termination of parental rights for the formerly incarcerated); 20 U.S.C. § 1091(r)(1)(automatically prohibiting federal loan dollars for those with a drug conviction); 10 U.S.C. §504 (ineligibility for all armed services); see Michigan Law Reentry for complete listings of employment and licensing limitations.

[115] MICH. DEP'T OF CORR., MICHIGAN PRISONER REENTRY A SUCCESS STORY (2011)(on file with author).

[116] Lester Graham, *Snyder Administration to cut Program that has Saved Hundreds of Millions in Prison Costs,* MICHIGAN RADIO, September 9, 2013; Grace Ruiter, Prison cuts Force Grand Rapids to Scale Back Prison Reentry Services, CHIMES CALVIN COLLEGE, March 21, 2014, at 4.

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APPENDIX E

John R. Mills et al, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway,"*
American University Law Review: Vol. 65 : Iss. 3, Article 4, p 535 (2016)

ARTICLE

JUVENILE LIFE WITHOUT PAROLE IN LAW AND PRACTICE: CHRONICLING THE RAPID CHANGE UNDERWAY

JOHN R. MILLS,* ANNA M. DORN,** AND AMELIA COURTNEY HRITZ***

This Article provides a comprehensive examination of juvenile life without parole ("JLWOP") both as a policy and in practice. Beginning in 2010, the U.S. Supreme Court has repeatedly held that the Eighth Amendment of the U.S. Constitution restricts the reach of JLWOP sentences, first prohibiting it for non-homicide offenses, then proscribing its mandatory application for any offense, and, in 2016, clarifying that it may only be imposed in the rare instance in which a juvenile's homicide demonstrates his or her "irreparable corruption." The legislative responses to these cases have been to either abandon or restrict JLWOP's application. These legislative changes undo aspects of the rapid expansion of harsh juvenile sentencing policies enacted across the country starting in the early-1990s and represent a trend away from using JLWOP sentences.

By analyzing JLWOP sentencing data from state departments of corrections, this Article includes three significant findings. First, among juveniles arrested for homicide, African American youth receive JLWOP sentences twice as often

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as their white counterparts. Second, a small number of counties are responsible for all JLWOP sentences nationally and in large disproportion to their population. Third, JLWOP sentencing dramatically increased during the same time period that states were enacting harsh juvenile sentencing laws—laws that are now falling out of favor. The Article offers potential reasons for these observations, but further study is required to fully explain the disparities in JLWOP sentencing practices. Such study is warranted because each observation raises substantial questions about the wisdom and constitutionality of JLWOP sentences, given the U.S. Supreme Court's increased interest in restricting its application.

TABLE OF CONTENTS

Introduction 537
I. The Eighth Amendment and Juvenile Justice 538
  A. Evolving Standards of Decency 538
  B. National Consensus Findings in the Court's Decade of Juvenile Cases 541
  C. Independent Judgment About the Proportionality of Sentencing Juveniles to Life Without Parole 547
II. State Abandonment of JLWOP in Law and Practice 549
  A. Methodology and Limitations 549
  B. Changes in JLWOP Policies 552
  C. JLWOP Actual Sentencing Practices Demonstrate It Is an Outdated, Disfavored Practice, Disproportionately Imposed on Children of Color 560
    1. Most JLWOP sentences were imposed in the mid-1990s .. 560
    2. Recent policy changes limit the ongoing impact of JLWOP, including in the jurisdictions that retain it and have used the sentence the most 568
    3. JLWOP sentences are concentrated in a handful of outlier jurisdictions 571
    4. African American juveniles are disproportionately sentenced to JLWOP 575
III. The Myth of the Superpredator and the Rise of JLWOP Sentences 581
  A. Creation of the Myth 582
  B. Resulting Policies 584
  C. Only a Myth 585
Conclusion 586

INTRODUCTION

This Article examines the rapid changes underway in sentencing juveniles to life without parole ("JLWOP"). It examines both the rapid changes in the law and in the actual sentencing practices in the counties and states that continue to sentence juveniles to die in prison for crimes they commit before reaching eighteen years of age.[1] In *Miller v. Alabama*,[2] the U.S. Supreme Court held that mandatory life without parole sentences for juveniles violate the Eighth Amendment.[3] In *Montgomery v. Louisiana*,[4] the Court said that such a sentence is "disproportionate . . . for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'"[5] The Court has explicitly held open the question of whether any such sentence is constitutional.[6] This Article addresses when, where, and on whom JLWOP sentences are being imposed—questions relevant to its constitutionality.

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1. This Article is timely and unique in several respects. First, no prior report has examined county-by-county sentencing. Second, earlier reports on JLWOP predate the U.S. Supreme Court's recent jurisprudence and the resulting change to juvenile justice. *See, e.g.*, AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1 (2005), http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf (providing an example of a study addressing JLWOP prior to the Court's recent decisions). As this Article will show, the changes to JLWOP in the last decade will have profound effects on the JLWOP population. Third, prior studies focused on total population, combining the impact of JLWOP sentencing with JLWOP arrests, which obscured the role of the prosecutor and sentence. *Id.* at 39. In contrast, this Article examines race and JLWOP as it relates to arrest rate.

2. 132 S. Ct. 2455 (2012).

3. *Id.* at 2475.

4. 136 S. Ct. 718 (2016).

5. *Id.* at 726 (quoting *Miller*, 132 S. Ct. at 2469) (holding that *Miller* applies retroactively to cases on collateral review).

6. *See Miller*, 132 S. Ct. at 2469 (noting that the Court did "not consider . . . [whether] the Eighth Amendment requires a categorical bar on life without parole for juveniles"). In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court requested briefs arguing whether *Miller* applies retroactively. One of the briefs filed in response requested that the Court hear arguments on the constitutionality of JLWOP. Brief of the Charles Hamilton Houston Institute for Race & Justice & the Criminal Justice Institute as Amici Curiae in Support of Neither Party at 2, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (No. 14-280). Additionally, *State v. Houston*, 353 P.3d 55 (Utah 2015), *petition for cert. filed*, No. 15-7087 (U.S. Nov. 20, 2015) also presents this issue and is pending before the Court. Most recently, the Court granted certiorari in *State v. Jacobs*, 165 So. 3d 69 (La. 2015) (per curiam), *vacated sub nom.* Lawence v. Louisiana, 2016 WL 854176 (U.S. Mar. 7, 2016), ultimately vacating the lower court's judgment and remanding the case in light of its holding in *Montgomery*.

Examining a comprehensive data set of all persons currently serving JLWOP sentences,[7] this Article finds that the vast majority of JLWOP sentences are the product of sentencing policies adopted during the height of interest in the myth of the superpredator,[8] are isolated in a handful of counties and states,[9] and the states with those polices are rapidly abandoning them.[10] The Article also demonstrates that there are twice as many African American offenders currently serving JLWOP sentences as their similarly situated white counterparts.[11]

This Article proceeds in three parts. Part One explains the Court's examination of legislation and sentencing trends as part of its national consensus analysis, which is relevant to determining whether sentencing juveniles to JLWOP violates the Eighth Amendment. Part Two examines the use of JLWOP in law and in practice. It demonstrates that the dawn of JLWOP sentences are a relatively recent phenomenon; that more recently, jurisdictions are abandoning the sentence; and those that impose it do so disproportionately on persons of color. Part Three discusses a potential explanation for these trends, including a discussion of the "Superpredator Era," a period marked by fear of a generation of violent youth, a group that never materialized.

The implementation—and rapid abandonment—of JLWOP raises questions about its penological justifiability and constitutionality.

I. THE EIGHTH AMENDMENT AND JUVENILE JUSTICE

A. *Evolving Standards of Decency*

The Eighth Amendment's prohibition on cruel and unusual punishment[12] is measured against the "evolving standards of decency that mark the progress of a maturing society."[13] Because "its

7. *See infra* Appendix B.

8. *See infra* Section III.A (noting the timing of the sentences and the theory of superpredators); *infra* Section III.B (detailing the policies developed during the Superpredator Era).

9. *See infra* Part II (providing statistics of states and counties imposing the majority of JLWOP sentences).

10. *See infra* Section II.C.2 (noting recent abandonment and restriction of JLWOP sentencing policies and their potential breadth).

11. *See infra* Section II.C (comparing the statistics of African American and white juvenile offenders receiving JLWOP).

12. U.S. CONST. amend. VIII.

13. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

applicability must change as the basic mores of society change,"[14] the U.S. Supreme Court looks to contemporary societal norms.[15] Since 2002, the Court has measured "evolving standards of decency" by determining whether a national consensus supports categorically prohibiting a given punishment.[16] If there is a national consensus against a punishment, the Court will exercise its independent judgment to determine whether the punishment is proportionate to the offender and the offense.[17]

To assess whether there is a national consensus about a particular punishment, legislative enactments constitute the "clearest and most reliable objective evidence of contemporary values,"[18] but "[a]ctual sentencing practices are [also] an important part of the Court's inquiry into consensus."[19] The number of states authorizing a given punishment, the extent and direction of legislative change addressing the punishment, and the frequency with which the punishment is actually imposed[20] are all relevant to this analysis.[21] Thus, even where

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14. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)), *modified*, 554 U.S. 945 (2008).

15. *See* Robert J. Smith et al., *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2406 n.43 (2014) (observing that in trying to determine the consensus of society, the Court has considered opinions of social and professional organizations, the findings of public opinion polls, and the views held by the international community).

16. Atkins v. Virginia, 536 U.S. 304, 311–12, 316 (2002) (noting the Court's attempt to evaluate "evolving standards of decency" when determining whether a given punishment is acceptable under the Eighth Amendment (quoting *Trop*, 356 U.S. at 101)); *see* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 301–02 (2015) (describing the factors evaluated by the Court in determining "national consensus," including public opinion, trends in state legislatures, and international practice).

17. Roper v. Simmons, 543 U.S. 551, 564 (2005) (holding that "national consensus" supported a holding that death penalty sentences for crimes committed as a juvenile are unconstitutional); *see also* Harmelin v. Michigan, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring) (describing the evolution of the Court's jurisprudence on sentencing proportionality).

18. *Atkins*, 536 U.S. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

19. Graham v. Florida, 560 U.S. 48 (2010) (prohibiting JLWOP sentences for nonhomicide offenses committed by persons under age eighteen at the time of the offense).

20. In the context of the death penalty, the "imposition" question is assessed under at least two criteria: the number of sentences meted out and the number of sentences enforced, that is, the number of persons actually executed. *See* Kennedy v. Louisiana, 554 U.S. 407, 433 (2008) ("Statistics about . . . executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society."), *modified*, 554 U.S. 945 (2008).

21. *See* Miller v. Alabama, 132 S. Ct. 2455, 2470–71 (2012) (observing that the mere fact that a majority of states allowed imposition of JLWOP sentences on

a practice was once common, a more recent repudiation of that practice indicates a national consensus against it and suggests that it violates the Eighth Amendment.

In addition to determining the existence or absence of a national consensus against a sentencing practice, the Court analyzes whether the practice is proportionate.[22] To make this assessment, the Court is "guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.'"[23] This analysis examines the penological justifications for the punishment: incapacitation, retribution, deterrence, and rehabilitation.[24] "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and highly relevant to the Eighth Amendment inquiry.[25] For example, the Court in *Atkins v. Virginia*[26] held that the imposition of a death sentence on an intellectually disabled person was unconstitutional because, inter alia, it failed to serve retributive and deterrent functions due to the impairments inherent to intellectual disability.[27]

Since *Atkins*, the Court has employed its consensus analysis five times to strike down extreme sentencing practices.[28] These five cases

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individuals under eighteen was not enough on its own to preclude the Court from finding such punishments unconstitutional); *Kennedy*, 554 U.S. at 433 (noting statistics about the imposition of a sentence as relevant); *Atkins*, 536 U.S. at 312 (highlighting a preference for objective factors, such as legislation enacted, in determining sentencing standards). Other factors, such as opinion polls and the international community's condemnation of a practice, have been cited by the Court, but most scholars agree that these other factors have, at most, limited influence on the Court's conclusions. *See* Smith et al., *supra* note 15, at 2406 n.43 (describing such factors as "more atmospheric than substantive").

22. *See Graham*, 560 U.S. at 59 ("The concept of proportionality is central to the Eighth Amendment.").

23. *Id.* at 61 (quoting *Kennedy*, 554 U.S. at 421).

24. *See id.* at 61, 67; *see also infra* note 86 (discussing the Court's use of its certiorari authority to assure alignment of its independent judgment with the national consensus).

25. *Graham*, 560 U.S. at 71.

26. 536 U.S. 304 (2002).

27. *Id.* at 319–20; *accord* Gregg v. Georgia, 428 U.S. 153, 183, 183 n.28 (1976) (asserting that retribution and deterrence are the "two principal social purposes" of the death penalty, and noting that such a sentence necessarily accomplishes incapacitation and forgoes all hope of rehabilitation). Similar to the death penalty, for sentences of life without the possibility of parole, retribution and deterrence are the only relevant factors justifying the sentence.

28. Hall v. Florida, 134 S. Ct. 1986, 2001 (2014) (invalidating a strict IQ cutoff score of seventy to measure intellectual disability relevant to eligibility for the death

address death sentences for persons less than eighteen years old at the time of their offense,[29] death sentences for non-homicide offenses,[30] JLWOP sentences for non-homicide offenses,[31] mandatory JLWOP,[32] and a strict IQ score cut-off of seventy for proving *Atkins* claims.[33]

Three of these five opinions address punishments for juveniles, suggesting a willingness to invalidate harsh punishments that treat juvenile offenders as harshly as their adult counterparts, despite a national consensus against doing so.[34] To find such a consensus and ban the punishment in these cases, the Court examined legislative enactments, actual sentencing practices, and the proportionality of the punishment to the offender and the offense.[35] The next subsections examine, respectively, how the Court found a national consensus in each of the juvenile sentencing cases and its independent judgment regarding the proportionality of sentencing a juvenile to serving a life sentence without the possibility of parole.

B. *National Consensus Findings in the Court's Decade of Juvenile Cases*

In the last decade, the Court has shown an increased willingness to involve itself in the regulation of juvenile justice, issuing four landmark juvenile justice opinions between 2005 and 2016. Three of those cases, *Roper v. Simmons*,[36] *Graham v. Florida*,[37] and *Miller v. Alabama*,[38] struck down punishments that violated the Eighth Amendment.[39] In holding each of the three sentences

penalty); Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (rejecting mandatory imposition of JLWOP on persons under age eighteen at the time of the offense); *Graham*, 560 U.S. at 82 (denouncing JLWOP sentences for non-homicide offenses committed by persons under age eighteen at the time of the offense); *Kennedy*, 554 U.S. at 447 (prohibiting imposition of the death penalty for non-homicide offenses); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (denying imposition of the death penalty on those under age eighteen at the time of the offense).

29. *Roper*, 543 U.S. at 578–79.

30. *Kennedy*, 554 U.S. at 447.

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

32. *Miller*, 132 S. Ct. at 2475.

33. *Hall*, 134 S. Ct. at 2001.

34. *Miller*, 132 S. Ct. at 2475; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578–79.

35. *Miller*, 132 S. Ct. at 2463, 2469–72, 2471 n.10; *Graham*, 560 U.S. at 62–71; *Roper*, 543 U.S. at 564–68, 575.

36. 543 U.S. 551 (2005).

37. 560 U.S. 48 (2010).

38. 132 S. Ct. 2455 (2012).

39. *Miller*, 132 S. Ct. at 2475 (holding that mandatory JLWOP sentences for homicide crimes violates the Eighth Amendment); *Graham*, 560 U.S. at 82 (prohibiting JLWOP sentence for crimes other than homicide); *Roper*, 543 U.S. at

unconstitutional, the Court found a national consensus against the punishment as a critical part of its analysis.[40] This subsection examines the Court's national consensus analysis in those cases.

In the first case, *Roper v. Simmons*, the Court found that there was a national consensus against the imposition of the death penalty on offenders under eighteen-years-old at the time of their crime.[41] Fifteen years before this decision, the Court held in *Stanford v. Kentucky*[42] that executing a person for an offense committed as a sixteen- or seventeen-year-old did not violate the Eighth Amendment.[43] In *Roper*, the Court first counted the states that banned the practice.[44] Thirty states prohibited the execution of offenders under the age of eighteen: twelve banned the death penalty altogether, and eighteen exempted juvenile offenders from its reach.[45]

The Court also noted that "the direction of change," namely that states banned—rather than reinstated—the death penalty for juveniles after the Court's affirmance of the death penalty for sixteen- and seventeen-year-olds.[46] Since the Court's decision in *Stanford*, five states abandoned the death penalty for those under eighteen, "four through legislative enactments and one through judicial decision."[47]

578–79 (holding that a death penalty sentence is unconstitutional for juveniles). Prior to *Roper v. Simmons*, the last time the Court substantively addressed juvenile justice issues was in two cases decided on June 26, 1989. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (ruling that executing someone for a crime committed when the person was sixteen- or seventeen-years-old did not violate the Eighth Amendment), *abrogated by Roper*, 543 U.S. 551. A fourth case, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), addressed whether a juvenile's age was relevant to determining if the juvenile was in custody, triggering the necessity of *Miranda* warnings. *Id.* at 2398, 2408. As noted above, the Court recently held that *Miller*'s bar on mandatory JLWOP sentences applies retroactively. *See supra* note 5. Whether the opinion did more, as Justice Scalia's dissent suggested, is beyond the scope of this Article. Montgomery v. Louisiana, 136 S. Ct. 718, 744 (2016) (Scalia, J., dissenting) (accusing the majority of interpreting *Miller* in a "devious way" to effectively eliminate JLWOP).

40. *See Miller*, 132 S. Ct. at 2470–71; *Graham*, 560 U.S. at 62, 67; *Roper*, 543 U.S. at 564–68.

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

42. 492 U.S. 361 (1989).

43. *See id.* at 380 (determining that a lack of "societal consensus" existed, and therefore, imposing the death penalty on sixteen and seventeen year olds convicted of murder to be constitutional).

44. *Roper*, 543 U.S. at 564.

45. *Id.* (observing that the same number of states prohibited executing the intellectually disabled when the Court, in *Atkins*, found a national consensus against that practice (citing Atkins v. Virginia, 536 U.S. 304, 313–15 (2002))).

46. *Id.* at 565–66 (quoting *Atkins*, 536 U.S. at 315).

47. *Id.* at 565.

No state that previously barred capital punishment for juvenile offenses had since reinstated it.[48]

Finally, the Court noted that the total numbers of actual executions for offenses committed by juveniles was "infrequent."[49] In the ten years preceding the Court's decision, only three states had carried out such an execution.[50] Thus, the Court examined the actual practice of carrying out the punishment in addition to formal prohibition of the practice.[51] For these reasons, the Court concluded that

> the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as "categorically less culpable than the average criminal."[52]

In the second juvenile sentencing case, *Graham v. Florida*, the Court found a national consensus against sentences of life without parole for non-homicide offenses committed by persons less than eighteen-years-old at the time of the offense.[53] The Court found a national consensus against the punishment based on its infrequent use, "despite its widespread legislative authorization."[54]

At the time of the opinion, only seven jurisdictions legislatively prohibited JLWOP for non-homicide crimes, and just six jurisdictions had outlawed JLWOP entirely.[55] The Court found, however, that the sentence was "exceedingly rare" in practice,[56] identifying 123 persons

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48. *Id.* at 566.

49. *Id.* at 553.

50. *Id.* at 565 (Oklahoma, Texas, and Virginia).

51. *Id.* at 564–65 (noting that after the Court's decision in *Stanford v. Kentucky*, Kentucky's governor elected to spare Mr. Stanford from execution, stating, "[w]e ought not be executing people who, legally, were children" (alteration in original)).

Doubtlessly, the Kentucky's governor's act of executive mercy had emotional resonance for the members of the Court who had previously voted to permit Mr. Stanford's execution, but it is properly understood as peripheral to the Court's analysis. *See generally* Smith et al., *supra* note 15, at 2406 n.43 (characterizing factors of this sort as "atmospheric" as opposed to "substantive" factors which may play a more important role in a particular case).

52. *Roper*, 543 U.S. at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

53. Graham v. Florida, 560 U.S. 48, 55, 57, 67, 82 (2010) (finding that Graham's JLWOP sentence was unconstitutional because he committed a non-homicide offense while seventeen years old).

54. Smith et al., *supra* note 15, at 2451.

55. *Graham*, 560 U.S. at 62.

56. *Id.* at 62, 67.

serving JLWOP for a non-homicide offense.[57] The Court found that even this number was over-representative of the commonality of the practice: "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades."[58] The Court necessarily assumed that some of the 123 sentences were imposed based on outdated sentencing policies and practices.[59] Thus, the Court found that the total number of sentences, as well as *when* those sentences were entered, was relevant to whether there was a national consensus.

The Court also considered whether the sentences actually imposed were geographically isolated and identified thirty-seven states and the District of Columbia that authorized JLWOP for non-homicide offenses.[60] Only eleven states had ever imposed the sentence, and a single state, Florida, accounted for the majority of JLWOP sentences.[61] Thus, the Court found a national consensus against JLWOP for non-homicide offenses based on *when* and *where* the offenses were imposed and despite de jure authorization of the offenses in most states.

In the third juvenile sentencing case, *Miller v. Alabama*, the Court held that the Eighth Amendment required individualized consideration of the mitigating aspects of youth before exercising discretion to impose JLWOP.[62] The Court rejected the state's argument that because twenty-nine jurisdictions statutorily authorized the punishment, there could be no consensus against it.[63] The Court noted that when it decided *Graham*, there were thirty-nine jurisdictions authorizing JLWOP for non-homicide offenses, and the

57. *Id.* at 62–64 (citing PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (2009)) (clarifying that the 123 persons does not include juveniles who received JLWOP sentences for non-homicide offenses at the same time they received a JLWOP sentence for a homicide offense because "[i]t is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination").

58. *Id.* at 65.

59. *Id.*

60. *Id.* at 62.

61. *Id.* at 64 (finding that 77 of the 123 individuals serving a JLWOP sentence for non-homicide offenses were imposed by Florida (citing ANNINO ET AL., *supra* note 57, at 2)).

62. Miller v. Alabama, 132 S. Ct. 2455, 2460, 2475 (2012) (remanding two separate cases of fourteen-year-old defendants who were convicted of murder and sentenced to JLWOP).

63. *Id.* at 2471.

Court nonetheless found a consensus against that punishment.[64] It also noted that "in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which 'less than half' of the 'States that permit[ted] capital punishment (for whom the issue exist[ed])' had previously chosen to do so."[65]

The Court explained that "the statutory eligibility of a [JLWOP sentence] does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration" because "more than half" of the twenty-nine jurisdictions with mandatory JLWOP impose it "by virtue of generally applicable penalty provisions" that apply, without discussion, to children and adults alike.[66] The Court thus concluded that there being twenty-nine jurisdictions authorizing mandatory JLWOP was no bar to an Eighth Amendment prohibition.[67]

The Court held that two lines of its precedent required individualized consideration of juveniles before imposing JLWOP. Its recent precedents on juvenile punishment established that "children are different" when it comes to sentencing.[68] Its death penalty jurisprudence established the necessity of particularized consideration of the offender before imposing the most severe sentences authorized under law.[69] Together, these two strands of precedent required individualized consideration of the juvenile before imposing a sentence that would necessarily mean the juvenile would die in prison.[70] The Court expressly reserved the question of whether JLWOP itself violated the Eighth Amendment.[71]

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64. *Id.* at 2471–73 (finding a lack of consensus in practice even though thirty-seven states, the District of Columbia, and the Federal government all allowed JLWOP sentences for juveniles who committed non-homicide offenses).

65. *Id.* at 2472 (quoting Atkins v. Virginia, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting) (alteration in original)).

66. *Id.* at 2473 (quoting *Graham*, 560 U.S. at 67).

67. *Id.*

68. *Id.* at 2469.

69. *Id.* at 2467 (citing Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion) (requiring consideration of a defendant's character and record prior to imposing death sentence)).

70. *Id.* at 2467, 2469.

71. *Id.* at 2469 ("Because [the Court's] holding is sufficient to decide these cases [at bar], we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those [fourteen] and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

In the Court's two most recent Eighth Amendment cases on the prohibition of capital punishment on the intellectually disabled, *Atkins v. Virginia* and *Hall v. Florida*,[72] its national consensus analysis proceeded similarly to its jurisprudence in these three juvenile cases.

In *Atkins*, the Court counted nineteen states—thirty-three when including states that forbid the death penalty altogether—that had prohibited the death penalty for the intellectually disabled.[73] As with *Graham*, however, the *Atkins* opinion "forcefully demonstrate[s that] legislative enactments are not dispositive."[74] For example, the Court noted that the fact that states like New Hampshire and New Jersey still statutorily authorized executions of the intellectually disabled carried little weight, because no such executions had been carried out in decades.[75] Put differently, "a state's failure to execute . . . individuals for long periods of time could arguably be construed as evidence that a state is as good as abolitionist for national consensus purposes."[76]

The *Atkins* Court was also the first case to address the notion of "direction," explaining that it is "not so much the number of these States that is significant, but the consistency of the direction of change."[77] Specifically, the Court noted that seventeen states had abolished the death penalty for the intellectually disabled since the Court had denied the Eighth Amendment claim in *Penry v. Lynaugh*[78] and that there was a "complete absence of States passing legislation reinstating" the penalty for the intellectually disabled.[79]

In *Hall v. Florida*, the Court held that a strict cut-off score of seventy and above failed to take account of the standard measure of error in intelligence quotient tests and was thus contrary to the national consensus.[80] In so finding, the *Hall* Court applied and expanded upon its national consensus analysis by looking not only to legislation or practice, but also to professional norms: "The legal determination

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72. 134 S. Ct. 1986 (2014).

73. *See* Atkins v. Virginia, 536 U.S. 304, 313–15 (2002) (including jurisdictions that had fully abolished the death penalty).

74. Smith et al., *supra* note 15, at 2408; *see Atkins*, 536 U.S. at 316 (noting that some states that have not enacted legislation to prohibit the imposition of the death penalty on individuals that are intellectually disabled still support a national consensus against executing the intellectually disabled because the sentence has not recently been imposed on persons with such a disability in the state).

75. *Atkins*, 536 U.S. at 316.

76. Smith et al., *supra* note 15, at 2408.

77. *Atkins*, 536 U.S. at 315.

78. 492 U.S. 302 (1989).

79. *Atkins*, 536 U.S. at 315–16.

80. Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

of intellectual disability . . . is informed by the medical community's diagnostic framework."[81] Because Florida's statute went "against the unanimous professional consensus," the Court concluded, it was invalid under the Eighth Amendment.[82]

A critical aspect of the Court's Eighth Amendment jurisprudence in juvenile sentencing is whether there is a national consensus against a punishment.[83] The Court examines formal authorization, including the nature and direction of change regarding authorization, actual sentencing practices, and whether the sentences are geographically isolated.[84] Where the sentences are geographically isolated and from a bygone era, the Court may invalidate a sentence, even where most states formally authorize it.[85]

C. *Independent Judgment About the Proportionality of Sentencing Juveniles to Life Without Parole*

Where the Court finds a national consensus against a punishment, it may invalidate that punishment where, in the Court's independent judgment, the punishment lacks the penological justifications of incapacitation, retribution, deterrence, or rehabilitation.[86] Relying

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81. *Id.* at 2000.

82. *Id.* at 1994, 2000 (quoting Brief of Amici Curiae American Psychological Association, American Psychiatric Association, American Academy of Psychiatry & the Law, Florida Psychological Association, National Association of Social Workers, & National Association of Social Workers Florida Chapter in Support of Petitioner at 15, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882)).

83. *See supra* notes 12–21 and accompanying text (discussing the Court's reliance on establishing a national consensus in determining constitutionality).

84. *See supra* notes 18–21 and accompanying text (explaining relevant factors the Court uses to determine whether there is national consensus).

85. *See supra* notes 75–79 and accompanying text (referencing the Court's decision in *Atkins* which showed a willingness to evaluate imposed sentences and the general trends of the states).

86. *See* Graham v. Florida, 560 U.S. 48, 71 (2010) ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). Several commentators have noted that the Court has never found a national consensus against a punishment where it did not also hold that its independent judgment required prohibition of the punishments and vice versa. *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 590 (2010) (observing a resurgence of the Court's reliance on its own judgment in deciding whether a punishment is suitable); *see also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730–31 (2000) (adding that the Court can change its interpretation of the Constitution by exercising its power to select cases or refuse cases). Perhaps the best explanation for this consistent convergence is the Court's use of discretion in granting certiorari in cases where the

on psychological and social science evidence, as well as what "any parent knows," the Court has consistently held that these purposes are greatly diminished in the context of imposing extreme sentences on juveniles.[87] That is, children are inherently less culpable than their adult counterparts.[88] They are "more vulnerable" to "negative influences and outside pressures, including peer pressure."[89] "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[90] Thus, the retributive rationale is diminished for juvenile offenders.[91]

The hallmark features of youth similarly weaken the deterrent rationale. "[I]mmaturity, impetuosity, and failure to appreciate risks and consequences" diminish the deterrent rationale because those features are characteristic of youth and undermine a juvenile's ability to apply future consequences to their present conduct.[92]

Finally, in *Roper*, the Court held that juveniles are uniquely amenable to reform. As the *Roper* Court noted, "the character of a juvenile is not as well formed as that of an adult."[93] That a juvenile is still struggling to form her or his identity "means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[94] Moreover, a sentence of life without parole is a once and for all finding that a juvenile is among the few "incorrigible juvenile offenders [and distinguishable] from the many that have the capacity for change."[95]

The Court has repeatedly held that the characteristics of youth weaken the rationales for imposing the harshest available penalties, and the scientific literature and the Court's authorities continue to

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national consensus and its independent judgment are likely to align. SUP. CT. R. 10 (providing grounds for granting a writ of certiorari).

87. Roper v. Simmons, 543 U.S. 551, 569 (2005).

88. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

89. *Roper*, 543 U.S. at 569.

90. *Id.* at 553.

91. No greater incapacitation for juveniles is authorized than life without parole. *See id.* at 578 (banning death penalty for juveniles). Thus, the incapacitation value is at its zenith for such sentences.

92. *Miller*, 132 S. Ct. at 2468.

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

94. *Id.* at 553. "Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Id.* at 570.

95. Graham v. Florida, 560 U.S. 48, 77 (2010).

confirm these common-sense holdings.[96] For this reason, the remainder of this Article focuses on the particularities of JLWOP, first examining its authorization and implementation and then discussing potential explanations for the trends present in JLWOP sentencing.

II. STATE ABANDONMENT OF JLWOP IN LAW AND PRACTICE

Rapid change is underway in the area of JLWOP. Legislatures are restricting its availability, and its use is highly concentrated, both within states and counties. This section first examines the state-by-state changes to JLWOP as a matter of policy. Next, it explains how JLWOP sentences are being imposed in practice.

A. *Methodology and Limitations*

This Part's remaining analysis proceeds in two steps. First, it examines the state-by-state policies regarding JLWOP, with a focus on statutory law. It provides an overview of the authorization, abolition, and major changes in the law affecting implementation of JLWOP. Other than the rapid changes in the law presently under way,[97] no significant limitations affect this part of the analysis.

In the second step of its analysis, this Part examines JLWOP sentencing practices, employing data from state departments of corrections. Between May and September 2015, the authors sent out requests for information regarding the current inmates in each jurisdiction's prison system serving a sentence of JLWOP.[98] Specifically, they sought: the name, date of birth, race, gender, offense date, sentencing date, age at time of offense, and county of conviction. Overall, the departments of corrections were very responsive.

The data, where possible, were checked against other public information.[99] These sources included any available appellate

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96. *Id.* at 50; *Roper*, 543 U.S. at 569.

97. *E.g.*, State v. Lyle, 854 N.W.2d 378, 387 (Iowa 2014) (noting that "constitutional protection for the rights of juveniles . . . is rapidly evolving").

98. The authors sought information about the individuals currently serving JLWOP sentences in order to explore the characteristics of individuals who would be affected by a change in the JLWOP sentencing practices. Thus, we do not have information about juveniles who were sentenced to JLWOP but are no longer serving those sentences. This may occur, for example, if their sentences were commuted to a term of years or they are no longer living. Therefore, we expect that our data underestimates the number of JLWOP sentences per year, especially the earlier years.

99. Louisiana's data was not checked in this manner because its Department of Corrections declined to provide the names of the persons serving JLWOP sentences. Email from Genie Powers, La. Dep't of Public Safety & Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 3:11 PM) (on file with author).

decisions, department of corrections website materials, and news reports.[100] With a small handful of exceptions, the publicly available information confirmed the states' reports.[101]

Nonetheless, the data some states provided presented certain limitations. These limitations are detailed in Appendix A,[102] but are outlined here. First, several states did not provide information about race and gender.[103] This information was not reliably available from accessible public information and has been excluded from the analysis unless provided by state departments of corrections. More problematically, however, four jurisdictions have declined to provide data at all: the federal government, Washington, D.C., New York, and Virginia. None of these jurisdictions appear to be significant users of JLWOP, and two jurisdictions, New York and Washington, D.C., do not appear to have any inmates sentenced to JLWOP.[104]

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100. *See, e.g.*, *Lyle*, 854 N.W.2d at 380 (appealing the prosecution of a juvenile in state supreme court); *Statistics*, STATE OF CONN. DEP'T OF CORR. (2015), http://www.ct.gov/doc/cwp/view.asp?a=1492&Q=270036 (providing statistics about the state's incarcerated population); *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), http://www.eji.org/node/893 (reporting on the impact of the Superpredator Era).

101. Sometimes none of this information was available. For those instances, the data was not confirmed against a second source. In the rare instances in which an alternative source of information provided conflicting information, it tended to be a difference in date of offense or sentencing and did not significantly differ from the department of corrections reports. *See, e.g.*, Commonwealth v. McCutchen, 343 A.2d 669, 670 (Pa. 1975) (indicating that offender was fifteen at the time of the offense, while the Pennsylvania Department of Corrections indicated he was sixteen); *Two Charged in Slaying*, NEWS OK (Oct. 20, 1998), http://newsok.com/article/2630214 (indicating the offender was fifteen at the time of his first court appearance, while the Oklahoma Department of Corrections indicated he was seventeen at the time of his offense). Thus, even the conflicting information did not meaningfully affect the analysis.

102. *See infra* Appendix A.

103. California, Florida, and Minnesota did not provide information about race and gender. Email from June DeVoe, Research Manager, Data Analysis Unit, Cal. Dep't of Corr. & Rehab., to Anna Dorn, Research Fellow, Phillips Black Project (July 22, 2015, 2:02 PM) (on file with author); Email from Deb Kerschner, Dir. of Planning & Performance, Minn. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Sept. 4, 2015, 6:01 AM) (on file with author). Of the 2295 individuals in our data set, we are missing race for 319 (fourteen percent).

104. *See* THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 2 (2015) [hereinafter THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE], http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf (providing a map of jurisdictions that have either banned or limited the use of JLWOP as of 2016, and indicating that New York and Washington, D.C. currently have no JLWOP prisoners).

In addition to withholding information, eight states—Alabama, Idaho, Indiana, Missouri, Nebraska, Nevada, Oklahoma, and Pennsylvania—have reported the number of persons entering the department of corrections and/or being sentenced to JLWOP before age eighteen instead of the persons who committed offenses before age eighteen.[105] These states do not record the date of offense; because of this practice, they likely underreport the total number of JLWOP sentences, particularly excluding persons sentenced to JLWOP for offenses committed at age seventeen. Thus, our analysis of age at the time of offense likely underreports the proportion of sentences for crimes committed as a seventeen-year-old. Finally, two states, Ohio and Wisconsin, provided information from 2014 and 2012, respectively, instead of current information.[106]

Despite the limitations associated with the data from state departments of corrections, the analysis derives from a robust data set, drawing on well-vetted sources of information.[107]

One set of analyses in this Article employs the FBI's Supplementary Homicide Reports ("SHR") to assess how race affects JLWOP sentences for juveniles arrested for homicide and how juvenile homicide rates differ from adults.[108] The SHR contains information on the majority of murders in the United States and is among the most reliable crime data available.[109]

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105. The following jurisdictions did not respond to the authors' request for information or provided data that was incomplete: Washington, D.C., New York, and Virginia. Email from Michele S. Howell, Legal Issues Coord., Va. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 5:34 PM) (on file with author); Email from N.Y. Dep't of Corr. & Cmty. Supervision, to Anna Dorn, Research Fellow, Phillips Black Project (July 27, 2015, 3:08 PM) (on file with author); Letter from Oluwasegun Obebe, Records, Info. & Privacy Officer, D.C. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 21, 2015) (on file with author).

106. Email from Lauren Chalupa, Staff Counsel, Ohio Dep't of Rehab. & Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 2, 2015, 11:41 AM) (on file with author); Email from Joy Staab, Dir. of Public Affairs, Wis. Dep't of Corr. to Anna Dorn, Research Fellow, Phillips Black Project (June 3, 2015, 7:27 AM) (on file with author).

107. The Supreme Court itself sought out and relied upon reporting from state departments of corrections to determine the number of persons serving JLWOP sentences for non-homicide offenses. *See* Graham v. Florida, 560 U.S. 48, 63–64 (2010) (referencing letters from prison officials the Court used to create a more accurate estimate of the number of juveniles serving JLWOP sentences in 2010).

108. U.S. Dep't of Justice, Nat'l Ctr. for Juvenile Justice, *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2013*, http://www.ojjdp.gov/ojstatbb/ezashr (last visited Mar. 27, 2016) [hereinafter *Supplementary Homicide Reports*].

109. *See* Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 517 (1997) (reviewing MICHAEL TONRY, A REVIEW OF MALIGN NEGLECT: RACE, CRIME, AND

B. *Changes in JLWOP Policies*

Since *Miller*, nine states have abolished JLWOP, bringing the current number of states completely banning the sentence to fifteen.[110] In the states that retain JLWOP policies, the legislatures and courts have diminished its impact through retroactivity rulings that provide every juvenile an opportunity to receive a lesser sentence, reforms to narrow the application of JLWOP, or a combination of the two.

States that have abolished JLWOP have generally done so in one of two ways. Most commonly, states ban the sentence outright, removing authorization for JLWOP as a sentencing possibility. Eight states have adopted this type of reform.[111] The other, less common form of abolition is achieved through a change in parole.[112] In the two states that have changed their parole practices, adding parole eligibility for persons under age eighteen at the time of the offense

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PUNISHMENT IN AMERICA (1995)) ("Homicide is likely more reliably reported across socioeconomic, racial, and other social divisions than other crimes."); John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423, 1425 (1998) (noting that reliable, long-term data for crime is generally hard to find outside of homicide); John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 14 (1998) ("[T]he crime with the best available data [is] murder."). *But see* Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 671–72, 689–91 (1989) (discussing sources of error in the Supplementary Homicide Reports ("SHR") data). The data exclude negligent manslaughters and justifiable homicides. *Supplementary Homicide Reports*, *supra* note 108.

110. *Infra* Table 1.

111. *See* MASS. GEN. LAWS ANN. ch. 265, § 2(b) (West 2015) (allowing parole for juveniles between the ages of fourteen and eighteen convicted of first-degree murder); S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (amending CONN. GEN. STAT. § 54-125a (2014)); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE ANN. tit. 11, §§ 4209, -A, -636(b), 4217(f), 3901 (d)); H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (abolishing life imprisonment without parole for offenses committed while under the age of eighteen); A.B. 267, 78th Sess. (Nev. 2015) (eliminating the imposition of a life sentence without the possibility of parole for offenses committed prior to the age of eighteen); S.B. 1083, 84th Leg., Reg. Sess. (Tex. 2015) (changing parole eligibility for a capital felony committed prior to reaching eighteen years of age); H.B. 62, 73rd Sess. (Vt. 2015) (prohibiting a sentence of life without parole for a person who was under the age of eighteen at the time of the offense); H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (providing that only people aged eighteen or older may be given life sentences without parole); H.B. 23, 62d Leg., Gen. Sess. (Wyo. 2013) (providing parole eligibility for lesser offenses committed prior to reaching the age of eighteen).

112. *See* S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015) (allowing juveniles to go at large on parole under certain conditions); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (allowing certain modifications to parole eligibility for juvenile offenders).

eliminates JLWOP. Some states enacting the first form of abolition have explicitly made it retroactive; all states enacting the second form necessarily did so. Connecticut has undertaken both reforms.[113] For this reason, a more detailed explanation of Connecticut's JLWOP sentencing statute and reforms illustrates the ways in which states have abolished JLWOP.

Before Connecticut's abolition of JLWOP, it imposed mandatory JLWOP in certain circumstances. Before April 25, 2012, if a juvenile committed a murder in which certain aggravating circumstances were present,[114] Connecticut law authorized either JLWOP or the death penalty.[115] Because the Eighth Amendment bars the death penalty for persons under the age of eighteen, the juvenile would be sentenced to JLWOP.[116] For offenses committed on or after April 25, 2012, but before the new law took effect, if a juvenile committed a murder in which one of the same aggravating circumstances was present, then the sentence would be JLWOP.[117]

Connecticut's new juvenile sentencing law took effect on October 1, 2015.[118] That law excludes juveniles from the definition of aggravated murder.[119] Thus, it eliminates JLWOP as a sentencing possibility. The law also creates parole eligibility for those currently serving JLWOP and other lengthy sentences.[120] It provides that juveniles are eligible for parole after serving sixty percent of their sentence or twelve years, whichever is longer.[121] The law also provides special criteria for the parole board to weigh when considering parole for a person incarcerated for a crime committed as a juvenile.[122] Additionally, the law provides for appointment of

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113. S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015).

114. *See* CONN. GEN. STAT. § 53a-54b (2011) (enumerating aggravating circumstances).

115. *See* CONN. GEN. STAT. § 53a-35a(1)(A) (enumerating circumstances under which a capital felony would lead to a death sentence versus life imprisonment without parole).

116. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (barring death sentences for crimes committed by juveniles). Connecticut's only known execution of a juvenile was in 1786, when it executed a twelve-year-old Native American girl for murder. DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE (2002), http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf.

117. CONN. GEN. STAT. ANN. § 53a-35a(1)(B).

118. S.B. 796, Gen. Assemb., Jan. Sess. (Conn. 2015).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

counsel for indigent inmates a year in advance of their parole hearing.[123] By its own terms, the law is explicitly retroactive.[124]

The following chart outlines forms of abolition since *Miller*, its effective date, and whether abolition is retroactive.

Table 1: Abolition of JLWOP Since Miller

State	Removes Sentencing Possibility	Adds Parole Eligibility	Explicitly Retroactive	Effective Date
Connecticut[125]	X	X	X	Oct. 1, 2015
Delaware[126]		X[127]	X	June 4, 2013
Hawaii[128]	X			July 2, 2014
Massachusetts[129]	X			July 25, 2014
Nevada[130]	X	X		Oct. 1, 2015
Texas[131]	X			Sept. 1, 2013

123. *Id.*

124. *Id.*

125. *Id.*

126. S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

127. Delaware provides for judicial review, rather than review before a parole board. *Id.*

128. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (amending HAW. REV. STAT. ANN. §§ 706-656(1), 657 (LexisNexis Supp. 2014)); § 706-670 (providing for appointed counsel in annual parole hearings and a presumption in favor of parole upon finding a low risk of reoffending).

129. MASS. GEN. LAWS ANN. ch. 119, § 72(a) (West 2015) (amended by H.B. 4307 188th Gen. Ct. (Mass. 2014)) (ensuring that incarcerated juveniles are fully able to take part in educational and treatment programs or to be placed in a minimum-security facility; protections which are not afforded to adult inmates); MASS. GEN. LAWS ANN. ch. 265, § 2 (amended by H.B. 4307, 188th Gen. Ct. (Mass. 2014)). Massachusetts's legislative abolition was subsequent to the state supreme court's holding, as a matter of state law, that discretionary imposition of JLWOP was unconstitutional. *See* Diatchenko v. Dist. Att'y (*Diatchenko I*), 1 N.E.3d 270, 284–85 (Mass. 2013). More recently, the state supreme court has held that indigent inmates sentenced to JLWOP are entitled to counsel and expert services related to their parole hearings. *See* Diatchenko v. Dist. Att'y (*Diatchenko II*), 27 N.E.3d 349, 356–57 (Mass. 2015).

130. NEV. REV. STAT. ANN. § 176.025 (LexisNexis Supp. 2013) (amended by A.B. 267, 78th Sess. (Nev. 2015)) (requiring consideration of the mitigating aspects of youth anytime a juvenile is sentenced as an adult, and rendering prisoners who are currently serving JLWOP sentences eligible for parole as follows: (A) if the offense did not result in death, the prisoner is eligible for parole after fifteen years of being incarcerated; (B) if the offense did result in death, after twenty years of incarceration). Nevada's retroactivity provision does not apply to persons "convicted of an offense or offenses that resulted in the death of two or more victims." A.B. 267, 78th Sess. (Nev. 2015).

West Virginia[132]	X	X[133]		June 6, 2014
Wyoming[134]	X	X	X	July 1, 2013
Vermont[135]	X			May 14, 2015

Both forms of abolition have the same effect. They indicate legislative thinking on the practice, the "clearest and most reliable objective evidence of contemporary values."[136] When Hawaii banned JLWOP, its legislature declared, "Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as the youth matures into an adult and neurological development occurs, the individual can become a contributing member of society."[137] The legislatures in these states have explicitly declared their objections to JLWOP.

The states barring JLWOP are fewer than the Court counted in *Atkins* when it barred imposing the death penalty on the intellectually disabled.[138] However, the "consistency [and] direction" of the change in JLWOP policy is as strong or stronger than in cases where

131. TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2015) (passed in June 2013).

132. H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (enacting W. VA. CODE. ANN. § 61-11-23 (LexisNexis Supp. 2014)). West Virginia's law also requires "the parole board [to] take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration." § 62-12-13b(b).

133. All persons "convicted of one or more offenses for which the sentence or any combination of sentences imposed is for a period that renders the person ineligible for parole until he or she has served more than fifteen years shall be eligible for parole after he or she has served fifteen years if the person was less than eighteen years of age at the time each offense was committed." § 61-11-23(b).

134. WYO. STAT. ANN. §§ 6-2-101(b), 6-10-301(c), 7-13-402 (2015) (outlawing JLWOP both by amending the first-degree murder scheme as applied to juveniles and by making those serving JLWOP parole eligible unless they have, while incarcerated for JLWOP, committed assault with a deadly weapon on a law enforcement officer or attempted an escape).

135. H.B. 62, 2015 Leg., Reg. Sess. (Vt. 2015) (enacting VT. STAT. ANN. 13, § 7045 (2015)). *See* E-mail from David Turner, Vt. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 1, 2015, 05:50 AM) (on file with author) (noting that Vermont had no one serving JLWOP at the time of passage, and, therefore, retroactivity is unlikely to be an issue).

136. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

137. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014).

138. *Atkins*, 536 U.S. at 313–15 (detailing that prior to *Penry*, only Georgia and Maryland prohibited the death penalty for the intellectually disabled but that after *Penry*, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina, and Texas also banned the practice).

the Court has addressed the issue.[139] In the thirteen years between *Penry* and *Atkins*, sixteen states eliminated the death penalty for the intellectually disabled.[140] In the fifteen years between *Stanford*[141] and *Roper*,[142] five states eliminated the death penalty for juveniles.[143] The elimination rate for these respective punishments was roughly 1.23 and 0.33 jurisdictions per year.[144]

In the years since *Miller*, the states' responses have been much quicker. On average 3.33 states per year have eliminated JLWOP, and six jurisdictions have eliminated the punishment since June 2014.[145] In response to *Miller*, a case that merely restricts the punishment, states are eliminating JLWOP all together, suggesting that *Miller* has caused states to examine their sentencing practices and, once scrutinized, abolish them.[146] Moreover, as in *Atkins* and *Roper*, no state without JLWOP has chosen to enact it, and no state has expanded its application.[147] The direction, consistency, and rate of change all suggest a mounting consensus against JLWOP.

States that have retained JLWOP after *Miller* blunted its impact by granting resentencing hearings to inmates subject to mandatory JLWOP sentences and by narrowing the reach of their JLWOP schemes. At least sixteen state courts have held that *Miller* provides retroactive relief to juveniles whose sentences are final,[148] with some

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139. *Id.* at 315.

140. Roper v. Simmons, 543 U.S. 551, 565 (2005).

141. 492 U.S. 361 (1989).

142. 543 U.S. 551.

143. *Id.* at 565.

144. *See id.* (noting that in thirteen years, sixteen states eliminated the death penalty for the intellectually disabled, or 1.23 states per year, and showing that five states in fifteen years eliminated the death penalty for juveniles).

145. *See supra* notes 125–32 and accompanying text.

146. *See* Graham v. Florida, 560 U.S. 48, 66–67 (2010) (noting that existence of the possibility of a sentence via a provision transferring juveniles to adult court does not amount to an acceptance of the range of sentencing outcomes that a juvenile would be subject to in adult court).

147. *See supra* Table 1; notes 125–35 and accompanying text (discussing the number of states that have abolished or restricted application of JLWOP); *infra* notes 148–68 and accompanying text (discussing further how some states have limited use of JLWOP beyond what *Miller* requires).

148. *See* Kelley v. Gordon, 2015 Ark. 277 at 6, 465 S.W.3d 842, 846 (Ark. 2015) (holding that fundamental fairness requires retroactive application of *Miller*), *cert. denied*, 2016 WL 854232 (U.S. Mar. 7, 2016); State v. Randles, 334 P.3d 730, 732–33 (Ariz. Ct. App. 2014) (same), *cert. denied*, No. CR-14-0306-PR, 2015 Ariz. LEXIS 126 (Ariz. Apr. 21, 2015); *In re* Rainey, 168 Cal. Rptr. 3d 719, 724 (Cal. Ct. App. 2014) (same), *cert. granted*, 326 P.3d 251 (Cal. 2014); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1035 (Conn. 2015) (same), *cert. denied*, 2016 WL 854311 (U.S. Mar. 7, 2016);

explicitly doing so on state law grounds.[149] Four of those states passed legislation to ensure that *Miller* would apply retroactively.[150] As discussed in more detail below, these retroactivity holdings mean that scores of inmates were already entitled to resentencing hearings, even before the Court's ruling in *Montgomery*.[151]

Countless more will not be subject to JLWOP because of states' substantive limitations on the reach of their JLWOP sentencing schemes.[152] For example, before a recent overhaul to its JLWOP policies, California made juveniles eligible for JLWOP if any one of

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Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015) (same); People v. Davis, 6 N.E.3d 709, 722–23 (Ill. 2014) (same), *cert. denied*, 135 S. Ct. 710 (2014); State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013) (same); *Diatchenko I*, 1 N.E.3d 270, 281 (Mass. 2013) (same); Jones v. State, 122 So. 3d 698, 702 (Miss. 2013) (en banc) (same); Branch v. Cassady, No. WD77788, 2015 WL 160718, at *5 (Mo. Ct. App. Jan. 13, 2015) (same); State v. Mantich, 842 N.W.2d 716, 724 (Neb. 2014) (same), *cert. denied*, 135 S. Ct. 67 (2014); *In re* State, 103 A.3d 227, 236 (N.H. 2014) (same), *cert. denied sub nom.*, New Hampshire v. Soto, 2016 WL 854309 (U.S. Mar. 7, 2016); Aiken v. Byars, 765 S.E.2d 572, 576 (S.C. 2014) (same), *cert. denied*, 135 S. Ct. 2379 (2015); Dickerson v. State, 2014 WL 3744454, at *4 (Tenn. Crim. App. July 28, 2014) (same); *Ex parte* Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (same); State v. Mares, 335 P.3d 487, 508 (Wyo. 2014) (same).

149. *See Randles*, 334 P.3d at 732 (finding that *Miller* applies retroactively according to the plain language of Arizona's amended statutes); *Falcon*, 162 So. 3d at 963–64 (finding *Miller* retroactive under its own three-prong *Witt* analysis); *Branch*, 2015 WL 160718, at *6 (finding that *Miller* applies retroactively under Missouri's adoption of the broader *Linkletter-Stovall* test).

150. *See* WYO. STAT. ANN. § 7-13-402(a)–(b) (2015) (denying retroactive application to prisoners who either assaulted a prison guard while in custody or attempted to escape); *Randles*, 334 P.3d at 732 (finding resentencing for *Miller* relief applies retroactively according to the plain language of Arizona's amended statutes); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2013) (amending WASH. REV. CODE ANN. §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430 (West Supp. 2015)).

151. At least two states have granted retroactive relief to persons serving discretionary JLWOP sentences. Those states held that the sentences violated *Miller* because the statutory schemes at the time did not require consideration of youth as a mitigating factor. *See* State v. Long, 8 N.E.3d 890, 894–99 (Ohio 2014) (agreeing with the U.S. Supreme Court that juveniles who commit criminal offenses are not as culpable as adults); *Aiken*, 765 S.E.2d at 576–77 (entitling youth with JLWOP sentences to a resentencing hearing in which age will be considered as a mitigating factor).

152. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (entitling a juvenile to present mitigating evidence as part of his case for a sentence less than JLWOP, and observing that once such information is meaningfully presented, the Court expects imposition of JLWOP sentences "will be uncommon"); *see also* MISS. STATE PUB. DEF., OFFICE OF CAPITAL DEF. COUNSEL, MONTHLY ACTIVITIES REPORT 8–9 (May 2015) [hereinafter MISSISSIPPI MONTHLY ACTIVITIES REPORT] (on file with author) (observing that data from Mississippi support the Court's hypothesis in *Miller* that a significant portion of JLWOP resentencing cases result in a sentence less than JLWOP).

twenty-two special circumstances existed, circumstances that are present in almost every first-degree murder case.[153] In 2012, California dramatically narrowed JLWOP eligibility.[154] Under the revised statute, a person serving can "submit to the sentencing court a petition for recall and resentencing" after serving fifteen years, unless the JLWOP sentence is "for an offense where the defendant tortured . . . [the] victim" or where "the victim was a public safety official."[155]

If the petition is not granted, the inmate has additional opportunities to petition again after serving a total of twenty and twenty-five years.[156] This change in policy dramatically limits the scope of JLWOP,[157] transforming California from having one of the most widely applicable JLWOP schemes to having one of the narrowest.[158]

California is not alone. Florida has passed similar legislation,[159] and three additional states—North Carolina, Pennsylvania, and Washington—have eliminated JLWOP for a class of offenders.[160] North Carolina eliminated JLWOP for felony murder, restricting the sentence to persons convicted of premeditated and deliberate first-degree murder.[161] Pennsylvania eliminated JLWOP as an option for

153. *See* CAL. PENAL CODE § 190.2 (West 2014) (enumerating special circumstances, including felony murder). *See generally* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1287 (1997) (noting that California's death penalty eligibility, which set the criteria for JLWOP sentences, is "arguably the broadest such scheme in the country").

154. CAL. PENAL CODE § 1170(d)(2)(A)(i)–(ii) (West 2015).

155. *Id.*

156. *Id.* § 1170(d)(2)(A), (H).

157. Of course, California continues to authorize JLWOP in name for a broad array of homicide offenses. However, as this discussion demonstrates, most of the persons technically subject to JLWOP will, in fact, have the opportunity to be paroled.

158. *See generally* PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER MILLER V. ALABAMA 2–3, https://www.phillipsblack.org/s/Juvenile-Life-Without-Parole-After-Miller.pdf (describing JLWOP availability in each authorizing jurisdiction). While examining the case files of the 288 people presently serving JLWOP sentences in California would provide a means for examining how much narrower California's amended statute actually is, such an undertaking was beyond the scope of this project.

159. H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (enacting FLA. STAT. ANN. §§ 775.082(1)(b), 921.1401 (West Supp. 2015)).

160. The Eastern District of Michigan has also ruled that Michigan's parole statute is unconstitutional because it permits JLWOP pursuant to Michigan's old mandatory JLWOP sentencing scheme. *See* MICH. COMP. LAWS ANN. § 769.25 (West Supp. 2014); Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *1 (E.D. Mich. Jan. 30, 2013) (declining to address retroactivity, but nonetheless providing many inmates sentenced prior to Michigan's change in JLWOP sentencing with an opportunity for release), *appeal filed*, No. 13-2705 (6th Cir. Dec. 20, 2013).

161. N.C. GEN. STAT. §§ 14-17(a), 15A-1340.19B (2013).

juveniles convicted of second-degree murder, whereas prior to the amendment second-degree murder called for automatic JLWOP.[162] Finally, Washington retroactively eliminated JLWOP for individuals who were under sixteen when they committed their crimes.[163]

Illinois and New Hampshire have both recently raised the jurisdictional age for adult court eligibility, limiting the availability of JLWOP and other adult sentences for juvenile offenders in those states.[164] Connecticut and Massachusetts have also recently raised their jurisdictional age.[165] Other states have either eliminated mandatory minimums for juveniles,[166] required consideration of the mitigating aspects of youth before sentencing a juvenile to a lengthy term,[167] or improved the reliability of parole hearings.[168] Each

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162. 18 PA. CONS. STAT. § 1102.1(c) (Supp. 2012); Commonwealth v. Batts, 66 A.3d 286, 293 (Pa. 2013) (vacating a JLWOP sentence and remanding for further consideration under the new statutory scheme).

163. WASH. REV. CODE ANN. § 10.95.030(3)(a)(i) (Supp. 2015).

164. *See* H.B. 2404, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (amending 705 ILL. COMP. STAT. ANN. § 405/5-120 (West 2015)) (changing jurisdictional age from seventeen to eighteen); H.B. 305, 2015 Leg., Reg. Sess. (N.H. 2015) (amending N.H. REV. STAT. ANN. 169-B:4 (Supp. 2014)) (changing jurisdictional age from sixteen to seventeen).

165. *See* H.B. 6638, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011) (amending CONN. GEN. STAT. ANN. § 46b-121 (Supp. 2015)) (changing jurisdictional age to eighteen); H.B. 1432, 188th Gen. Court, Spec. Sess. (Mass. 2013) (amending MASS. GEN. LAWS ANN. ch. 119, § 72 (West 2015) (changing jurisdictional age from seventeen to eighteen)).

166. *See* State v. Lyle, 854 N.W.2d 378, 389 (Iowa 2014) ("[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal." (quoting J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403–04 (2011))); *see also* State v. Taylor, 854 N.W.2d 420, 421 (Iowa 2014) (finding a mandatory minimum sentence "cruel and unusual punishment" under the Iowa state constitution).

167. *See* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047–48 (Conn. 2015) (holding that courts must consider mitigating features of youth before imposing a fifty-year sentence); People v. Sanders, No. 1-12-1732, 2014 WL 7530330, at *9, *10 (Ill. App. Ct. 2014) (asserting the trial court should have considered mitigating features of youth before imposing consecutive forty and thirty-year sentences); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (holding that sentencing courts are required to consider youth as a mitigating factor for a sentence that would end when the juvenile was in his sixties, explaining "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*").

168. *See* CAL. PENAL CODE §§ 3041, 3046, 4801 (West 2011) (setting standards for review of cases in parole hearings); CONN. GEN. STAT. § 54-125a (West, Westlaw through 2015 Reg. Sess.) (entitling indigent persons sentenced for juvenile offenses to counsel to assist in preparation for parole hearings); DEL. CODE ANN. tit. 11 § 4204A(d) (Supp. 2014) (setting time guidelines for parole hearings based on age and the crime committed); FLA. STAT. ANN. §§ 775.081(1)(b), 921.1402 (West 2014)

change signals a growing intention to treat juveniles differently from adults, even if they are somewhat modulated for purposes of assessing a national consensus on JLWOP.

States are rapidly abandoning and limiting the availability of JLWOP. The direction, consistency, and speed of the change manifest a growing consensus against the practice.

C. *JLWOP Actual Sentencing Practices Demonstrate It Is an Outdated, Disfavored Practice, Disproportionately Imposed on Children of Color*

Careful review of the actual JLWOP sentencing practices in the states that retain JLWOP reflects its diminishing role in juvenile justice. The imposition of JLWOP sentences over time demonstrates that the overwhelming majority of JLWOP sentences were imposed in the mid-1990s in a handful of jurisdictions pursuant to policies adopted at the height of fear over the myth of the superpredator.[169]

1. *Most JLWOP sentences were imposed in the mid-1990s*

Current JLWOP sentences were overwhelmingly imposed during the mid-1990s. As discussed below, this was an era when forty-five states changed their laws[170] during hysteria over a "coming generation of super-predators."[171] The change in laws expanded the applicability of JLWOP. This period saw a marked increase in JLWOP sentences, despite a *drop* after 1994 in homicides committed by juveniles.[172] The criminal justice policies of the 1990s track the number of JLWOP sentences being served.

(entitling juveniles sentenced to terms greater than fifteen years to sentencing review after fifteen, twenty, or twenty-five years); NEB. REV. STAT. § 83-1,110.04(1) (2014) (entitling persons who were sentenced when they were less than eighteen to have an adverse parole decision revisited annually and in light of enumerated factors); W. VA. CODE ANN. § 62-12-13(b) (LexisNexis Supp. 2015) (requiring parole boards to consider the mitigating circumstances of youth when making parole decisions); *see also Diatchenko II*, 27 N.E.3d 349, 353 (Mass. 2015) (holding that indigent juvenile offenders are entitled to counsel and expert assistance to ensure meaningful opportunity for release pursuant to parole board decisions).

169. *See infra* Part III.

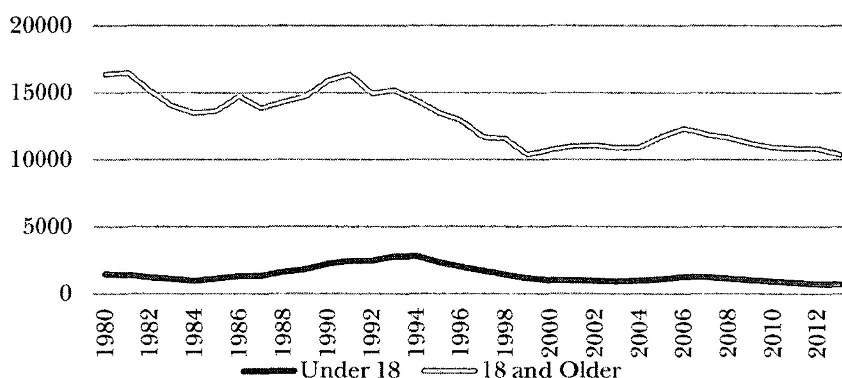
170. JESSICA SHORT & CHRISTY SHARP, CHILD WELFARE LEAGUE OF AM., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005), http://66.227.70.18/programs/juvenilejustice/disproportionate.pdf.

171. *Hearings on the Juvenile Justice and Delinquency Prevention Act Before the Subcommittee on Early Childhood, Youth & Families of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 89–90 (1996) (statement of Rep. Bill McCollum, Chairman, Subcomm. on Crime, H. Judiciary Comm.).

172. SHORT & SHARP, *supra* note 170, at vi.

The nation's focus on the generation of superpredators is curious in light of the proportion of homicides committed by juveniles. As demonstrated in the figure below, in any era, including the period in which states changed their juvenile laws, adult homicide arrests dwarf the number of juvenile homicide arrests, and juvenile homicide arrests generally trend in the same direction as adult homicide arrests.

Figure 1: Number of Juveniles and Adults Arrested for Homicide Between 1980 and 2013[173]



Nonetheless, the imposition of JLWOP sentences increased, even as homicide rates fell.[174] Between 1986 and 1994, arrests for violent crimes committed by juveniles, including homicide, rose.[175] However, that rate fell sharply between 1994 and 2000, even as JLWOP sentences were peaking.[176] Moreover, the rise in juvenile homicide arrests in the 1980s and early 1990s might be better understood as "narrower bands of behavior," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults" than as a national crime wave.[177] Under either analysis, the rise in JLWOP sentences was not concurrent with the rise in juvenile homicides, and juvenile homicides made up only a small fraction of all homicide

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173. *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2013*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/ojstatbb/ezashr (select "Known Offender Crosstabs" hyperlink, then select "Year of Incident" as the "Row Variable" and "Age of Offender" as the "Column Variable").

174. *See id.*

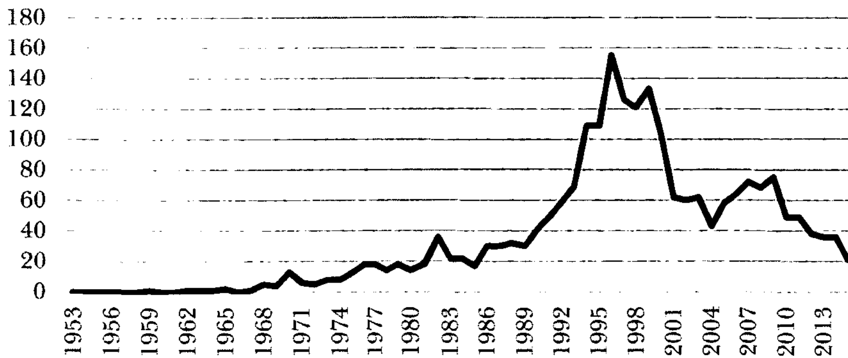
175. *Id.*

176. *Id.*

177. Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727, 728 (1998).

arrests.[178] Thus, the emphasis on changing juvenile sentencing policies arrived during a period of waning juvenile violence.[179]

Figure 2: Number of Juveniles Sentenced to Life Without Parole Per Year[180]



There is a sharp uptick in the imposition of JLWOP sentences during the same period of rapid expansion of JLWOP eligibility. This upswing occurred despite juvenile homicide arrests falling in the same timeframe.[181] The percent of life without parole sentences per homicide arrest was between one percent and two percent from 1980 to 1993.[182] Between 1994 and 1999, the rate of JLWOP sentences increased, and in 1999, eleven percent of juveniles arrested for homicide were sentenced to JLWOP.[183] Likewise, the rate of JLWOP sentences per homicide arrest remained at or above four percent until 2013, the most recent year for which the homicide arrest data is available.[184] While the increased imposition of JLWOP sentences does not track an increase in crime, it follows a change in juvenile justice policies that expanded its applicable scope.

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178. *Id.* at 742.

179. *Id.* at 744.

180. This information comes from responses to the authors' FOIA requests and is on file with the authors. *See infra* Appendix A (detailing the results of authors' FOIA requests and the limitations of the authors' data collection).

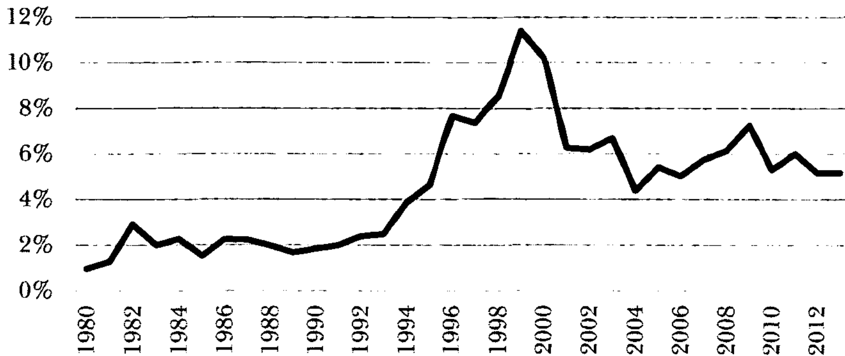
181. *See* Zimring, *supra* note 177, at 742; *supra* notes 173–77 and accompanying text.

182. This information was compiled by comparing responses to the authors' FOIA requests to statistics available in the FBI's SHR. Responses to the authors' FOIA request are on file with the authors. *See Supplementary Homicide Reports*, *supra* note 108.

183. *Id.*; *supra* Figure 2.

184. *Supplementary Homicide Reports*, *supra* note 108; *supra* Figure 2.

Figure 3: Rate of JLWOP Sentences Per Juvenile Arrest for Homicide[185]



A handful of jurisdictions—California, Florida, Louisiana, Michigan, and Pennsylvania—are responsible for imposing two-thirds of all JLWOP sentences.[186] Amidst the nationwide changes to juvenile sentencing policies, these key jurisdictions made changes to their laws expanding eligibility for JLWOP. In 1991, Louisiana required juveniles as young as fifteen to be tried as adults for certain crimes, including homicide.[187] In 1995, Pennsylvania specified that all juveniles charged with murder would be tried as adults.[188] In 1996, Michigan extended adult jurisdiction to juveniles as young as fourteen.[189] Finally, Florida and California have both made multiple changes to the way they impose JLWOP. In 1994, Florida lowered its age of eligibility for transfer to adult court for serious offenses to fourteen years old.[190] In 1997, Florida required that all juveniles indicted for a crime carrying JLWOP as a potential sentence be tried as adults.[191]

Since 1976, California has placed every person less than eighteen-years-old under the jurisdiction of the juvenile court and gave that

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185. This information was compiled by comparing responses to the authors' FOIA requests to statistics available in the FBI's SHR. Responses to the authors' FOIA request are on file with the authors. *See supra* Figures 1–2.

186. *See infra* Appendix B.

187. LA. CHILD. CODE ANN. art. 305 (2014) (enacted by H.B. 939, 1991 Leg., Reg. Sess. (La. 1991)).

188. 42 PA. CONS. STAT. § 6302 (Supp. 2012) (enacted by S.B. 100, 179th Gen. Assemb., 1st Spec. Sess. (Pa. 1995)).

189. MICH. COMP. LAWS § 600.606 (2015) (enacted by H.B. 4486, 1996 Leg., Reg. Sess. (Mich. 1996)).

190. 1994 FLA. LAWS 1240 (amending FLA. STAT. § 39.049 (1993)). *See generally* Michael Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 140 (1994) (exploring changes to Florida law made during the 1994 legislative session).

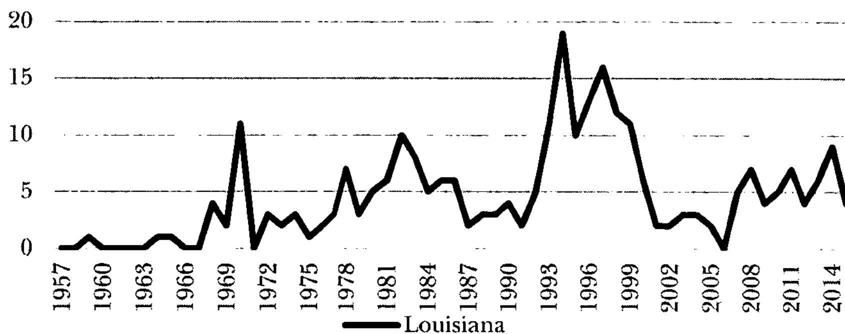
191. FLA. STAT. ANN. § 985.56(1) (West 2014) (enacted by H.B. 1369, 15th Leg., Reg. Sess. (Fla. 1997)).

court discretion to decide whether a juvenile was unfit to proceed in juvenile court, listing some offenses where the juvenile was presumed to be unfit.[192] If the juvenile was sixteen or older and committed certain offenses, including those carrying a JLWOP sentence, the adult court was presumed to have jurisdiction.[193] In 2000, via Proposition 21, California removed that discretion and mandated that all juveniles ages fourteen through seventeen indicted for certain crimes, including all crimes carrying JLWOP as a potential sentence, be tried as adults.[194]

A review of California, Florida, Louisiana, Michigan, and Pennsylvania's sentencing practices confirms that JLWOP sentences in these high-use jurisdictions were affected by changes to the states' juvenile sentencing policies.

Louisiana's JLWOP sentences dramatically increased after its 1991 expansion of JLWOP eligibility.[195]

Figure 4: JLWOP Sentences in Louisiana[196]



Michigan expanded its juvenile transfer laws in 1996, broadening the scope of JLWOP there.[197] Michigan is a notable exception in that

192. CAL. WELF. & INST. CODE §§ 602, 607 (West Supp. 2015) (amended by 1976 Cal. Stat. 4819); People v. Cardona, 99 Cal. Rptr. 3d 313, 317–20 (Ct. App. 2009).

193. CAL. WELF. & INST. CODE § 602; *Cardona*, 99 Cal. Rptr. 3d at 317–20.

194. CAL. WEL. & INST. CODE § 602(b) (amended by 2000 CAL. LEGIS. PROP. 21, http://vigarchive.sos.ca.gov/2000/primary/propositions/21text.htm); *see also Cardona*, 99 Cal. Reptr. 3d at 317–19 (applying the new statutory framework).

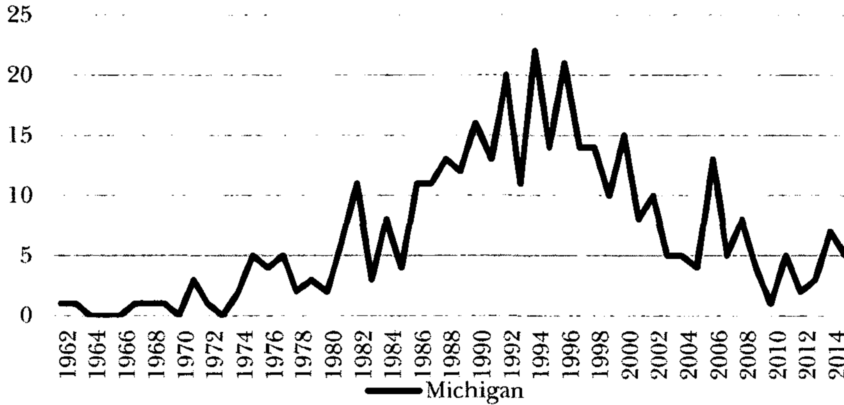
195. *See* LA. CHILD. CODE ANN. art. 305 (2014) (enacted by H.B. 939, 1991 Leg., Reg. Sess. (La. 1991)); E-mail from Genie Powers, La. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 13, 2015, 3:11 PM) (on file with author) (providing a complete list of all persons serving JLWOP sentences).

196. *Id.*; *see also infra* Appendix B (reporting that 247 individuals are serving JLWOP sentences in Louisiana).

197. MICH. COMP. LAWS § 600.606 (2015) (enacted by H.B. 4486, 1996 Leg., Reg. Sess. (Mich. 1996)).

its JLWOP sentences sharply increased prior to the change broadening JLWOP's potential impact. However, as discussed below, Michigan's peak in the mid-1990s is in keeping with other social and political change that was underway throughout the country.

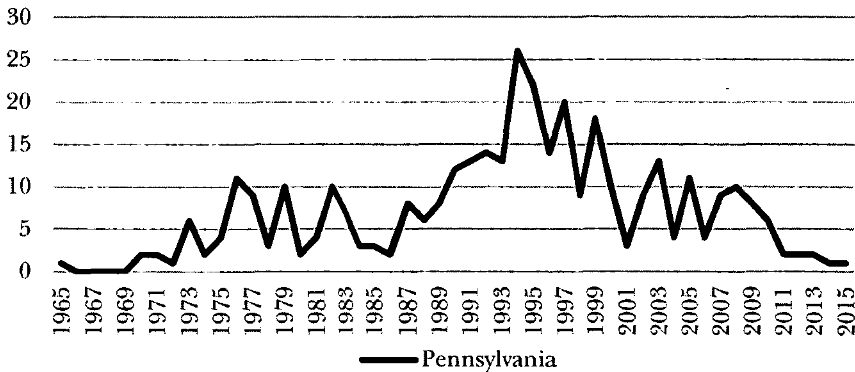
Figure 5: JLWOP Sentences in Michigan[198]



198. *See* E-mail from Andrew Phelps, Assistant FOIA Coordinator, Mich. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Oct. 20, 2015, 2:43 PM) (on file with author) (providing a complete list of all JLWOP sentences in Michigan); Appendix B (reporting that 370 individuals are serving JLWOP sentences in Michigan).

Pennsylvania saw a spike in JLWOP sentences after requiring all juveniles charged with homicide to be tried as adults.[199]

Figure 6: JLWOP Sentences in Pennsylvania[200]



There are no JLWOP sentences being served in Florida that were imposed before the state changed its transfer laws in 1994, when it lowered its age of eligibility for transfer to adult court for serious offenses to fourteen years old.[201] Florida's JLWOP sentences spiked after 1997, when it required all juveniles charged with an offense carrying a potential sentence of JLWOP to be tried as adults.[202]

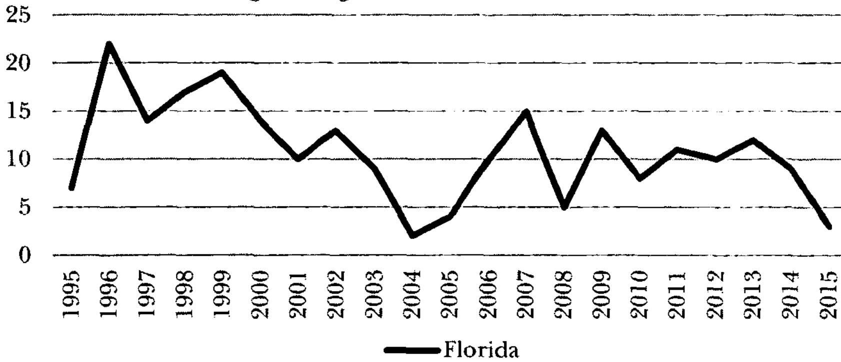
199. *See* 42 PA. CONS. STAT. § 6302 (Supp. 2012) (enacted by S.B. 100, 179th Gen. Assemb., 1st Spec. Sess. (Pa. 1995)); E-mail from Andrew Filkosky, Agency Open Records Officer, Pa. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 3, 2015, 9:00 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Pennsylvania).

200. E-mail from Andrew Filkosky, Agency Open Records Officer, Pa. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 3, 2015, 9:00 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Pennsylvania); *see also infra* Appendix B (reporting that 414 individuals are serving JLWOP sentences in Pennsylvania).

201. E-mail from Dena French, Fla. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (June 30, 2015, 10:29 AM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in Florida).

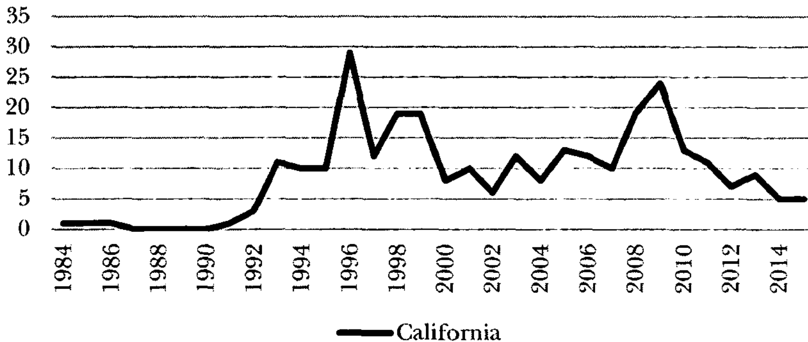
202. *Id.*; *see also* FLA. STAT. ANN. § 985.56(1) (West 2014) (enacted by H.B. 1369, 15th Leg., Reg. Sess. (Fla. 1997)).

Figure 7: JLWOP Sentences in Florida[203]



Finally, California's expansion of adult jurisdiction in 2000 and the concomitant expansion of JLWOP eligibility produced more JLWOP sentences there.[204] Its earlier upswing in the mid-1990s may reflect a change in the number of transfers being sought, the number being granted, or the number of cases affected by presumptive transfer.[205] Regardless, the uptick reflects the national trend: a mid-1990s upswing in imposition of JLWOP sentences.

Figure 8: JLWOP Sentences in California[206]



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203. *Id.*; *see also infra* Appendix B (reporting that 227 individuals are serving JLWOP sentences in Florida).

204. *See supra* note 192–94.

205. *See* SHORT & SHARP, *supra* note 170, at 7 (describing the uptick in juvenile transfers throughout the United States during 1990s).

206. Email from June DeVoe, Research Manager, Data Analysis Unit, Cal. Dep't of Corr. & Rehab., to Anna Dorn, Research Fellow, Phillips Black Project (Aug. 14, 2015, 12:47 PM) (on file with author) (providing a complete list of all persons serving JLWOP sentences in California); *see also infra* Appendix B (reporting that 288 individuals are serving JLWOP sentences in California).

The sentencing practices in these jurisdictions confirm that JLWOP sentences increased generally at the same time that states undertook changes to their juvenile justice policies. These changes took place despite little apparent relationship to actual changes in homicide rates.

2. Recent policy changes limit the ongoing impact of JLWOP, including in the jurisdictions that retain it and have used the sentence the most

Changes in state juvenile sentencing policy will likely limit the ongoing impact of JLWOP sentences, independent of *Montgomery*'s effect,[207] as states abandon the policies they enacted during the height of JLWOP sentencing. Since *Miller*, six states have abolished JLWOP.[208] Among the states that retain the sentence, substantial restrictions limit its impact. California, Florida, and Pennsylvania, three of the top five users of JLWOP, have each recently passed significant reforms to their JLWOP laws, narrowing their applicability.[209] In Michigan—also among the top five—the state's failure to provide a meaningful opportunity for release has been held unconstitutional, with an appeal pending.[210] The particular effects of these reforms remain to be seen, but some of the most frequent users of the sentence are restricting their use of the practice.

Moreover, accounting for both retroactivity holdings requiring resentencing and substantive reforms to statutes, the true number of persons subject to JLWOP is likely far lower than the 2295 reported by the departments of corrections.[211] This subsection details the impact of recent reforms on the number of persons serving valid JLWOP sentences.

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207. The impact of *Montgomery* is beyond the scope of this Article. However, at least some early commentary on the decision suggests that *Montgomery* is an expansion of *Miller*, potentially applying even to discretionary sentences of life without parole. *See, e.g.*, Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBLOG (Jan. 25, 2016, 12:26 PM), http://www.scotusblog.com/2016/01/opinion-analysis-further-limit-on-life-sentences-for-youthful-criminals ("[T]he ruling's clarification—or, apparently, its expansion—of *Miller* will now rule out all life-without-parole sentences for juveniles who commit crimes before age of eighteen, unless prosecutors can prove to a judge that a particular youth is beyond saving as a reformed person.").

208. *See supra* Section II.B (describing the two ways that states have abolished JLWOP both before and after *Miller*).

209. *See supra* notes 157–60 and accompanying text (highlighting a shift to limiting JLWOP eligibility in these states).

210. Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *1 (E.D. Mich. Jan. 30, 2013), *appeal docketed*, No. 13-2661 (6th Cir. Dec. 13, 2013).

211. *See infra* note 215.

Prior to *Montgomery*, thirteen states had either passed legislation or issued final retroactivity rulings that may entitle inmates serving JLWOP sentences entered prior to the respective jurisdictions' post-*Miller* change in sentencing practices to a new sentencing proceeding.[212] Five hundred and ninety-two persons are currently serving a sentence of JLWOP in those states, and, as a result of these holdings, may have an opportunity for a new sentencing proceeding. Five hundred and ninety-two, however, likely overstates the scope of potential resentencing proceedings because, for example, some states have restricted their retroactive relief to exclude narrow categories of JLWOP sentences.[213] An additional 354 persons are serving JLWOP sentences in Michigan for convictions imposed prior to eliminating mandatory JLWOP in 2014 and will be eligible for parole if the U.S. Court of Appeals for the Sixth Circuit affirms a lower court decision providing every person sentenced to Michigan's mandatory JLWOP with an opportunity to seek parole.[214] Depending on how frequently JLWOP

212. Juveniles serving JLWOP sentences in Delaware, Washington, Wyoming, Arizona, Arkansas, Florida, Illinois, Iowa, Mississippi, Nebraska, South Carolina, Massachusetts, and Texas may have been entitled to new sentencing proceedings even before the Court's ruling in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). WYO. STAT. ANN. § 7-13-402(a) (2015); State v. Randles, 334 P.3d 730, 732–33 (Ariz. Ct. App. 2014) (holding that Arizona's statutory amendments applied retroactively and required the court to modify a JLWOP defendant's sentence), *cert. denied*, No. CR-14-0306-PR, 2015 Ariz. LEXIS 126 (Ariz. Apr. 21, 2015); Kelley v. Gordon, 465 S.W.3d 842, 846 (Ark. 2015) (holding that *Miller* applies retroactively to JLWOP defendants); Falcon v. State, 162 So. 3d 954, 955–56 (Fla. 2015) (same); People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014) (same), *cert. denied*, 135 S. Ct. 710 (2014); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (same); *Diatchenko I*, 1 N.E.3d 270, 276 (Mass. 2013) (same); Jones v. State, 122 So. 3d 698, 703 (Miss. 2013) (en banc) (same); State v. Mantich, 842 N.W.2d 716, 719 (Neb. 2014) (same), *cert. denied*, 135 S. Ct. 67–68 (2014); Aiken v. Byars, 765 S.E.2d 572, 575 (S.C. 2014) (same), *cert. denied*, 135 S. Ct. 2379 (2015); *Ex parte* Maxwell, 424 S.W.3d 66, 68 (same) (Tex. Crim. App. 2014); State v. Mares, 335 P.3d 487, 508 (Wyo. 2014) (same); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); S.B. 5064, 63d Leg., Reg. Sess. (Wash. 2013). Given the Court's holding in *Montgomery*, namely that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment, applies retroactively, persons subject to such a sentence in every U.S. state are entitled to resentencing proceedings.

213. *See, e.g.*, CAL. PENAL CODE § 1170(d)(2)(A)(i)–(ii) (West 2015) (sentencing review unavailable for those convicted of torture murder or murdering a police officer); H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (enacting FLA. STAT. ANN. §§ 775.082(1)(b), 921.1401 (West Supp. 2015)) (retroactive review unavailable for those previously convicted of certain felonies).

214. *See Hill*, 2013 WL 364198, at *1–2 (noting that *Miller* must be applied retroactively because to do otherwise would be "an intolerable miscarriage of justice"); *see also* MICH. COMP. LAWS ANN. § 769.25-.25a (West 2014) (outlining

is imposed in these resentencing hearings, the total number of JLWOP sentences being served may become much lower than it currently is.[215]

Preliminary data from Mississippi and Washington suggest that inmates receive a sentence with the possibility of parole in as many as four out of five cases.[216] California and Florida, with 288 and 227 inmates, respectively, have passed legislation dramatically limiting the availability of JLWOP.[217] Likewise, Pennsylvania, with 414 current inmates, has eliminated JLWOP for persons sentenced to second-degree murder.[218]

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procedures used to resentence individuals whose sentences were determined to be unconstitutional after *Miller*); *infra* Appendix B (reporting that 370 individuals are currently serving JWLOP sentences in Michigan).

215. The total sentences are 2295. Excluding the sentences from Arizona (33), Arkansas (57), California (288), Delaware (5), Florida (227), Illinois (93), Iowa (2), Michigan (370), Mississippi (68), Missouri (103), Nebraska (27), New Hampshire (5), South Carolina (37), Tennessee (13), Texas (17), Washington (22), and Wyoming (4), reduces the total to 924.

As noted above, the Federal Bureau of Prisons and the Virginia Department of Corrections did not provide substantive responses to requests for public information. Thus, information about their JLWOP populations is from other sources. *See* Louis Hansen, *Bill Would Help Va. Juveniles Reduce Life Sentences*, VIRGINIAN-PILOT (Jan. 9, 2014), http://hamptonroads.com/2014/01/bill-would-help-va-juveniles-reduce-life-sentences (reporting that Virginia has at least twenty-two persons serving JLWOP sentences); *Federal Stats: Juveniles Serving Life Without Parole Sentences in the Federal System*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (June 2011), http://fairsentencingofyouth.org/the-issue/federal-stats (reporting that there are at least thirty-eight individuals serving JLWOP sentences for crimes committed when they were younger than eighteen).

216. MISSISSIPPI MONTHLY ACTIVITIES REPORT, *supra* note 152, at 9 (reporting that of the seventeen JLWOP sentences that have been reevaluated as of May 2015, eight individuals were resentenced to life with parole, two were resentenced to life without parole, and seven were still waiting to be resentenced); Mitch Ryals, *Juvenile Who Killed Elderly Spokane Woman Given New Sentence*, INLANDER (Sept. 24, 2015, 3:37 PM), http://www.inlander.com/Bloglander/archives/2015/09/24/juvenile-who-killed-elderly-spokane-woman-given-new-sentence (noting recent resentencing proceedings in Washington resulting in exclusively parole eligible sentences).

217. *See supra* notes 157–59 and accompanying text; *infra* Appendix B. Pennsylvania has not yet ruled on whether its repeal of JLWOP for second-degree murder is retroactive. *See* PHILLIPS BLACK PROJECT, *supra* note 158, at 77–78 (noting that the Pennsylvania Supreme Court did not find that *Miller* should apply retroactively). Discerning the full extent of the reforms in these three states would require examination of each of the case files of the people subject to JLWOP in those states. In light of the history of JLWOP in those states, this would be a worthwhile undertaking, but is beyond the scope of this Article.

218. *See* PHILLIPS BLACK PROJECT, *supra* note 158, at 77–78 (noting that the Pennsylvania Supreme Court did not find that *Miller* should apply retroactively); *infra* Appendix B. Discerning the full extent of the reforms in these three states would require examination each of the case files of the people subject to JLWOP in those

Recent changes in eligibility for JLWOP—including state court holdings making those changes retroactive—mean that many of the people currently subject to the sentence may no longer be. Thus, the total number of persons subject to a *valid* sentence of JLWOP may be much lower than Departments of Corrections have reported.

3. JLWOP sentences are concentrated in a handful of outlier jurisdictions

Only a handful of jurisdictions are responsible for most JLWOP sentences;[219] ten counties alone account for nearly thirty-five percent of *all* JLWOP sentences nationwide.[220] Three counties, which represent 4.1% of the U.S. population, are responsible for over twenty percent of all sentences.[221] A similar trend holds for sentences overall, sentences in the last decade, and sentences in the last five years.

The following tables detail the individual counties that are the top ten imposers of JLWOP sentences, both overall and over the last decade. The tables include the number of sentences imposed, the population of the county as a percentage of the total U.S. population in 2014, and the percentage of total JLWOP sentences it imposed.

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states. In light of the history of JLWOP in those states, this would be a worthwhile undertaking, but is beyond the scope of this Article.

219. *See supra* note 186 and accompanying text (including California, Florida, Louisiana, Michigan, and Pennsylvania).

220. *Infra* Table 2; Appendix C.

221. *Infra* Table 2; Appendix C.

Table 2: Concentration of Sentences by County, 1953–2015: Top Ten Sentencers[222]

County, State	Sentences	County Population as Percentage of Total U.S. Population[223]	Percentage of Total Sentences (n=2295)
Philadelphia, PA	214	0.5%	9%
Wayne, MI	156	0.5%	7%
Los Angeles, CA	112	3.1%	5%
Orleans, LA	72	0.1%	3%
Cook, IL	65	1.6%	3%
Oakland, MI	49	0.3%	2%
St. Louis City, MO	41	0.1%	2%
East Baton Rouge, LA	35	0.1%	2%
Allegheny, PA	34	0.4%	1%
Jefferson, LA	33	0.1%	1%

222. *Infra* Appendix C.

223. *State & County QuickFacts: Allegheny County, Pennsylvania*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/42/42003.html (last visited Mar. 27, 2016) (indicating 2014 population of 1,231,255); *State & County QuickFacts: Cook County, Illinois*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/17/17031.html (last visited Mar. 27, 2016) (indicating 2014 population of 5,246,456); *State & County QuickFacts: East Baton Rouge Parish, Louisiana*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/22/22033.html (last visited Mar. 27, 2016) (indicating 2014 population of 446,042); *State & County QuickFacts: Jefferson Parish, Louisiana*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/22/22051.html (last visited Mar. 27, 2016) (indicating 2014 population of 435,716); *State & County QuickFacts: Los Angeles County, California*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06037.html (last visited Mar. 27, 2016) (indicating 2014 population of 10,116,705); *State & County QuickFacts: Oakland County, Michigan*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26/26125.html (last visited Mar. 27, 2016) (indicating 2014 population of 1,237,868); *State & County QuickFacts: Orleans Parish, Louisiana*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/22/22071.html (last visited Mar. 27, 2016) (indicating 2014 population of 384,320); *State & County QuickFacts: Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/42/42101.html (last visited Mar. 27, 2016) (indicating 2014 population of 1,560,297); *State & County QuickFacts: St. Louis (City), Missouri*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/29/2965000.html (last visited Mar. 27, 2016) (indicating 2014 population of 317,419); *State & County QuickFacts: Wayne County, Michigan*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26/26163.html (last visited Mar. 27, 2016) (indicating a 2014 population of 1,764,804); *QuickFacts: United States*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 27, 2016) (indicating 2014 population of 318,857,056).

A single county, Philadelphia County, Pennsylvania, accounts for nine percent of all JLWOP sentences nationwide. Its proportion of JLWOP sentences is eighteen-fold its proportion of the U.S. population. Three counties account for over twenty percent of all JLWOP sentences. Orleans Parish, Louisiana has a proportion of JLWOP sentences that is thirty-one fold its proportion of the U.S. population. With the exception of Los Angeles County, California, each of the counties among the top ten sentencers is responsible for JLWOP sentences far out of proportion to its population. Thus, Los Angeles's inclusion as a top sentencer can, in part, be explained by its large population. The same is not true for the other counties in this list. Sentences in the last decade have followed similar trends.

Table 3: Concentration of Sentences by County, 2006–2015: Top Nine Sentencers[224]

County, State	Sentences	County Population as Percentage of Total U.S. Population[225]	Percentage of Total 2006–2015 (n=504)
Los Angeles, CA	29	3.1%	7%
Wayne, MI	22	0.6%	4%
Philadelphia, PA	18	0.5%	4%
Miami-Dade, FL	13	0.8%	3%
Sacramento, CA	12	0.5%	2%
Orleans, LA	11	0.1%	2%
Harris, TX	11	1.4%	2%
Allegheny, PA	10	0.4%	2%
Oakland, MI	9	0.4%	2%

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224. This information comes from responses to the authors' FOIA requests and is on file with the authors. *See infra* Appendix A (detailing the results of authors' FOIA requests and the limitations of the authors' data collection). Hillsborough and Palm Beach Counties in Florida, along with San Diego County in California, each have eight JLWOP sentences.

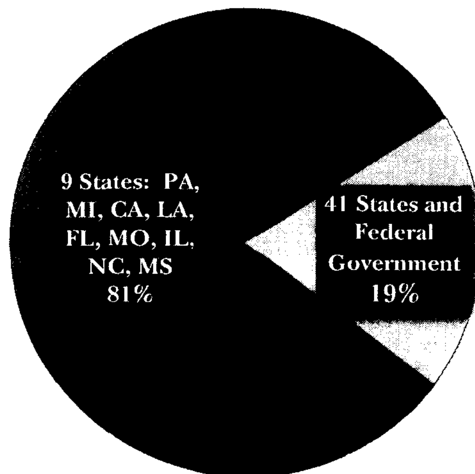
225. *State & County QuickFacts: Harris County, Texas*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48/48201.html (last visited Mar. 27, 2016) (indicating a 2014 population of 4,441,370); *State & County QuickFacts: Miami-Dade County, Florida*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/12086.html (last visited Mar. 27, 2016) (indicating a 2014 population of 2,662,874); *State & County QuickFacts: Sacramento County, California*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/06067 (1 last visited Mar. 27, 2016) (indicating a 2014 population of 1,482,026); *supra* note 223 (providing U.S. Census data for Los Angeles, California; Wayne, Michigan; Philadelphia, Pennsylvania; Orleans, Louisiana; Allegheny, Pennsylvania; and Oakland, Michigan).

Remarkably, many of the overall high sentencers are also among those imposing a high number of sentences in the last ten years. Although East Baton Rouge and Jefferson Parishes in Louisiana are not included in the top ten sentencers in the last decade,[226] each of those jurisdictions has imposed seven JLWOP sentences. Five counties and one parish are in the top ten on both lists: Philadelphia County, Pennsylvania; Wayne County, Michigan; Los Angeles County, California; Orleans Parish, Louisiana; Oakland County, Michigan; and Allegheny County, Pennsylvania.

This handful of jurisdictions is responsible for a large portion of JLWOP sentences, both historically and in the last decade. Moreover, like the overall sentencing trend, JLWOP sentencing in the last ten years has, with the exception of Los Angeles County, been largely disproportionate to the population of those jurisdictions.

As with counties, JLWOP sentences are concentrated in a small handful of states: only nine states account for over four-fifths of JLWOP sentences.[227]

Figure 9: JLWOP Use by State[228]



226. *Infra* Appendix C.

227. JOHN R. MILLS ET AL., PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 2 (2015), http://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWOP+2.pdf; *infra* Appendix B.

228. *Infra* Appendix B.

California and Florida recently limited the availability of JLWOP sentences, and Pennsylvania and North Carolina have eliminated it for second-degree murder and felony murder, respectively.[229] In light of the significant role that these states play in JLWOP, both historically and in recent years, these changes could have a profound impact on JLWOP sentences going forward.

Both overall and in recent years, states have limited their use of JLWOP in practice, even if the sentence is statutorily available.[230] In addition to the jurisdictions that have abolished JLWOP, Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island currently have no one serving a JLWOP sentence.[231] An additional four states have five or fewer persons serving a JLWOP sentence from any period,[232] and, in addition to those, five states have one or no persons serving a JLWOP sentence imposed in the last five years.[233] At the state level, the use of JLWOP is increasingly isolated.

4. African American juveniles are disproportionately sentenced to JLWOP

The majority of JLWOP sentences are imposed on African American juveniles. There are more than double the number of African American juveniles serving JLWOP compared to white juveniles; 1303 of the juveniles serving JLWOP are African American, compared to 531 juveniles who are white.

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229. *See supra* notes 154–62 and accompanying text.

230. *See supra* notes 110–13 and accompanying text (noting that JLWOP sentences have been limited by a variety of state changes in the law).

231. E-mail from Christine M. Blessinger, Ind. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 21, 2015, 05:08 AM) (on file with authors); E-mail from Scott Fish, Dir. of Special Projects, Me. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (May 28, 2015, 06:19 AM) (on file with authors); E-mail from Catherine Earl, Office of Gen. Counsel, N.M. Corr. Dep't, to Anna Dorn, Research Fellow, Phillips Black Project (May 22, 2015, 01:15 PM) (on file with authors); E-mail from Kathleen Kelly, Chief Legal Counsel, R.I. Dep't of Corr., to Anna Dorn, Research Fellow, Phillips Black Project (Sept. 29, 2015, 2:51 PM) (on file with authors); *see* AMNESTY INT'L & HUMAN RIGHTS WATCH, *supra* note 1, at 2 (noting that no inmates were serving JLWOP sentences in New Jersey as of 2005); THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE, *supra* note 104, at 2 (suggesting that New York does not currently have any juveniles serving JLWOP).

232. Idaho (4), Ohio (5), New Hampshire (5), North Dakota (1). *See infra* Appendix B.

233. Alabama (0), Arkansas (1), Iowa (1), Maryland (1), Minnesota (0). *See infra* Appendix B.

Table 4: Race of Juveniles Serving JLWOP[234]

Race	n (n=1981)	%
African American	1303	65.8%
White	531	26.8%
Hispanic	120	6%
Asian	17	1%
American Indian	10	1%

One possible explanation for the race differences in JLWOP sentences is that the arrest rates are also different. If African American juveniles are arrested in similar proportions to JLWOP sentences, the racial disparity may be attributable to policing policies, rather than sentencing. To examine whether the racial disparity in JLWOP sentences can be explained by differences in arrest rates, we compared our JLWOP dataset with the SHR from 1980 to 2013.[235] The SHR contains information on the majority of murders committed in the United States and is regarded as among the most reliable crime data.[236]

Of the individuals who have been arrested for murder and non-negligent manslaughter between 1980 and 2013, fifty-six percent were African American and forty-one percent were white.[237] Therefore, JLWOP sentences are imposed upon African American juveniles in disproportion to their homicide arrest rate: African American juveniles make up fifty-six percent of the individuals arrested for murder and non-negligent homicide and sixty-six percent of the individuals sentenced to JLWOP.[238]

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234. *Infra* Appendix B. We were missing race data from 318 individuals in our dataset. This includes all of the individuals serving JLWOP sentences in California (n=288) and Minnesota (n=7).

235. *Supplementary Homicide Reports*, *supra* note 108.

236. Valerie P. Hans et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies?*, 12 J. EMPIRICAL LEGAL STUD. 70, 84–85 (2015).

237. *Supplementary Homicide Reports*, *supra* note 108.

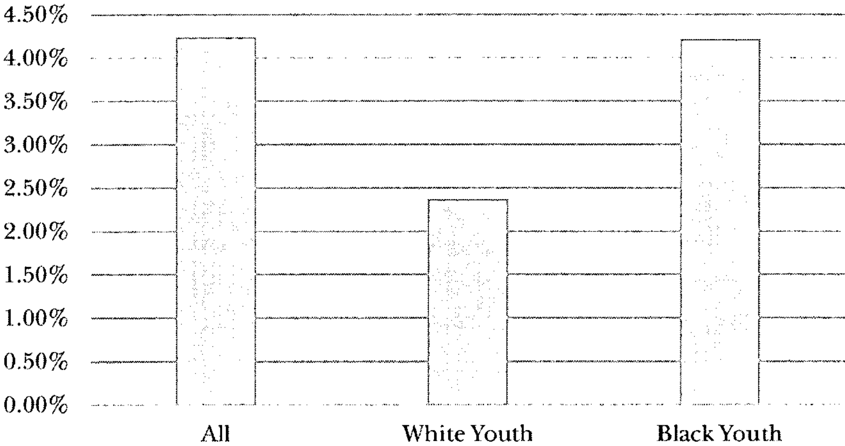
238. *See infra* Figure 11 (showing that arrest rates between African Americans and whites have been relatively similar over the same time period).

Table 5: Race of Juveniles Arrested for Murder and Non-negligent Homicide, 1980-2013[239]

Race	n (n=48,188)	% of those arrested
African American	27,109	56%
White	19,779	41%
Asian	877	2%
American Indian	423	1%

Next we used SHR data to calculate the portion of JLWOP sentences per reported homicide for white and African American juveniles.[240] By comparing the proportion of JLWOP sentences per reported homicides, we are able to control for the overall number of homicide arrests within each racial group.

Figure 10: JLWOP Sentences Per Homicide Arrest[241]



239. *Supplementary Homicide Reports*, *supra* note 108. The SHR does not record Hispanic Ethnicity. *Id.*

240. We did not calculate sentencing rates for Hispanic juveniles because the SHR does not record Hispanic Ethnicity. In addition, we do not report the sentencing rates for Asian and Native American juveniles because few Asian and Native American youths are arrested and at most one or two Asian and Native American youth are sentenced to JLWOP a year.

241. These rates were calculated by comparing the authors' JWLOP sentencing data to arrest rates from the SHR. *See Supplementary Homicide Reports*, *supra* note 108; *infra* Appendix B (reporting the number of JLWOP sentences being served in each state); *see also infra* Appendix A (detailing the results of authors' FOIA requests and the limitations of the authors' data collection).

The results confirm that African American juveniles are disproportionately sentenced to JLWOP compared to white juveniles. While five percent of African American juveniles arrested for murder are sentenced to JLWOP, only three percent of white juveniles are similarly sentenced.[242] The disparate impact described here accounts for the varied arrest rates between African Americans and whites. That is, the disparity is not because one group is more often arrested for homicide than the other is—the disparity necessarily arises at some point after the arrest.

The disparity in JLWOP sentencing has been present since 1980, the first year of our SHR data, but it increased after 1992.[243] A chi-square test of independence revealed that this effect is statistically significant.[244] The chi-square statistic tests whether the number of life sentences varies significantly across the race of the youth and the period during which he or she was sentenced.[245] The association here means that it is unlikely that the results were the product of chance and did not involve a relationship between race and time of sentencing.[246] Since 1992, the portion of African American juveniles sentenced to JLWOP has increased.

The disparity reported here is attributable only to events occurring after arrest. This leaves only charging discretion, conviction rates, and sentencing discretion. The latter was largely only present after *Miller*.[247] Thus, the disparity is likely attributable to either a higher conviction rate for non-whites or to racially disparate charging practices.

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242. *Supra* Figure 10. These rates were calculated by comparing the authors' JWLOP sentencing data to arrest rates from the SHR. *Supplementary Homicide Reports*, *supra* note 108.

243. *Supplementary Homicide Reports*, *supra* note 108.

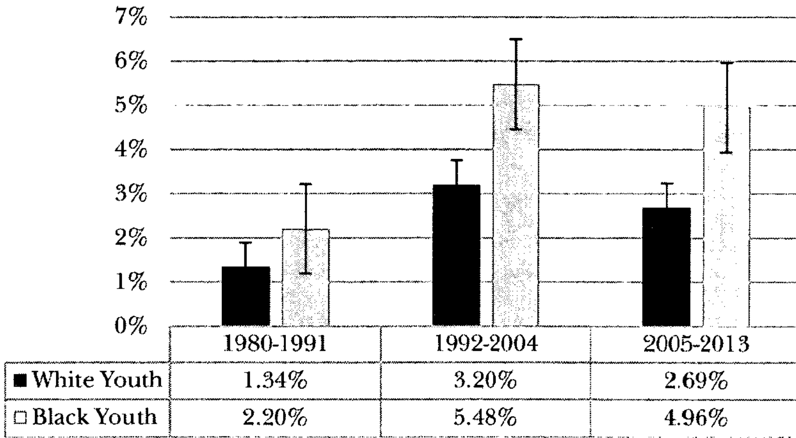
244. Chi-square is a common statistical test used frequently in the social sciences. *See, e.g.*, Stephanie Hindson et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 579 (2006) (employing chi-square analysis).

245. $X^2(2, N = 758) = 9.35, p < .05$.

246. "A p-value is a measure of how likely it is that one would obtain results at least as skewed as those shown even if the differences were, in fact, simply random variation. A p-value of 0.05 or less is generally considered to be statistically significant and evidence of a relationship between the two variables at issue." Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 330 n.98 (2009).

247. *See generally* PHILLIPS BLACK PROJECT, *supra* note 158, at 2–3 (outlining JLWOP eligibility in each U.S. jurisdiction before and after *Miller v. Alabama*).

Figure 11: Rates of JLWOP Sentences per Juvenile Arrested for Homicide Based on Race of Juvenile[248]



	1980-1991	1992-2004	2005-2013
■ White Youth	1.34%	3.20%	2.69%
□ Black Youth	2.20%	5.48%	4.96%

Qualitatively, it is difficult to explain the racial disparities of JLWOP sentences in race-neutral terms, particularly for some jurisdictions. For example, Texas has had no whites and only has non-whites serving JLWOP sentences.[249] The U.S. Census reports that, in 2014, Texas's population was 43.5% white, non-Hispanic.[250]

Other states also have highly disparate rates of imposing JLWOP sentences on non-whites, including Illinois (81.7% of the JLWOP population; 37.7% of the total population), Louisiana (81% of the JLWOP population; 40.7% of the total population), Mississippi (69.1% of the JLWOP population; 42.7% of the total population), North Carolina (88.5% of the JLWOP population; 35.9% of the total population), Pennsylvania (79.5% of the JLWOP population; 22.1% of the total population), and South Carolina (70.3% of the JLWOP population; 36.1% of the total population).[251] Non-whites are

248. *Infra* Appendix B. The standard error represents the amount of variation in the sample. For each year, the majority of the arrest rates will fall within the error bars. Because the error bars do not overlap for white and black youth from 1992–2004 and 2005–2013, these groups are likely to be significantly different.

249. *Infra* Appendix B. Before abolishing JLWOP, Texas imposed it on seventeen people: thirteen are black and four are Hispanic.

250. *State & County Quick Facts: Texas*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last visited Mar. 27, 2016).

251. *State & County Quick Facts: Illinois*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/17000.html (last visited Mar. 27, 2016); *State & County Quick Facts: Louisiana*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/22000.html (last visited Mar. 27, 2016); *State & County Quick Facts: Mississippi*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/

overrepresented among the JLWOP population in ways perhaps unseen in any other aspect of our criminal justice system. This kind of disparity harkens back to the inequitable sentencing practices that developed during the Jim Crow Era.[252]

These findings are especially remarkable and alarming because prior research suggests that rate of arrest is a larger source of racial disparity in the administration of juvenile justice.[253] Moreover, similar studies of the death penalty most often find racial disparities based on the race of the victim, or the interplay between the race of the defendant and victim.[254] Here, we find significantly different sentencing practices for African American and white youth without taking into account the race of the victims. Based on the experience with the death penalty, we would expect an even greater disparity between African American youth accused of killing white victims and white youth accused of killing African American victims.

A complete accounting of the race of defendants as well as an examination of additional variables, such as the race of the victim and the aggravating circumstances present in each case, would uncover the defendants most at risk for a JLWOP sentence. However, these

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qfd/states/28000.html (last visited Mar. 27, 2016); *State & County Quick Facts: North Carolina*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/37000.html (last visited Mar. 27, 2016); *State & County Quick Facts: Pennsylvania*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/42000.html (last visited Mar. 27, 2016); *State & County Quick Facts: South Carolina*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/45000.html (last visited Mar. 27, 2016); *infra* Appendix B. Percentages were rounded to the nearest tenth.

252. *See* Marvin E. Wolfgang, *The Social Scientist in Court*, 65 J. OF CRIM. L. & CRIMINOLOGY 239, 242 (1974) (studying application of capital rape statutes for convictions in eleven southern states from 1945 to 1965, and finding that black defendants with white victims were sentenced to death eighteen times more frequently than any other combination).

253. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 188 (2006), http://ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf (finding that racial disparity is most pronounced at the arrest stage of the juvenile justice system).

254. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS 140–41 (1990) (finding that the race of the victim effects Georgia's administration of the death penalty); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 55 (1984) (finding similar results across jurisdictions); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1939–40 (2012) (finding dramatically higher death sentencing rate where the victim is white and the defendant is African American).

nuances would not undermine the principal finding here: there is a significant racial disparity in JLWOP sentencing.[255]

III. THE MYTH OF THE SUPERPREDATOR AND THE RISE OF JLWOP SENTENCES

In the 1990s, the same period which saw a dramatic upswing in JLWOP sentences and significant changes to policies permitting those sentences, some political scientists were promoting the idea that a group of youth, unhinged from moral restraints, would endanger the safety and well-being of everyone in their paths. They coined the term "superpredator" to describe the group of juveniles who would commit atrocious, violent acts for seemingly insignificant reasons.[256] At the same time, legislatures in forty-five states passed laws that expanded the application of adult sentences to persons less than eighteen years old. Although there was a short-lived upswing in violent crimes—committed by both adults and juveniles—there is little empirical evidence for what has now been recognized as the superpredator myth. In light of the significant changes in policy and sentencing, we have described this period as the Superpredator Era.

The racial undertones, now widely acknowledged to undergird the superpredator myth, may explain the disparities in JLWOP sentencing beginning around the same time that the superpredator myth gained national prominence. Whether the sentencing outcomes are a product of the myth or whether both are the product of a larger phenomenon is, in some ways, beside the point. Both point to a larger problem regarding how the state administers its harshest penalties. Race plays a significant role when the only appropriate question should be whether "the juvenile offender will forever be a danger to society . . . [such that the] sentence . . . make[s the] judgment that the juvenile is incorrigible."[257]

The following discussion of the superpredator myth is intended to provide one possible explanation for the dramatic shift in policies and sentencing outcomes that took place in this era. We do not, and could not, conclusively identify the myth as the source of the disparity. However, its prominence and influence during the same period that saw a rise in both total JLWOP sentences imposed and in

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255. *See supra* Section II.C.4.

256. *See* John Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), http://www.weeklystandard.com/article/8160.

257. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010).

the disparity of imposition suggest a discussion of the superpredator myth is warranted.

A. *Creation of the Myth*

Twenty years ago, Princeton academic John Dilulio coined the term "superpredator" to refer to an impending wave of dangerous juvenile offenders.[258] Specifically, he predicted "tens of thousands of severely morally impoverished juvenile[s]" who "fear[ed] neither the stigma of arrest nor the pain of imprisonment" and who were "capable of committing the most heinous acts of physical violence for the most trivial reasons."[259] A number of influential criminologists at the time adopted Professor Dilulio's theory and rhetoric, anticipating an upcoming surge of "radically impulsive, brutally remorseless" juveniles, armed with guns and having "absolutely no respect for human life."[260] Criminologist James Fox publicly admonished: "Unless we act today, we're going to have a bloodbath when these kids grow up."[261]

Throughout the 1990s, the superpredator myth captured popular and political imaginations. In 1996, Newsweek published an article warning of a "generation of teens so numerous and savage that [they will] take violence to a new level."[262] Former Florida congressman Bill McCollum warned subcommittee members to "brace themselves for the coming generation of super-predators."[263] In a speech before the International Association of Chiefs of Police, President Bill Clinton warned about dangerous children whose "hearts can be turned to stone by the time they're [ten] or [eleven] years old."[264]

258. *See* Dilulio, *supra* note 256 (exploring factors that push youth to become "super crime-prone young males").

259. *Id.*

260. *See The Superpredator Myth, 20 Years Later*, *supra* note 100 (tracing the rise and fall of the Superpredator Era).

261. *Id.*

262. *Superpredators Arrive*, NEWSWEEK (Jan. 21, 1996, 7:00 PM), http://www.newsweek.com/superpredators-arrive-176848.

263. *Hearings on the Juvenile Justice and Delinquency Prevention Act: Hearings Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Econ. and Educ. Opportunities*, 104th Cong. 90 (1996) (statement of Rep. Bill McCollum, Chairman, Subcomm. on Crime, H. Comm. on the Judiciary).

264. *Clinton Cites Need for Role Models*, CHI. SUN-TIMES, Oct. 18, 1994, at 3, 1994 WLNR 5440091.

The language invoked to describe the "superpredator" evoked race-based sentiments without explicitly mentioning race.[265] There was, however, "little difference between the description of mainly inner city African-American youth as 'superpredators' and the historic representations of African-Americans as violence-prone, criminal, and savage."[266] Media reports during this time depicted these "teen killers" and "young thugs" primarily as children of color.[267] A 1999 study based on nineteen local news programs across the country found that non-white youth appeared in crime news significantly more often than white youth (fifty-two percent versus thirty-five percent).[268] Likewise, a 2000 study of national news accounts found that sixty-two percent of stories about Latino youth were about homicide, despite youth of color accounting for less than fifty percent of all violent juvenile crime arrests around this time.[269] The media also exaggerated the connection between race and dangerous crime.[270] A 1996 study found that Los Angeles media outlets were twenty-two percent more likely to depict African American offenders committing violent crime than nonviolent crime, while in reality they were equally likely to be arrested for both.[271] On the other hand, white offenders were thirty-one percent more likely to be shown committing a nonviolent crime, when in reality they were only seven percent more likely to be arrested for a nonviolent crime.[272] News reports similarly exaggerated interracial crime. Between 1990 and 1994, interracial homicides were twenty-five percent more likely to be reported by the Los Angeles Times than intra-racial homicides.[273] Ultimately, in the public consciousness, "superpredator" became a "code word for young Black males."[274]

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265. Jane Rutherford, *Juvenile Justice Caught Between* The Exorcist *and* A Clockwork Orange, 51 DEPAUL L. REV. 715, 720–21 (2002) (explaining that terms like superpredator "carry silent, racially charged messages").

266. Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002).

267. Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 38 (1998).

268. LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 21 (2001), http://cclp.org/documents/BBY/offbalance.pdf.

269. Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. CIV. RTS. & ECON. DEV. 765, 771 (2015).

270. DORFMAN & SCHIRALDI, *supra* note 268, at 4–5.

271. *Id.* at 15.

272. *Id.*

273. *Id.* at 16.

274. Nunn, *supra* note 266, at 712.

The racial underpinnings of the defining myth for the Superpredator Era extended beyond the depictions promoting it and reached the core assumptions underlying it as a social theory. In 1992, psychiatrist Dr. Frederick Goodwin organized an initiative to study inner-city violence.[275] In choosing to focus on the inner city, Dr. Goodwin explained, "maybe it isn't just careless use of the word when people call certain areas of certain cities jungles,"[276] making references to hyper-aggressive male monkeys.[277] Professor Dilulio also played a major role in implanting race-based assumptions into the superpredator narrative. In his 1995 Weekly Standard article, he wrote that the "surge in violent youth crime has been most acute among black inner-city males."[278] In 1996, he wrote an article entitled *My Black Crime Problem, and Ours*, in which he described the increasing "black crime rate, both black-on-black and black-on-white," and predicted that "as many as half of these juvenile super-predators could be young black males."[279] Similarly, a 1996 report of the Dean of Northeastern University's College of Criminal Justice predicted that "the next wave of youth crime" would be attributed to an increase in the population of African American males.[280] Thus, racialized media accounts and the academic underpinnings of the coverage played a role in defining the Superpredator Era and its resulting policies.

B. *Resulting Policies*

Media coverage of violent crimes by juveniles coupled with ominous predictions might have led state legislatures during this era to expand harsh sentencing options for juveniles.[281] One commentator wrote: "Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation."[282] From 1992 to 1999, forty-nine states

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275. Rutherford, *supra* note 265, at 723.

276. *Id.*

277. *Id.*

278. Dilulio, *supra* note 258.

279. John J. Dilulio, Jr., *My Black Crime Problem, and Ours*, CITY J. (1996), http://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html.

280. JAMES ALAN FOX, U.S. DEP'T OF JUSTICE, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 3 (1996).

281. *The Superpredator Myth, 20 Years Later*, *supra* note 100.

282. Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 514 (2009).

and the District of Columbia amended their transfer statutes to make it easier for juveniles to be tried in adult court and face adult sentences.[283]

These states enacted changes such as lowering the minimum age of transfer, expanding the catalogue of offenses that allowed for or required transfer, and shifting discretion from judges to prosecutors in charging decisions.[284] By 1999, more than half of the states had mandatory transfer provisions for certain offenses, often removing all judicial discretion from the process.[285] In some states, transfer statutes were amended to reach children as young as ten.[286] By 1997, seventeen states had amended their juvenile sentencing statute's purpose clauses to stress the objectives of public safety and offender accountability, as opposed to the previous goal of rehabilitating delinquent youth.[287] Following these statutory changes, increasing numbers of juveniles were prosecuted in the adult system, with expanded vulnerability to JLWOP sentences.

C. Only a Myth

The predicted surge of juvenile crime never occurred. By 2000, the juvenile homicide rate had stabilized below its 1985 level, as confirmed by the very criminologists who predicted the crime wave.[288]

Recently, in a complete about-face, DiIulio and Fox were among a group of criminologists who submitted an amicus brief in support of the petitioners in *Miller*, arguing that mandatory JLWOP violated the Eighth Amendment.[289] The brief detailed comprehensive research demonstrating that predictions regarding the superpredator were wrong and admitted that the myth created "an ill-suited and excessive punishment regime."[290] Thus, the remaining unchanged

283. SHORT & SHARP, *supra* note 170, at 7.

284. PATRICK GRIFFIN ET AL., NAT'L CENTER FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 14–15 (1998), https://www.ncjrs.gov/pdffiles/172836.pdf; Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9, 12–13 (2008).

285. Feld, *supra* note 284, at 13.

286. *Id.*

287. PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE 6–9 (1998), https://www.ncjrs.gov/pdffiles/172835.pdf.

288. *The Superpredator Myth, 20 Years Later*, *supra* note 100.

289. *Id.*

290. Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 37, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9647, 10-9646).

Superpredator Era statutes, including those expanding the availability of JLWOP, may be described as vestiges of debunked social theories.

To be sure, the superpredator myth does not tell the whole story. The surge in JLWOP sentences, in some places, predates Dilulio and Fox's first articles on the superpredator myth. However, their now discredited theory was part of an era of expanded treatment of youth as adults and increased JLWOP sentences. It thus may provide an important piece of the puzzle in explaining both the sharp rise in JLWOP sentences and its racialized application.

CONCLUSION

An examination of juvenile life without parole, both in law and in practice, raises substantial questions about its wisdom and constitutionality. The stark racial disparities raise particularly troubling questions about its ongoing legitimacy. African American juvenile offenders are sentenced to JLWOP at almost twice the rate of white juvenile offenders per homicide arrest.[291] For juveniles sentenced to mandatory JLWOP sentences, this means that the only source of the disparity is in the prosecutor's charging decision and in the jury's guilt determination. In discretionary JLWOP regimes, the source of disparity is with the prosecutor, the jury, or the sentencer.[292]

An examination of the cause of racial disparities in sentencing is beyond the scope of this Article. Future research should examine the JLWOP cases more closely to determine whether charging, conviction, and/or sentencing decisions are being made, consciously or unconsciously, based on race.[293] If those decisions are conscious, those serving JLWOP sentences pursuant to those decisions should be entitled to relief from their sentences.[294] Even if the decisions are

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291. *See supra* Section II.C.4.

292. *See supra* Section III.B.

293. *See supra* Section II.A.

294. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (explaining that to establish an equal protection violation, criminal defendants must show "the decisionmakers [sic] in *his* case acted with discriminatory purpose"); *see also* United States v. Armstrong, 517 U.S. 456, 458 (1996) (holding that a defendant must produce credible evidence that similarly situated individuals of different races could have been prosecuted but were not in order to establish entitlement to discovery in selective prosecution cases based on race); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 529 (1995) (noting that proving discriminatory impact would be very difficult because "racism is often unconscious, or usually, at the least, not openly expressed, [and] such proof will rarely be available"). *See generally* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV.

unconscious and do not rise to the level of a constitutional violation, they are plainly bad policy. Either source of disparity raises questions about our criminal justice system's ability to fairly and rationally mete out its harshest punishments on juveniles, some of the most vulnerable people it is responsible for sentencing.

States, however, are abandoning those policies. Only three counties, which account for approximately four and one-tenth percent of the total population, are responsible for over one-fifth of all sentences nationwide.[295] In the last decade, that trend has continued, as six counties account for one-fifth of all JLWOP sentences in that timeframe.[296] On a state level, nine jurisdictions account for over four-fifths of all JLWOP sentences.[297]

The states and counties that have been the most frequent users of JLWOP have recently adopted substantial limitations to their JLWOP policies.[298] The rate, direction, and consistency of the change in JLWOP statutes, together with its waning use, where still available, indicate our nation's evolving standards of decency regarding JLWOP sentences and could result in its prohibition under the Constitution.[299] The policy's potential relationship to the superpredator myth and its implementation now require rigorous examination to determine whether it possesses any legitimate penological justification.

13, 18 (1998) (examining the increasing difficulty in challenging discretionary decisions that have a discriminatory effect and proposing the use of racial impact studies to address the issue).

295. *See supra* Section II.C.3.

296. *See supra* Section II.C.3.

297. *See supra* Section II.C.3.

298. *See supra* notes 151–59 and accompanying text.

299. *See supra* Section I.A (summarizing the evolving standards of decency); *supra* Part II (discussing how states are moving away from imposing JLWOP sentences).

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APPENDIX F

Josh Rovner, *The Sentencing Project, Policy Brief: Juvenile Life without Parole,* May 2021

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Juvenile Life Without Parole: An Overview

The momentum to protect youth rights in the criminal legal system is clear. Twenty-five states and the District of Columbia have banned life sentences without the possibility of parole for people under 18; in nine additional states, no one is serving life without parole for offenses committed before age 18.

The Sentencing Project, in its national survey of life and virtual life sentences in the United States found 1,465 people serving JLWOP sentences at the start of 2020. This number reflects a 38% drop in the population of people serving JLWOP since our 2016 count and a 44% drop since the peak count of JLWOP figures in 2012.[1] This count continues to decline as more states eliminate JLWOP.

In five decisions – *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), *Montgomery v. Louisiana* (2016), and *Jones v. Mississippi* (2021) – the Supreme Court of the United States establishes and upholds the fact that "children are constitutionally different from adults in their levels of culpability"[2] when it comes to sentencing. Differences in maturity and accountability informs the protections of the Eighth Amendment's prohibition on cruel and unusual punishment that limits sentencing a child to die in prison.

Research on adolescent brain development confirms the commonsense understanding that children are different from adults in ways that are critical to identifying age-appropriate criminal sentences. This understanding – Supreme Court Justice Anthony Kennedy called it what "any parent knows"[3] – was central to the recent Supreme Court decisions excluding people under 18 from the harshest sentencing practices.

Starting in 2005, *Roper* struck down the death penalty for people under 18. In 2010, *Graham* invalidated life without parole sentences for people under 18 convicted of non-homicide crimes. Two years later in *Miller*, the Court recognized the need to protect nearly all youth from life without parole sentences, regardless of the crime of conviction. Life without parole, as a mandatory minimum sentence for anyone under age 18 was found unconstitutional. *Montgomery*, in 2016, clarified that *Miller* applied retroactively. *Jones* reaffirmed both *Montgomery* and *Miller* but held that a specific factual finding of "permanent incorrigibility" at the time of sentencing is not required for the imposition of a juvenile life without parole sentence.

Henceforth, few youth will be sentenced to life without the possibility of parole. Moreover, youth sentenced to parole-ineligible life sentences in 28 states where the sentence was mandatory and the federal government are in the process of having their original sentences reviewed or have been granted a new sentence, including hundreds of individuals who have been released from prison.

SUPREME COURT RULINGS

Since 2005, Supreme Court rulings have accepted adolescent brain science and banned the use of capital punishment for juveniles, limited life without parole sentences to homicide offenses, banned the use of mandatory life without parole, and applied the decision retroactively.

ROPER V. SIMMONS, 543 U.S. 551 (2005)

The Supreme Court ruled that juveniles cannot be sentenced to death, writing that the death penalty is a disproportionate punishment for the young; immaturity diminishes their culpability, as does their susceptibility to outside pressures and influences. Their heightened

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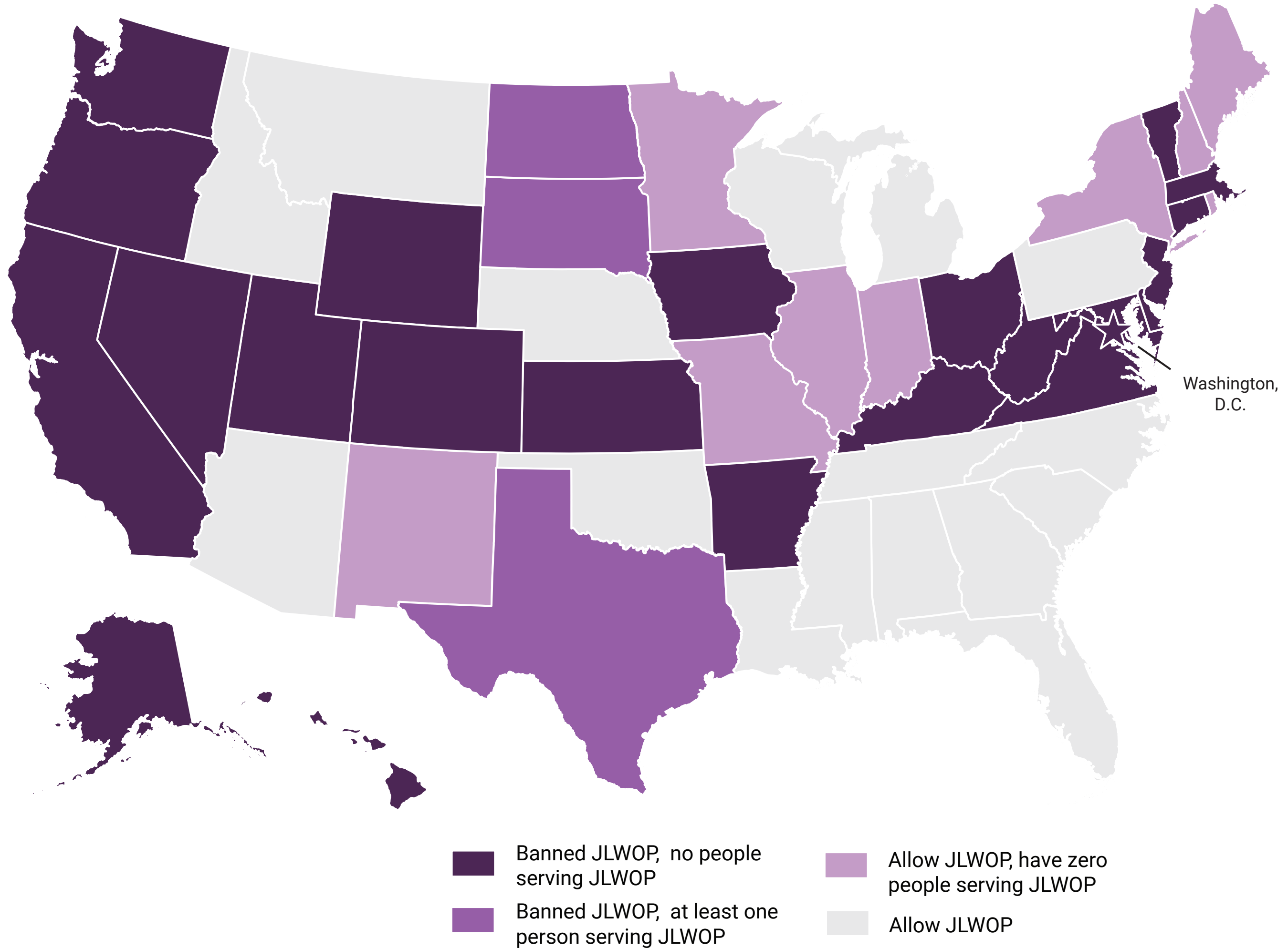
States that have banned or limited the use of juvenile life without parole sentences, 2021



Source: Data collected by The Sentencing Project

capacity for reform means that they are entitled to a separate set of punishments. The court also held that the nation's "evolving standards of decency" showed the death penalty for juveniles to be cruel and unusual: 12 states banned the death penalty in all circumstances, and 18 more banned it for people under 18.[4] The *Roper* ruling affected 72 juveniles on death row in 12 states.[5] Between 1976 and the *Roper* decision, 22 defendants were executed for crimes committed before age 18.[6]

GRAHAM V. FLORIDA, 130 S.CT. 2011 (2010)

Having banned the use of the death penalty for juveniles in *Roper*, the Court left the sentence of life without parole as the harshest sentence available for offenses committed by people under 18. In *Graham v. Florida*, the Court banned the use of life without parole for juveniles not convicted of homicide. The ruling applied to at least 123 prisoners – 77 of whom had been sentenced in Florida, the remainder in 10 other states.[7] As in *Roper*, the Court pointed to the rare imposition of a particular punishment to prove that the punishment is unusual.[8]

U.S. Supreme Court precedent recognizes that non-homicide offenses do not warrant the most serious punishment available.[9] "The concept of proportionality is central to the Eighth Amendment," wrote Justice Kennedy.[10] Thus, having denied the maximum punishment for all people under 18 (life without parole), the Court ruled that the harshest punishment must be limited to the most serious category of crimes (i.e., those involving homicide).

The Court called life without parole "an especially harsh punishment for a juvenile ... A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[11] Limiting the use of

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life without parole did not guarantee such individuals would be released; it guaranteed a "meaningful opportunity" for release.

MILLER V. ALABAMA AND JACKSON V. HOBBS, 132 S.CT. 2455 (2012)

Following *Roper*'s exclusion of the death penalty for juveniles and *Graham*'s limitation on the use of life without parole, approximately 2,500 people were serving sentences of life without parole for crimes committed as juveniles, all of whom were convicted of homicide.[12]

> Adolescence is marked by "**rashness, proclivity for risk,** and **inability to assess consequences**."

In 2012, deciding *Miller* and *Jackson* jointly, the U.S. Supreme Court held that, for people under 18, mandatory life without parole sentences violate the Eighth Amendment. Writing for the majority, Justice Kagan emphasized that judges must be able to consider the characteristics of young defendants in order to issue a fair and individualized sentence. Adolescence is marked by "transient rashness, proclivity for risk, and inability to assess consequences," all factors that should mitigate the punishment received by juvenile defendants.[13]

MONTGOMERY V. LOUISIANA 136 S.CT. 718 (2016)

The *Miller* ruling affected mandatory sentencing laws in 28 states and the federal government. States inconsistently interpreted *Miller's* retroactivity. Supreme Courts in fourteen states ruled that *Miller* applied retroactively[14] while those of seven other states ruled that *Miller* was not retroactive.[15] In addition, California, Delaware, Nebraska, Nevada, North Carolina, and Wyoming passed sentencing legislation for people under 18 that applied retroactively as of 2014.[16]

The question was settled by the U.S. Supreme Court in the case of 68-year old Henry Montgomery[17], who had been imprisoned in Louisiana with no chance of parole since 1963 and called a "model member of the prison community."[18] Justice Kennedy, writing for a 6-3 majority, noted that the Court in *Roper, Graham*, and *Miller* found that "children are constitutionally different from adults in their level of culpability."[19] Moreover, the severest punishment must be reserved "for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[20]

States can remedy the unconstitutionality of mandatory juvenile life without parole sentences by permitting parole hearings rather than resentencing the approximately 2,100 people whose life sentences were issued mandatorily.[21,22]

JONES V. MISSISSIPPI 593 U.S. __ (2021)

Brett Jones is among the thousands of people who were eligible to apply for a new sentence following *Miller* and *Montgomery*. Despite the progress he had attained while imprisoned,[23] the state of Mississippi reissued his life-with-parole sentence in 2015, which Jones challenged because there had been no finding of "permanent incorrigibility." Writing on behalf of a 6-3 majority, Associate Justice Brett Kavanaugh upheld *Miller* and *Montgomery's* requirement that "youth matters in sentencing" (as such, mandatory life without parole sentences remain unconstitutional for youth), but also held that a separate and specific factual finding of "permanent incorrigibility" was not required to sentence a person who was under 18 at the time of their offense to life without parole.[24]

LEGISLATIVE RESPONSES TO JLWOP

Since 2012, 32 states and the District of Columbia have changed their laws for people under 18 convicted of homicide, mostly by banning life without parole for people under 18, but also eliminating life without parole for felony murder or re-writing penalties that were struck down by *Graham*. Twenty-five of the 32 reforms, plus that of the District of Columbia, banned life without parole for people under 18; the other seven states limited its application. All but five of the states that banned life without parole for people under 18 had previously required it in the same circumstances.

These new laws provide mandatory minimums ranging

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from a chance of parole after 15 years (as in Nevada and West Virginia) to 40 years (as in Nebraska). Twenty-five states still allow life without parole as a sentencing option for juveniles.

In most states, the question of virtual life sentences – a term of years that exceeds life expectancy but not life without parole – has yet to be addressed. There are 1,716 people serving such lengthy terms, such as Bobby Bostic of Missouri, hypothetically parole-eligible at age 112 for offenses committed at age 16.[25]

PEOPLE SERVING JUVENILE LIFE WITHOUT PAROLE SENTENCES

Thirty-one states and the District of Columbia do not have any prisoners serving life without parole for crimes committed as juveniles, either due to laws prohibiting the sentence or because there are no individuals serving the sentence at this time.

CHILDHOOD EXPERIENCES

The life experiences of those sentenced to life as juveniles varies, but they are often marked by very difficult upbringings with frequent exposure to violence; they were often victims of abuse themselves. Justice Kagan, in *Miller*, ruled that Alabama and Arkansas erred because a mandatory sentencing structure does not "tak[e] into account the family and home environment."[26] The petitioners in those cases, Kuntrell Jackson and Evan Miller, both 14 at the time of their crimes, grew up in highly unstable homes. Evan Miller was a troubled child; he attempted suicide four times, starting at age 6.[27] Kuntrell Jackson's family life was "immers[ed] in violence: Both his mother and his grandmother had previously shot other individuals."[28] His mother and a brother were sent to prison. The defendant in *Graham*, Terrance Graham, had parents who were addicted to crack cocaine.[29] Similarly, in *Jones,* Justice Sotomayor's dissent noted that "Brett Jones was the victim of violence and neglect that he was too young to escape."[30]

In 2012, The Sentencing Project released findings from a survey of people sentenced to life in prison as juveniles and found the defendants in the above cases were not unusual.[31]

- 79% witnessed violence in their homes regularly
- 32% grew up in public housing
- Fewer than half were attending school at the time of their offense
- 47% were physically abused
- 80% of girls reported histories of physical abuse and 77% of girls reported histories of sexual abuse

RACIAL DISPARITIES

Racial disparities plague the imposition of JLWOP sentences. Sixty-two percent of people serving JLWOP, among those for whom racial data are available, are African American. While 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of JLWOP sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JWLOP sentence as their proportion of arrests for killing an African American (6.4%).[32]

COST OF LIFE SENTENCES

Aside from important justice considerations, the financial cost of JLWOP sentences is significant. A life sentence issued to a juvenile is designed to last longer than a life sentence issued to an older defendant.

Housing juveniles for a life sentence requires decades of public expenditures. Nationally, it costs over $33,000 per year to house an average prisoner. This cost roughly doubles when that person is over 50.[33] Therefore, a 50-year sentence for a 16-year old will cost upwards of $2.25 million.

WHAT MAKES YOUTH DIFFERENT?

In amici briefs written on behalf of the defendants in *Roper, Graham, Miller*, and *Montgomery* organizations representing health professionals, such as the American Academy of Child Adolescent Psychiatry and the American Psychological Association, explained current research on immature brains. In *Miller*, Justice Kagan noted that adolescence is marked by "immaturity, impetuosity, and failure to appreciate risks and

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consequences," all factors that limit an adolescent's ability to make sound judgments. Justice Kagan cited *Graham* and *J. D. B. v. North Carolina*[34] in noting that juvenile defendants are at a substantial disadvantage in criminal proceedings; they are less able than adults to assist in their own defenses (working constructively with counsel) and they are likely to respond poorly to the high pressures of interrogation.

Even before *Roper*, states routinely recognized differences between juveniles and adults in other contexts. Almost every state prohibits juveniles from voting, buying cigarettes and alcohol, serving on juries, and getting married without parental consent. Teenagers' drivers licenses are typically restricted through age 18. The *Graham* decision emphasized the importance of giving juvenile offenders a chance to become rehabilitated. These individuals have a substantial capacity for rehabilitation, but many states deny this opportunity: approximately 62% of people sentenced to life without parole as juveniles reported not participating in prison programs[35] in large part due to state prison policies that prohibit their participation or limited program availability. They typically receive fewer rehabilitative services than others in prison.[36]

MOMENTUM FOR REFORM

Under current Supreme Court precedent, curbs on juvenile life without parole sentences do not guarantee release. Rather, Supreme court holdings and the reforms passed in response to those holdings by state legislatures provide an opportunity for individualized review before a parole board or a judge for a new sentence, taking into consideration the unique circumstances of each defendant.

The Sentencing Project supports a 20-year maximum sentence for nearly all individuals convicted of crimes.[37] This recommendation recognizes that the age of mass incarceration in America led to extreme and overly harsh sentences that are often unjust and counterproductive to public safety. It applies to all people in prison, not only those sentenced in their youth. Some recent reforms are beginning to align with this recommendation as states recognize that extreme sentences are outdated, unnecessary and inhumane. For example, both West Virginia[38] and the District of Columbia[39] offer opportunities for release after 15 years with a parole hearing or a chance to apply to a court for a new sentence, respectively. Maryland, Nevada, New Jersey, and Virginia allow for the possibility of release after 20 years. All incarceration should further the goals of rehabilitation and reintegration.

In *Montgomery*, the Court ruled that "allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the 8th Amendment."[40]

The District of Columbia[41] and Washington State[42] have extended *Miller's* guidance to people under age 25 and 21, respectively, with the understanding that older and younger adolescents alike should not be sentenced to die in prison. Additional legislation for people under 21 has progressed elsewhere.

In many other countries the period before a mandated sentencing review is 10 to 15 years, and 10 years prior to a second look is recommended by the American Law Institute's Model Penal Code.[43] If adequate rehabilitation has not occurred during these years in prison, as decided by experts, the individual may remain in prison and their case should be reviewed again in another few years.

Nor is it appropriate to eliminate life sentences in name only, replacing them with excessively lengthy prison terms that can reasonably expected to last for an offender's entire life. There is mounting support for such reform in select states. Motivated by the *Miller* decision, the state of California (previously home to one of the largest populations of JLWOP defendants) now affords prisoners a meaningful chance at parole after 15 to 25 years if their crime occurred when they were a juvenile. Reforms are underway in other states as well. Sentences that close the door on rehabilitation and second chances are cruel and misguided.

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6 Death Penalty Information Center. Facts About the Death Penalty.
7 *Graham* at 2024.
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THE SENTENCING PROJECT
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Updated May 2021.

The Sentencing Project works for a fair and effective U.S. justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

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APPENDIX G

National Trends in Sentencing Children to Life without Parole,
Campaign for Fair Sentencing of Youth, (2021)

February 2021

National trends in sentencing children to life without parole

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U.S. Supreme Court

In four decisions—*Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016)—the Supreme Court of the United States established that "children are constitutionally different from adults for purposes of sentencing." *Roper*, *Graham*, *Miller*, and *Montgomery* are critical in defining Eighth Amendment limitations for sentencing a child to die in prison.

Roper struck down the death penalty for children. *Graham* struck down life without parole for children who commit non-homicide offenses, requiring a meaningful opportunity to obtain release. *Miller* struck down life-without-parole sentences for the vast majority of youth who commit homicide—all but those deemed incapable of positive growth and change—and five years ago in *Montgomery,* the Court applied *Miller* retroactively.

"In light of what [the Supreme] Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability . . . prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."

Montgomery v. Louisiana

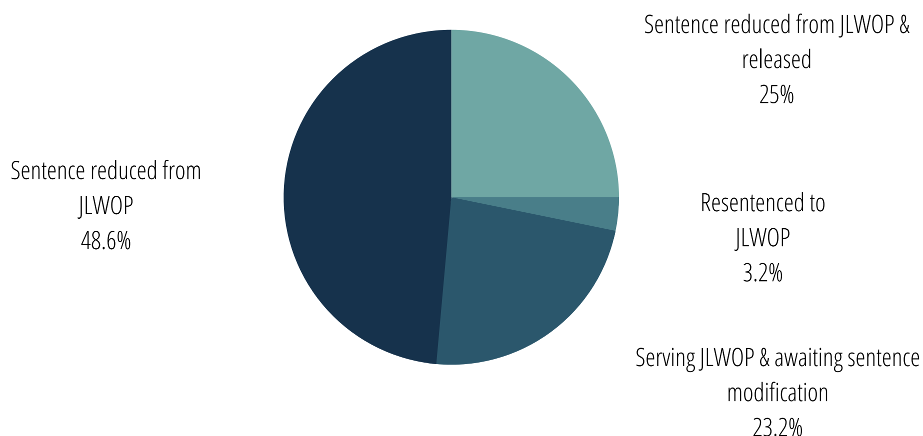
JLWOP post-*Miller* and *Montgomery*

A majority of the 2,800 individuals serving juvenile life without parole (JLWOP) following *Miller* and *Montgomery* have been resentenced in court or had their sentences amended via legislation, depending on the jurisdiction in which they were convicted.

Yet despite the over 75 percent reduction in people serving JLWOP, jurisdictions have varied significantly in their implementation of *Miller* and *Montgomery*. As a result, relief afforded to individuals serving JLWOP is based more on jurisdiction than on whether the individual has demonstrated positive growth and maturation.

The uneven implementation of *Miller* and *Montgomery* disproportionately impacts Black individuals, who represent 61 percent of the total JLWOP population.

The chart below reflects the current status of the approximately 2,8000 people serving JLWOP when *Montgomery* was decided. Within that population, 25 percent have been released, nearly 49 percent have had their sentences reduced from JLWOP, about 23 percent have not yet been afforded relief, and approximately 3 percent have been resentenced to JLWOP.



Data on file at the Campaign for the Fair Sentencing of Youth

Fast facts

700
Over 700 people originally sentenced to JLWOP have been released since *Montgomery*

30
30 states now ban JLWOP or have no one serving the sentence

75%
The national JLWOP population has been reduced by 75 percent in five years

61%
Sixty-one percent of children sentenced to JLWOP pre-*Miller* are Black, and the proportion of Black children sentenced to JLWOP has increased increased in new cases post-*Miller*

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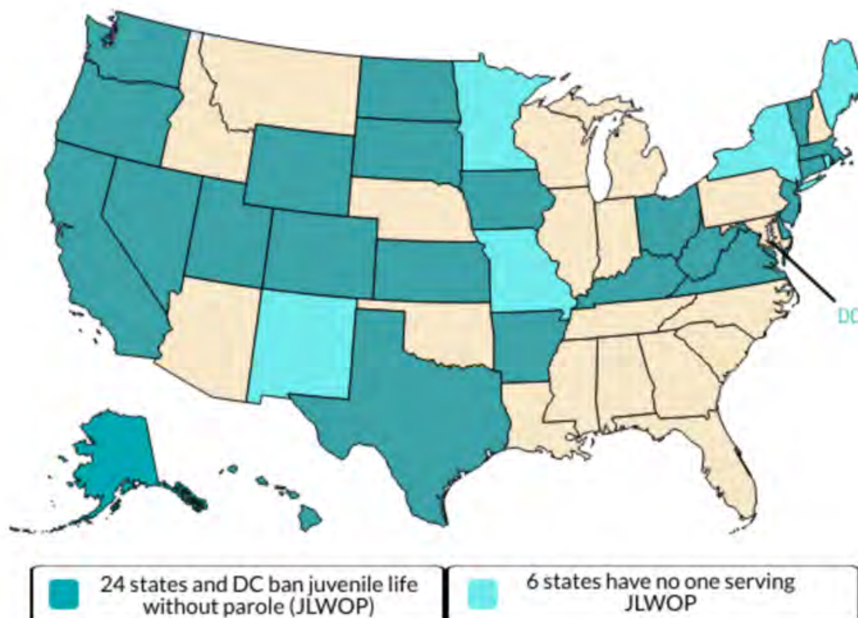
Rapid state-level rejection of life without parole for children

In the nine years since *Miller* was decided in June 2012, the United States has experienced sweeping change in the practice of sentencing children to die in prison. When *Miller* was decided, 45 states and the District of Columbia permitted life without parole as a sentencing option for children. In many states, life without parole was the only sentence available if a child was convicted of homicide.

Remarkably, the number of states that do not allow life without parole to be imposed on children has more than quadrupled since 2012, from five states to twenty-four states and the District of Columbia. And in at least six additional states, no one is serving the sentence for an offense committed as a child. Today a majority of states ban life without parole for children or have no one serving the sentence.



Jurisdictions that ban JLWOP

- Alaska
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Iowa
- Kansas
- Kentucky
- Massachusetts
- Nevada
- New Jersey
- North Dakota
- Ohio
- Oregon
- South Dakota
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wyoming

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APPENDIX H

The Sentencing Project, *Juvenile Life without Parole; Trends in Sentence Over Time*, April 14, 2011

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JUVENILE LIFE WITHOUT PAROLE: TRENDS IN SENTENCE USE OVER TIME

Introduction

Juvenile life without parole (JLWOP) sentences are not used anywhere in the world except the United States, where approximately 2,500 individuals are currently serving this sentence for crimes committed when they were under 18 years old. A growing body of research points to evidence that youth are cognitively, behaviorally, and emotionally different from adults in ways that make a sentence of life without parole entirely inappropriate for this segment of our population.

The federal government and most states allow life without parole sentences for juvenile offenders who commit certain crimes. JLWOP is not permitted in 6 states,[1] and it is allowed but not currently used in an additional 9 states.[2] Seventy-three of the individuals serving JLWOP sentences were age 14 or younger at the time of their offense.[3]

The Impact of Juvenile Transfer on JLWOP Sentence Use

The use of this extreme sentence for young offenders becomes available once they transferred to the adult system, which can happen mandatorily or discretionarily depending on state law. Once a juvenile case is transferred to the adult system, JLWOP is an option and may be applied again as a mandatory sentence upon conviction or applied as a result of judicial discretion.

The transfer of juveniles to the adult criminal justice system represents a reversal from the reasoning that led to the creation of the juvenile justice system in 1899. For nearly a century, the view prevailed that young people require a different system of justice than adults because of their underdeveloped maturity level and capacity to reform problematic behavior. However, a rise in crime beginning in the late 1980s led many states and the federal government to abandon this view in favor of a more punitive approach. This received public support in large part due to unfounded warnings that a new breed of youth violence led by a remorseless group of "superpredators" was upon us.[4] One of the harshest responses to delinquent youth has been the expansion of the juvenile transfer provision, now in place in most states. Once a young person is convicted in the adult court system, sentencing options become limited to those available in the adult system. In some instances, sentences are mandatory and cannot take into account the age of the offender.

Recent reports note a decline in use of juvenile transfer around the nation.[5] The decline is partly due to extensive evidence now available that these young people – and the public – are far worse off because of this practice. Juveniles transferred to the adult system are more likely to commit a new offense upon release than if they had been retained in the juvenile system, and their new offenses are more likely to be violent. In addition, juveniles in adult facilities are significantly more likely to commit suicide, experience physical and sexual assault, and have their needs for education, mental health, and medical attention unmet.

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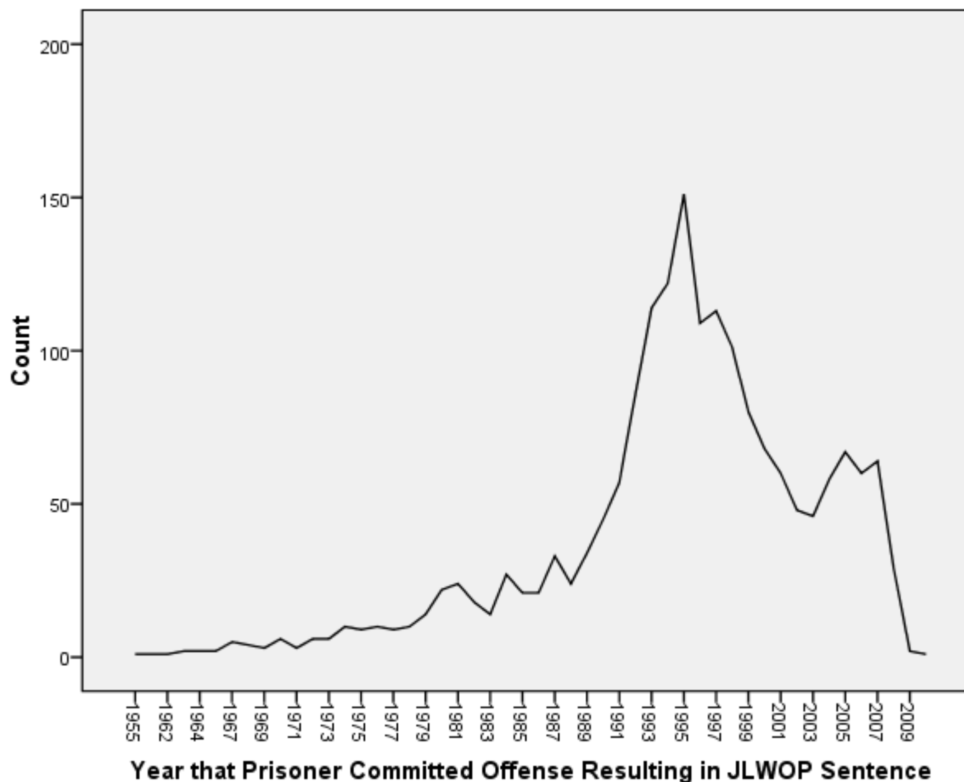
Trends in the Use of JLWOP Over Time

For juveniles convicted in the adult system, the harshest punishment is life without the possibility of parole. This is because in 2005, the United States Supreme Court ruled in *Roper v. Simmons* that the death penalty for juveniles violated the 8th Amendment. The JLWOP sentence was used relatively infrequently until the 1990s, usually with fewer than 30 sentences applied per year nationwide. During the mid-1990s, however, the use of this sentence surged; in fact, 39% of all current JLWOP sentences were applied for crimes that occurred during the 6-year period from 1993 to 1998 (See Figure 1). The sentence use is begun to decline somewhat since this time. The trends in use of JLWOP sentences vary greatly from state to state and future analysis will explore state trends in use over time. Future analysis will also explore the extent to which mandatory sentences of JLWOP fluctuate over time as compared to discretionary application of the sentence.

Conclusion

States' use of juvenile transfer is beginning to wane, which is wise for public safety and for youth. Momentum for reform in this area is expected to carry over to benefit those youth who would otherwise be sentenced to excessive adult sentences including life without the chance for parole.

Figure 1: JLWOP Sentencing Trends



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[1] These states are Alaska, Colorado, Kansas, Kentucky, Montana, and Texas.
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APPENDIX I

Deborah Labelle & Anlyn Addis*, Basic Decency, Protecting the Human Rights of Children,* ACLU of Michigan (2012)

BASIC DECENCY

Protecting the human rights of children

An examination of natural life sentences for Michigan's children

Acknowledgements

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We thank the National Campaign for the Fair Sentencing of Youth, The Sentencing Project, the ACLU of Michigan, and Human Rights Watch for their research and commitment to protecting the human rights of youth in the criminal justice system.

Deborah LaBelle, human rights advocate and the Director of the Juvenile Life Without Parole Initiative, and Anlyn Addis were principle authors. Gonzalo Ubillus and Jeffrey Shook, Associate Professor at the University of Pittsburgh's School of Social Work, provided invaluable statistical analysis and commentary.

Rana Elmir and Shelli Weisberg of the ACLU of Michigan, and Barbara Levine, Director of Citizens Alliance on Prisons and Public Spending, provided wisdom and feedback. Betsy Lewis, Matthew Baxter, Austin Land, Jihan Williams, Marita Inglehart, and Nicole Hall all devoted their time, energy and ideas to this project. We are grateful to the individuals serving natural life sentences and their family members for their strength and willingness to share their stories with us.

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1 **Introduction**

2 **Protection & punishment of Michigan's children**

4 **Criminal laws treating children as adults**

8 **Adult time for adult crime: less than life**

12 **Plea bargaining: disparate impact on children**

15 **Racial disparities in pleas & sentencing**

18 **Michigan's inadequate indigent defense impact on children in the adult system**

24 **Evolving standards of decency & Michigan's exceptionalism**

30 **The cost of Michigan's laws & practice: human rights and fiscal responsibility**

32 **Conclusion: a call for basic decency**

34 **Recommendations**

36 **Methodology**

36 **Notes**

Introduction

Six years ago, through polling and focus groups, citizens of Michigan were asked this question: "How should we treat Michigan youth involved in homicide crimes?"

People weighed the importance of just punishment, the need for public safety, and also considered their social responsibility to the troubled youth involved in the crime. Results revealed that these Michigan residents were deeply concerned that the most severe sentence our state laws can impose on an adult who commits murder is likewise imposed on a child who did not.

They were also uncomfortable to learn that Michigan's current laws do not allow a jury or a judge to consider a juvenile's age, abusive upbringing, troubled environment, lack of maturity, or their potential for rehabilitation before imposing adult punishment. Most of those polled were unaware that hundreds of adolescents in our state, some as young as 14, have been sentenced to die in prison without an opportunity to demonstrate their remorse, show their potential for rehabilitation, or prove that they pose no risk to society.

The 2006 polling revealed strong public opposition to our current laws, which require sentencing all young people between the ages of 14 and 17, who are convicted of an offense involving a first-degree homicide, to spend the rest of their lives in adult prison without any opportunity for parole.

When faced with the issue, people in Michigan strongly supported eliminating the life without parole sentence for juveniles.[1] They recognized the distinct differences between adults and developing adolescents, and supported sentencing practices that would protect youthful offenders from the adult consequences of their decisions.[2]

In 2008 a bipartisan majority of the Michigan House of Representatives passed legislation that would end Michigan's practice of sentencing young people under the age of 18 to life without parole. The Michigan Senate Judiciary Committee refused to release these bills for a vote and the laws mandating this punishment remain in place.

To date, 376 young people have been sentenced to life without the possibility of parole in Michigan. Only one other state has more.

In recent years, editorials in major media outlets have called for, at minimum, judicial discretion in sentencing. Some legislators who initially favored this punishment for youth have since called for reform. Former Representative Burton Leland, a Democrat from Detroit, repudiating his initial support of the 1995 Juvenile Justice Reform Act explained, "We wanted to let thugs know that they can't hide behind their mother's apron. Now, 25 years later, I think locking youthful offenders up for life is ridiculous."[3]

Prosecutors, who are central opponents of juvenile life without parole reform, often make the argument of "adult time for adult crime." However, most adults do not spend the rest of their lives in prison for comparable homicide crimes because prosecutors have full discretion to offer plea bargains of a lesser sentence to those adults charged with homicide crimes. Even where children are offered plea bargains, they are at a significant disadvantage in negotiating these same pleas. In fact, young people in Michigan are more likely to receive longer sentences than adults for comparable offenses.

This report examines the arguments for and against reforming Michigan's laws that mandate a life without parole sentence for youth involved in certain homicide crimes. It addresses the disadvantages children face in the adult criminal justice system and analyzes the data resulting from the implementation of this sentence. This report also explores the fiscal and human costs of sentencing a young person to life without parole (LWOP) in Michigan.

Protection and punishment of Michigan's children

All of us were once children and most of us have known, nurtured or loved a child. With that experience comes an inherent understanding that adolescents are distinctly different than adults. They are impulsive, inexperienced, vulnerable to mistreatment, and uniquely dependent on adult and societal guidance and protection.

The civil laws in Michigan provide that children under the age of 18 are not responsible enough to vote, to sit on a jury or to enlist in the armed services. They cannot enter into a contract or quit school. Children may not leave home, get married without parental consent, or obtain a driver's license until the age of 16.

Michigan also has laws that protect youth against sexual violence, parental neglect and exploitation. Labor laws, contract laws, and human services statutes work to ensure the well-being of children by recognizing their inability to adequately care for themselves. These considerations are a formal acknowledgement that children lack the experience, judgment, and responsibility of an adult, and need protection. But in Michigan, such recognition and protections do not extend to children in our criminal justice system, despite the social, political, and scientific acknowledgement that children are less culpable and responsible than adults for their actions.

Contemporary neurological science confirms the cognitive differences between a child and an adult. An examination of the human brain demonstrates the undeveloped frontal lobe in adolescence compared to adults.[4] This is the area of the brain that is associated with impulse control, planning, risk evaluation, and comprehending consequences. Scientific research confirms that the part of the brain which allows for mature decision making is not yet fully developed in teenagers.

It is not that children fail to recognize right from wrong. Instead, it is this cognitive underdevelopment of the brain, coupled with an inability to appropriately respond to peer pressure, adult persuasion, and lack of control over their environment, that increases the risk of impulsive and dangerous activity among youth.[5]

While there is no denying that youth must be held fully accountable for their poor choices and violent acts, the U.S. Supreme Court has ruled that punishment must be proportional, recognizing a young person's lesser responsibility and culpability. Even when adolescents commit the most serious of crimes, a series of decisions from the U.S. Supreme Court recognize that children cannot be viewed and punished the same as an adult.

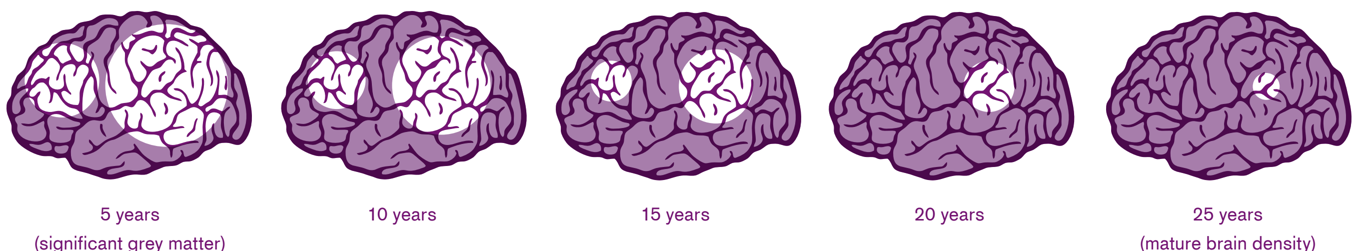


FIGURE 1
EARLY BRAIN DEVELOPMENT

Neurological research shows that a child's brain continues to mature even into his or her mid-twenties. This graphical representation shows how grey matter volume in the brain decreases as a child ages. To watch a video of this process, see **www.bit.ly/braindevelopment**

In 2005 the U.S. Supreme Court abolished the death penalty for children who committed their crime before the age of 18, reasoning that: "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." (Justice Kennedy, *Roper v. Simmons*) In 2010, the Supreme Court extended recognition of the need for lesser punishment for youth in *Graham v. Florida.*

GRAHAM V. FLORIDA

In *Graham v. Florida*, a watershed case with respect to the sentencing of children, Terrence Graham, a 17-year-old, was sentenced to life without parole for his involvement in an armed robbery. The Court reasoned that children are different than adults and thus entitled to distinct treatment that accounts for their particular vulnerabilities. Children lack the same maturity and responsibility level of adults, they are more vulnerable and susceptible to peer pressure, and their character is still forming.[6] In comparison to adults, children are both less culpable and more capable of reform.[7]

"By denying the defendant the right to reenter the community, the state makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability… For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more relevant." (Justice Kennedy, *Graham v. Florida*)

The same rationales cited by the Court in *Graham v. Florida* for treating young people as less culpable than adults can be equally persuasive when considering the appropriate punishment for youth convicted of homicide crimes in our state. Case in point is one Michigan judge who converted a youth's life without parole sentence into a life with parole sentence: **"Thus, the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise… If the U.S. Supreme Court considers the defendant in *Graham* as capable of one day demonstrating growth and maturity, its reasoning and analysis in making such a determination should surely apply to the Defendant here."** (Judge Gary C. Giguere, *People v. Jones,* vacating Anthony Jones' life without parole sentence, Dec. 21, 2011, 9th Circuit, Michigan)

ANTHONY JONES

Anthony Jones was 17 when he and two other teens planned to rob the owner of a local store. The owner resisted and one of Anthony's co-defendants, who had a handgun, grabbed the owner and a struggle ensued. While running away, Anthony heard the shot that killed the owner. He was charged as an adult and convicted of first-degree felony murder on the theory that he aided and abetted. Anthony received a life without parole sentence in 1979. His co-defendant, who shot and killed the owner was charged with second-degree murder and upon conviction received a life sentence with parole, making him eligible for release after 10 years. Anthony, who has served 33 years for his actions, is now awaiting parole review.

Criminal laws treating children as adults

Currently, Michigan is one of only seven states that mandates that a child as young as 14 be charged, tried, and sentenced as an adult for a homicide offense and, if convicted, be sentenced to life without any possibility for parole.[8] Under the current system, there is no opportunity for a judge or jury to ever consider the youth's lesser culpability, rehabilitative capacity or diminished risk to public safety.

But Michigan's criminal justice system has not always worked this way. Before 1988, charges against children under the age of 17 could only be filed in juvenile court. Prosecutors could ask a judge to waive 15- and 16-year-olds to adult court. In making the waiver decision, the judge was required to consider the seriousness of the offense, the youth's maturity and life experiences, prior juvenile record, amenability to treatment in a youth facility, as well as public safety and welfare.[9] And yet, once waived to adult court, a judge had no discretion but to sentence the youth to the adult punishment of life without the possibility of parole.

17-YEAR-OLDS

Michigan has long been in the minority of states who treat 17-year-olds as adults for purposes of criminal punishment. The majority of states (38) treat 17-year-olds as minors for both civil and criminal purposes.[10] 55% of youth serving LWOP in Michigan were 17 years old at the time of their offense and automatically treated as adults for purposes of charging, conviction and sentencing.

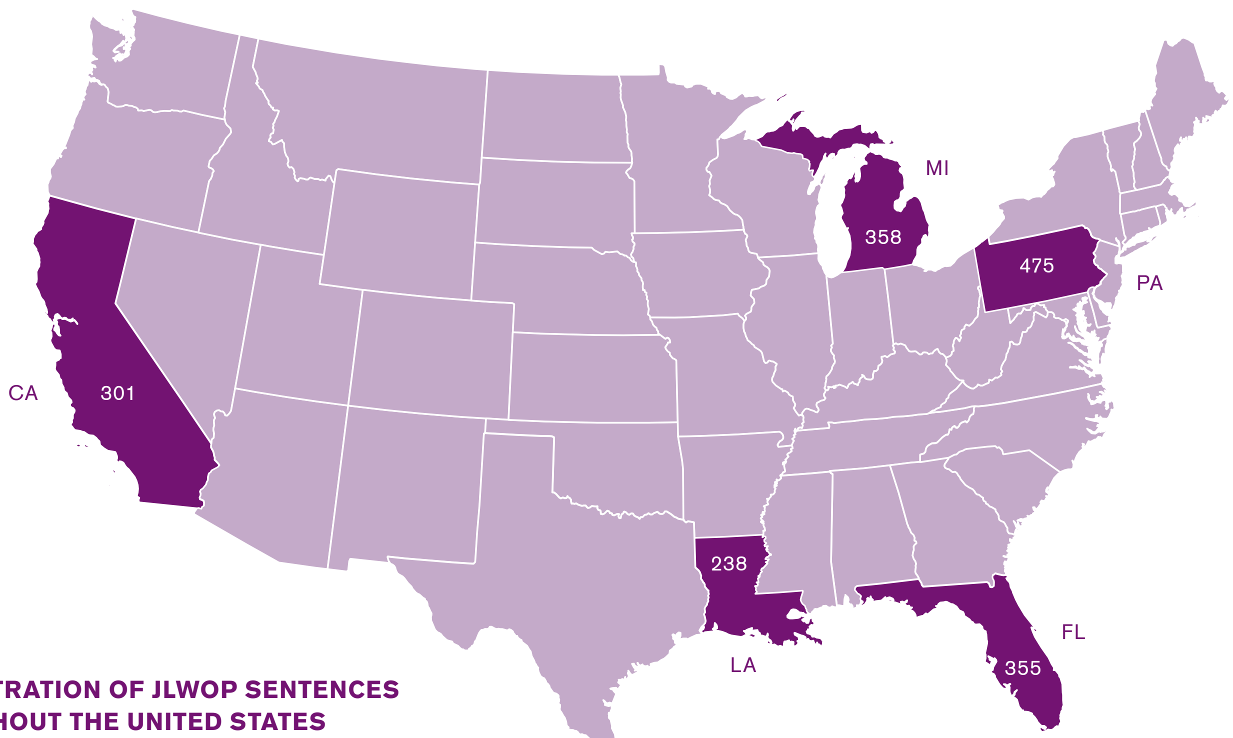


FIGURE 2
CONCENTRATION OF JLWOP SENTENCES THROUGHOUT THE UNITED STATES
Michigan and four other states account for two-thirds of all children imprisoned for life in the United States.

In 1988 the legislature eliminated the requirement of judicial waiver hearings in favor of automatic waiver. This allowed a prosecutor to file charges against 15- and 16-year-olds directly in adult court without any judicial review or consideration of their youthful status or circumstances. The direct file provision eliminated all opportunity for individual assessment before transfer to adult court. If convicted in adult court, the judge had limited discretion in sentencing. The judge could send the youth to a juvenile facility until release at age 19, or impose the sentence of life without the possibility of parole.

In 1996 the automatic waiver provision was expanded to include 14-year-olds charged with one of 12 crimes, including homicide. Any judicial discretion on whether a child, 14 and older, could be charged and tried as an adult was eliminated.[11] Once in adult court, the law now requires the judge to sentence the child as an adult, which means life without parole for first-degree homicide offenses.[12]

Michigan is among a minority of states that make life without parole mandatory for a juvenile accomplice who did not commit an intended homicide.[14] Under current Michigan law: **"The most sympathetic 15-year-old accomplice to a felony-murder and the most sociopathic adult serial killer will receive the same sentence, without any judicial ability to take stock of the difference between the two for sentencing purposes."** (Kimberly Thomas, University of Michigan Law School Professor)

One-third of youth currently serving life without parole sentences in Michigan did not themselves commit a homicide but instead were convicted for their lesser involvement as tag-alongs, lookouts, or for following the orders of adult co-defendants. These current sentencing laws are the kind that the U.S. Supreme Court has criticized: **"An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."**[15]

"DESIGNATION"

In 1996 the legislature created a little-used process called *designation,* which allows a prosecutor to decide to try youth under 17 in juvenile court with adult-like proceedings.[13] If the child, designated as an adult, is found guilty of a first-degree homicide crime, the judge may:

1. commit the child to a juvenile facility until age 21;
2. sentence the child as an adult, which means a mandatory life without parole sentence; or
3. give the child a "blended sentence," where the child is sent to a juvenile facility and then re-evaluated to determine whether adult sentencing is appropriate at a later date.

The only adult sentence available is still life without possibility of parole. The blended sentence allows the court to evaluate the youth's progress in juvenile programming at regular intervals before determining whether an additional adult sentence is appropriate. There is only one documented case of a child, between the ages of 14 and 17, being designated.

Adult time for adult crime: less than life

"Adult time for adult crime"[16] is the repeated public argument for punishing young people the same as mature adults. To understand the limitations of the argument, it is important to look at what prison time an adult in Michigan actually serves as a result of homicide conviction, in particular.

Each year hundreds of adults are charged with homicide crimes that mandate a life without parole sentence upon conviction. In Michigan, prosecutors offered the majority of those adults charged with a first-degree homicide a plea bargain for a lesser sentence in exchange for admitting their guilt. 62% of those adults charged with committing first-degree murder were plea bargained by the prosecutor to a lesser term of years or a parolable sentence.

The average prison time served by those adults who took a plea offer for their first-degree homicide charge was 12.2 years.[17] 12.2 years and then they were released. This is the actual "adult time for adult crime" in Michigan.

Plea agreements are a recognized, constitutional method of resolving criminal cases. A prosecutor may elect to offer a plea bargain in which the defendant admits his guilt in exchange

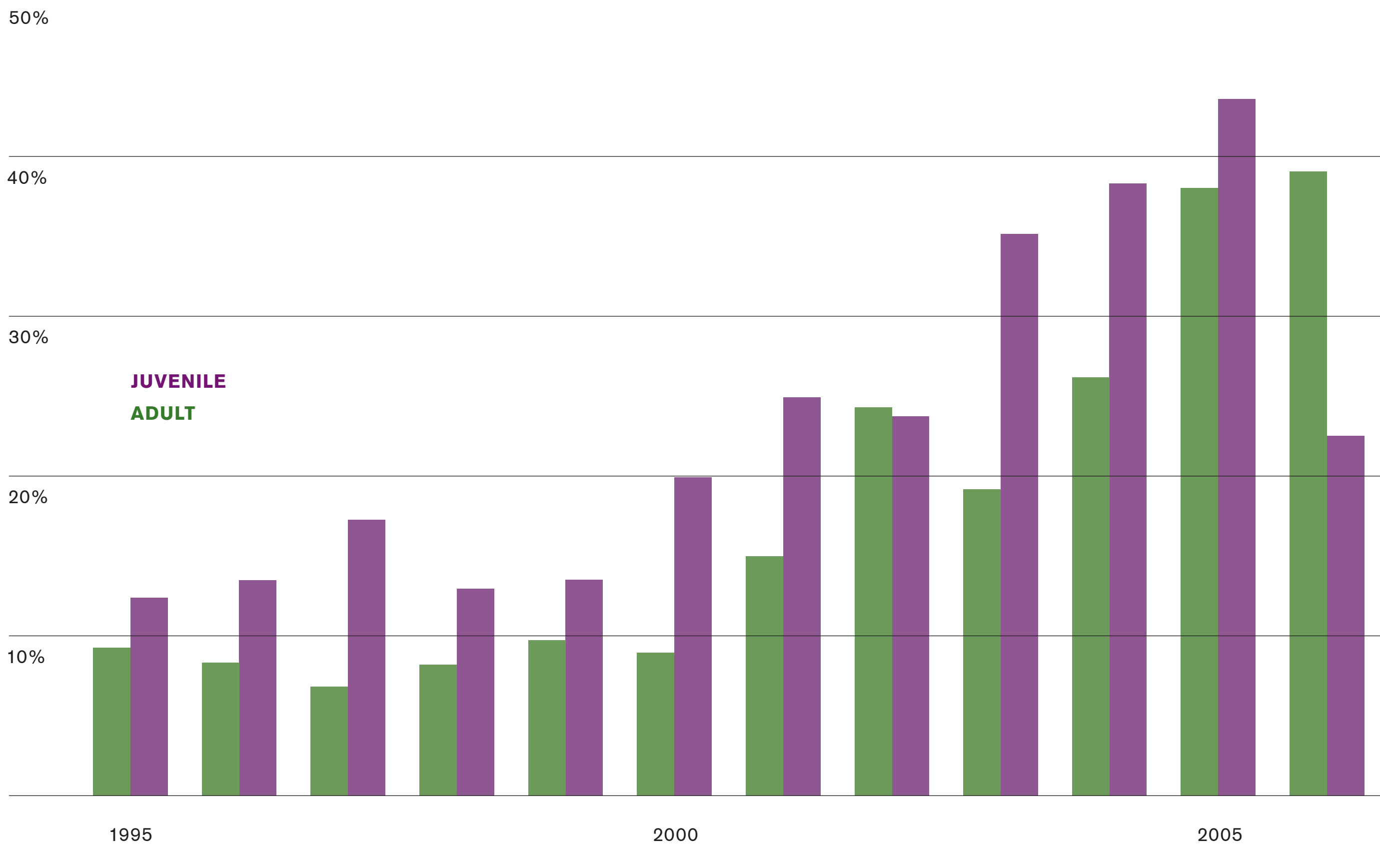


FIGURE 3
LWOP SENTENCING RATES OF ADULTS & JUVENILES FOR CRIMES OCCURRING IN MICHIGAN, 1995–2010

The LWOP sentencing rate for juveniles has outpaced that of adults during 12 of the past 16 years.

for a lesser sentence. Although statistics vary, guilty pleas account for roughly 75–90% of all criminal convictions.[18]

Unlike judicial decisions, there are no written rules or established guidelines on who is or is not offered a plea bargain. There are no legislatively defined parameters for prosecutors' decisions in the charging and very little oversight of the plea process. A prosecutor virtually has unlimited discretion over the plea bargains, making the decision on what crime to charge an individual with, what lesser sentence to offer, and to whom.

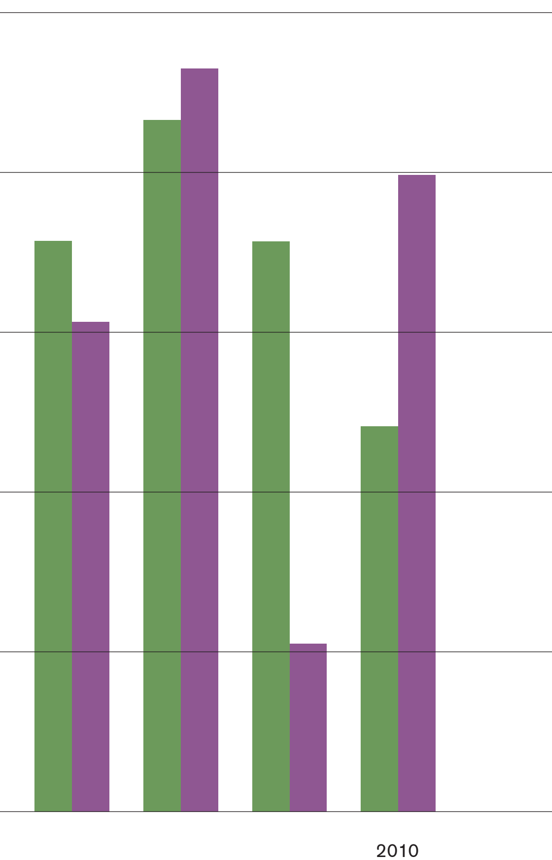
Plea bargaining has also been identified as one area where defendants facing criminal charges encounter racial bias. Nationally, it is reported that African-Americans, for example, have been forced to accept guilty pleas to more serious offenses than whites. Studies further show that African-Americans are offered fewer reductions in plea bargains than other defendants.[19]

Additionally, the U.S. General Accounting Office reports that in states studied, African-American children charged with violent offenses are 1.8–3.0 times more likely than white children to be tried in adult courts and, therefore, subject to the plea bargaining process.[20] (Michigan did not participate in this study and has not publicly reported on which juveniles prosecutors decide to treat as adults and which as children.)

No public record exists to demonstrate why prosecutors decide to treat some youth involved in homicide crimes as juveniles and others as adults. Because there is no appellate review of the decision making process, prosecutors are the only participants in the criminal justice system who decide whether a young person under the age of 17 will be sent to adult courts or will be protected and given the opportunity to receive counseling, treatment, education and rehabilitative programming in a juvenile detention setting until the age of 21.

The U.S. Department of Juvenile Justice and Delinquency Prevention has announced a plan requiring data collection on youth adjudicated as adults versus those treated as children, starting in 2012. The announcement stated that, "at this time, the only apparent reality is that prosecutors are increasingly treating young people as if they were adults."

The decision to charge a child as an adult, results in that child being processed through the complex adult criminal justice system. As the U.S. Supreme Court recognized, juveniles are less able to understand the criminal justice proceedings, causing them to work less effectively with their lawyers.[21] This lack of understanding has particular significance in the plea bargaining process, for which there is little judicial oversight.



I want my “life to be full of human dignity and commitment to others.”

ANTONIO ESPREE

“Juveniles have less ability to perceive and to evaluate risk than they will have at full maturity… similarly many youth make decisions based mostly on short-term outcomes rather than considering the longer consequences, more so than when they become adults. Not surprisingly, this immaturity may have a significant—and perilous—influence on youths’… decisions about pleas and plea agreements.”[22]

Adequate and skilled counsel is essential if a child is to understand the significance of a plea offer. Counsel must fully explain the relevant aspect of law so the youth completely understands the possible scenarios under which he or she can be convicted and the consequences of a conviction. For example, one Michigan court found that the defense counsel’s actions were objectively unreasonable when counsel did not explain to the defendant that he could be convicted of first-degree murder through an aiding and abetting theory, despite knowing his client’s hesitancy to plead guilty because he did not kill anyone.[23] The defendant stated that he would not have “gambled” his life standing trial if he had known he faced life in prison without parole.[24]

As the U.S. Supreme Court recognized recently in *J.D.B. v. North Carolina,* “a child’s age is far more than a chronological fact. It is a fact that generates common sense conclusions about behavior and perception.[25] Children are less mature than adults and they lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and are more vulnerable to outside pressures than adults.[26]”

There is no place where the disparity and inequity of being a child in an adult system is more in evidence than in the area of plea bargaining. Countless examples exist of young people who rejected prosecutors’ offers of lesser sentences—sentences that, if accepted, would have meant most of them would now be free. Time and time again, these adolescents said they simply could not comprehend the offer or the likely alternative and did not understand the consequences of their not taking the plea that was offered.

The very same reasons that young people are deemed too immature to enter into a civil or business contract should also apply when the contract involves their life.

JAMAR JOHNSON

When Jamar Johnson had just turned 16, he and his older brother were arrested for the murder of their little brother. Jamar’s older brother informed the police that Jamar was not the shooter and admitted his own guilt. During Jamar’s trial the prosecuting attorney offered him a plea deal of 15 years. When Jamar asked for advice, he recalls his

lawyer explaining that he thought they could successfully fight the charges and Jamar would go free. Jamar remembers believing that if convicted he would receive a “life sentence” which he understood meant 20 years. No one explained that, if convicted, he would be sentenced as an adult to a natural life sentence and would die in prison. Jamar turned down the plea and was sentenced to life without possibility of parole. Jamar has now served 21 years.

ANTONIO ESPREE

As a child, Antonio had no choice or ability to leave his environment, which was characterized by drug abuse and domestic violence. When he was 13 years old, Antonio began to hang out with his older brother and cousins who were involved in the drug trade. During the holiday break in 1997 Antonio went with two of his older friends to Ypsilanti for a drug deal, which ended in a shoot-out between the rival groups. Antonio was shot, but one of his friends and another young man were shot and killed.

Antonio was 16 years old and his only prior involvement with the justice system was for truancy and for running away from home. He and one of his older co-defendants were charged with first-degree murder. A third adult co-defendant was convicted of second-degree murder and became eligible for parole in 2010. Antonio was offered a plea. In exchange for pleading guilty to second-degree murder, he would receive a sentence of 25 to 40 years in prison. Antonio asked the older inmates he was housed with for advice. All of the inmates told him not to accept the plea because it was a scam that would later be used against him. Antonio, just 16 at the time, could not conceive of spending 25 years in prison and did not understand that the only sentence he could receive, if convicted, was life without parole. He rejected the offer.

Antonio has now served 24 years of his life without any hope of release. He expects to complete his Associate Degree in Domestic Violence Counseling and maintains a 3.85 GPA. Antonio also serves as Chairman of the Warden's Forum, a collaborative organization

comprised of inmates and prison administration. Despite his maturation, Antonio will never have the opportunity to demonstrate his rehabilitation, transformation and lack of threat to public safety.

BOBBY HINES

When Bobby had just completed the eighth grade, he went with two older youth to confront a man who was an alleged drug dealer and who had stolen a friend's coat. The argument escalated and one of the older youth pulled a gun and shot the man, who died from his wound. Both the shooter and 19-year-old co-defendant received second-degree parolable life sentences and will soon be eligible for release.

Bobby was charged as an adult even though he was the youngest; he did not have a gun and did not assault anyone. Ironically, because Bobby didn't shoot anyone, he was not charged with second-degree murder. Instead, he was charged with participating in a felony robbery and assault in which a homicide occurred. Felony murder in Michigan causes the same sentence as first-degree premeditated murder—life without parole. Bobby just finished middle school when he was charged and offered a plea bargain of 20 to 40 years in exchange for pleading guilty to a lesser charge of second-degree murder.

Bobby could not understand why he was being charged with first-degree homicide when the adult person with a gun—who shot someone—was charged with a lesser crime. He did not understand how he could admit guilt to second-degree murder when he did not shoot anyone. Bobby could not believe he would go to adult prison and did not understand the mandatory life without parole sentence. He also could not contemplate 20 years in prison. Not understanding the law or the consequences, he rejected the plea offer. Bobby was convicted of felony murder for his involvement and received the mandatory adult punishment for this crime: life without possibility of parole. Bobby has already served 22 years for his decision to go along that day, two more years than the prosecutor agreed would have been sufficient.

Plea bargaining: disparate impact on children

A prosecutor's decision to offer a plea requires a belief that a sentence less severe than life without parole is both appropriate and consistent with protecting public safety. While some prosecutors publicly assert that a life without parole sentence should be imposed on all juveniles convicted of first-degree murder, 74% of juveniles who committed homicide offenses were initially given the opportunity to plead guilty to a lesser change. The number of years offered in exchange for guilty pleas ranged from two years to parolable life (with parole eligibility beginning after 10 or 15 years).

Some prosecutors do understand that the state's treatment of young defendants is in desperate need of reform. Instead of the harsh, mandatory structure that exists under current law, they argue that the system should provide greater discretion and consideration for review when a child's life is at stake.

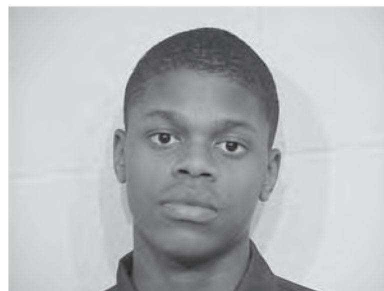
"The uniquely harsh punishment of juveniles in Michigan is inconsistent with the principles I have seen in residents of this state." (Mark Osler, former Federal Prosecutor in Michigan, now serving as a Law Professor at the University of St. Thomas Law School in Minneapolis, Minnesota)

They also fully comprehend the gravity of the juvenile life without parole sentence, acknowledging that it is not the proper punishment for all youth accused of serious homicide offenses.

"A juvenile's level of participation in a crime should be considered. Cases where a juvenile was a major participant in a violent crime but not the person who pulled the trigger. That's where I think it lies with the prosecutor and the judge to say, even though [the juvenile] is guilty of that offense, I'm going to take away the possibility of life without parole by charging the juvenile with an offense such as second-degree murder, which is punishable by up to life in prison but with the possibility of parole." (Jeff Fink, Kalamazoo County Prosecutor, "No one here gets out alive," *Kalamazoo Gazette,* Nov. 6, 2011)

When a prosecutor decides to issue the complaint and warrant, a child is automatically tried in adult criminal court. This means there is no judicial hearing in which evidence is presented on the record and no appealable written opinion is issued showing the reasons for adult court filing. There are no standards or evidence-based practices for charging and the prosecutor is not obligated to consider the child's family history, mental capacity, school records, or youthful status. This system causes inequity in both sentencing and plea offers.

Judge Mark Janer contends that, **"when you realize the number [of lifers] who didn't do the killing, you realize it's too harsh a penalty. It would be best to individualize the cases and allow judges to determine if they get a shot at parole."** Abolishing the life without parole sentence does not mean nor does it guarantee that all imprisoned juveniles will earn parole or be released. Providing a meaningful opportunity for release based on an individual's demonstrated maturity and rehabilitation is just that: an opportunity. Judges in Michigan retain veto power for those who have parolable life sentences and the parole board must still decide whether an individual should be paroled under established guidelines.[27]



"My attorney told me I was offered a plea, but my mother told me don't take it because I didn't do it." (Dontez Tillman, the youngest juvenile ever sentenced to life without parole in Michigan. Dontez was 14 years and 87 days old when he was charged as an adult with felony murder. Dontez was convicted and sentenced to spend the rest of his life behind bars.)

Juveniles are at a serious disadvantage in negotiating and understanding plea offers because of their very youthfulness, immaturity, inexperience, and failure to realize the consequences. Many have reported that they did not fully understand the nature of the charges they were facing, the crime they were on trial for, or the meaning of parole. As such, they do not comprehend the value of the pleas offered and rejected them at a much higher rate than adults.

A prosecutor's decision to plea bargain does not appear to be linked to a level of the defendant's involvement in the crime, their age, prior juvenile record, the existence of an adult co-defendant, or troubled family history. Only a minority of counties appear to offer pleas based on participation in the offense. The young people who were the primary participants and those who did not actually commit a homicide were offered pleas at roughly the same rate. However, the young people who did not actually commit the homicide were less likely to accept a plea than those who did the killing. Many asserting their belief that they would not be punished with a life sentence because they did not kill anyone.[28]

"I practically begged [my client] to take [the plea agreement to a lesser charge] but [he] turned it down... and now this young man who is 15 years old is going to spend the rest of his life in prison and it's a tragedy." (Larry Phelan, defense counsel for Cedric King, Kent County)

Some juveniles reject a plea offer based on the well-meaning but untrained advice of a loved one. Some received ineffective assistance of counsel. For many, the limitations of their young mind impaired their ability to fully understand the consequences of rejecting a plea offer. Most children cannot imagine a life beyond age 20 and, to an adolescent, the thought of spending a term of 15 years behind bars is literally unimaginable. They simply cannot fully understand or comprehend the real possibility of lifelong incarceration.

DEON HAYNES

Deon Haynes had never been in trouble with the law. He was 16 and had just finished the tenth grade at Saginaw High School, when he and two friends went out to eat. Two of the boys concocted a plan to break into the house of an acquaintance and steal money they saw there a day earlier. Deon states he was present for the plan but stayed in the car when the other two boys broke into the house and shot one of the residents.

The teen that shot the homeowner pled guilty to assault with intent to commit murder and was sentenced to a term of 23 to 50 years. He will likely be released in 2014. Deon, who insists he never entered the home, was charged as an adult with first-degree homicide. On the advice of his attorney,

he rejected a plea offer of 15 to 30 years because he was innocent of the homicide and did not understand he could receive a life without parole sentence for felony murder. His case was tried twice and two separate juries could not agree on his guilt, resulting in mistrials. Deon was tried a third time and, after only three days of testimony, was convicted of felony murder and sentenced to mandatory life without parole. He has now spent nineteen years in prison, five years more than the prosecutor thought appropriate. Absent any reform of the laws, Deon will spend the remainder of his life behind bars.

Nearly 100 children in Michigan who were offered plea deals for early release and turned them down now have no meaningful opportunity for release. Unless there is reform, these young offenders will die in prison despite the fact that there is little difference between the crimes they committed and those committed by other adolescents and adults, who today are free after serving fewer than 15 years in prison for their crime.

"Our challenge as we redesign the juvenile system is to create a bridge with the adult system that prevents dangerous youthful offenders from slipping through the crack. We must also effectively balance deterrence and public safety concerns with a young offender's potential for rehabilitation." (Former Governor John Engler, addressing the purpose of his 1996 Juvenile Justice Reform Action Plan for Michigan)

38% of all young people serving life without parole in Michigan had no prior criminal record in juvenile or adult court. This supports the assumption that which defendants are offered a plea appears to be based largely on circumstances unconnected to their perceived dangerousness. Rather, the geographies of where the crime was committed had a significant impact on whether a plea was offered, with Calhoun, Oakland, and Saginaw counties offering pleas at a rate far below the state average.

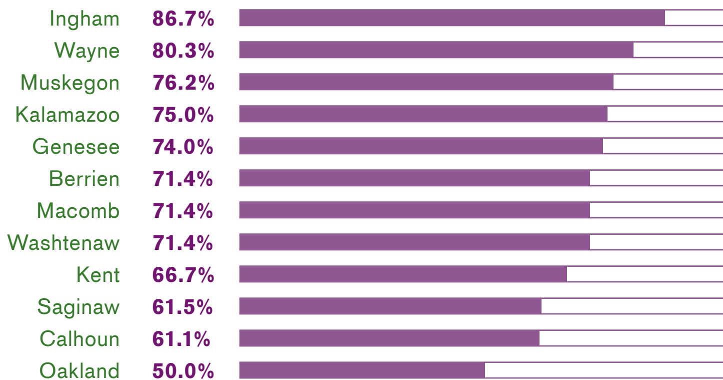


FIGURE 4

GEOGRAPHIC DISPARITIES IN PLEA OFFER RATES FOR YOUTH CHARGED WITH FIRST-DEGREE HOMICIDES

Where the offense is committed dramatically impacts the length of time a youth will serve in prison.

JEROME WALKER

Despite the turmoil and instability in his home life, Jerome managed to finish the ninth grade before dropping out of a Detroit public school. Without school or any parental guidance Jerome became involved in a youth gang. In 1998 he went to rob a house, believing it to be unoccupied. When confronted by the homeowner, Jerome shot and killed him. Charged as an adult with first-degree murder, the prosecution offered Jerome a plea deal on two separate occasions that would have had him serve 15 to 30 years

in prison. He rejected the offers. Jerome says that he did not understand the offers and did not realize that by continuing to fight his case, he was facing a possible lifetime behind bars. Jerome was convicted and sentenced to life without parole.

Self-improvement became very important to Jerome. Since his incarceration, he has completed his GED and has now exhausted all institutional certification programs. Jerome also loves to write and is currently working on a series of novels for at-risk youth that he hopes will be published one day. Although he has not been in contact with his victim's family, Jerome has tattooed the man's name on his chest as an expression of his remorse. He says it also serves as a constant reminder of both the life he took and his obligation to change and give back.

Racial disparities in pleas and sentencing

Nationwide, racial disparities appear at each juncture of the criminal justice system. In Michigan, 73% of those youth serving life without parole are children of color, despite their only representing 29% of youth in Michigan. Nationwide, black youth represent just 28% of juvenile arrests,[29] yet they account for 35% of juvenile defendants waived to adult court.[30]

Since there is no reported public data in Michigan on which youth offenders' prosecutors choose to divert to the juvenile courts, compared to those sentenced in adult court, the complete data on racial disparities is unknown. With no established criteria or judicial oversight, this lack of transparency raises a number of concerns.

In the area of plea bargaining and youth charged with homicide crimes in Michigan, the data that is available shows some racial disparities for those youth sentenced to and serving life without parole as adults. Across the state, there is a significant difference in the rate of pleas offered to adolescents based on the race of the victim. Youth accused of a homicide offense where the victim was white were 22% less likely to receive a plea offer than in cases where the victim was a person of color.

In the context of the death penalty, studies consistently show that the decision to offer a lesser punishment is influenced when the race of the victim mirrors the race of the decision maker, but the circumstances of the homicide and the criminal history of the defendant are otherwise similar.[31] 96% of the publicly elected prosecutors in Michigan are white. Prior to 2004, only one of the 83 prosecutors in Michigan was a person of color and all but three were male. Currently there are two prosecutors of color and 13 who are women.

Historical narratives on race relations suggest that prosecutors perceive violent crimes against whites as more serious and threatening than those committed against blacks, resulting in harsher punishments.[32] In some counties across the state, the racial disparity in plea offers by prosecutors is more pronounced.

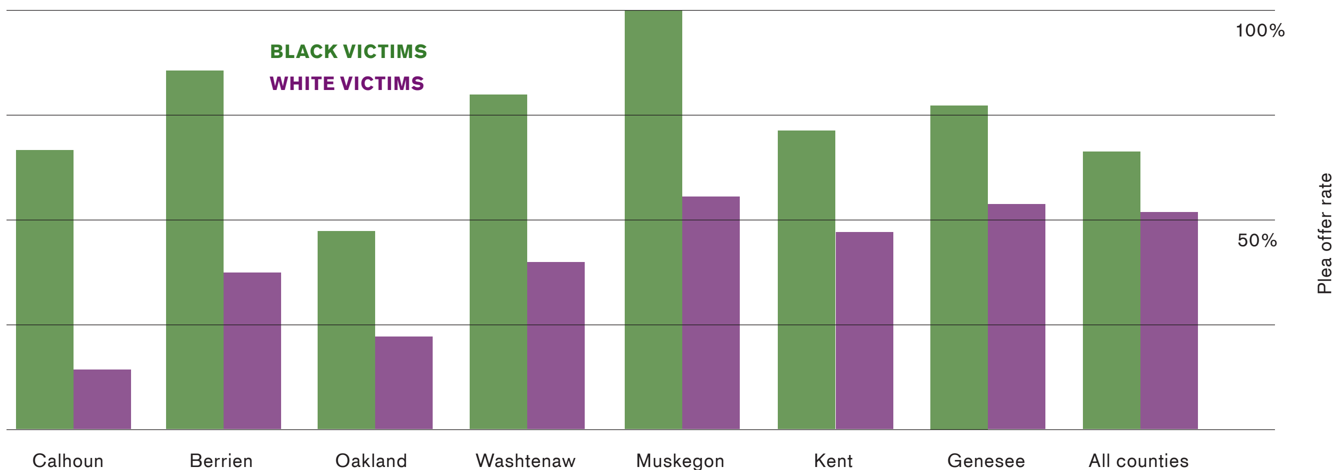


FIGURE 5
RACIAL DISCREPANCY IN PLEA OFFER RATES

Counties in Michigan with the widest discrepancy in plea offer rates based on the race of the victim. Throughout the state youth with white victims were 21.8% less likely to be offered a reduced sentence than youth whose victims were black.

Sometimes who is offered a plea and who is not depends more on who is better equipped to negotiate a deal.

ERNEST DAVIS

Ernest Davis was 17 in 1984 when he went with his uncle—who, at 34, was twice his age—and two other co-defendants to rob a man of drugs and money. His uncle, Larry Davis, was the planner of the crime and the one who shot and killed the home-owner. Mr. Davis, who had served two prior prison sentences as an adult, knew the system and negotiated a plea offer for parolable life, making him eligible for release after 10 years. Ernest Davis, a youth with no prior juvenile or adult records, was in the eleventh grade and was never offered a plea for a lesser sentence. He was tried and convicted as an adult for first degree murder under the aiding and abetting theory and received the mandatory life without possibility of parole sentence.

NICOLE DUPURE

At 17, Nicole Dupure left home to live with her 19-year-old boyfriend Tommy, who was kicked out of his house. Tommy worked on a plan to get money to pay for a place for them to stay. The couple stopped at a Big Boy restaurant next to an apartment complex, where an elderly woman lived that Nicole frequently looked after. Tommy excused himself, saying he had to use the restroom, but instead left the restaurant and went next door to rob the woman. Nicole remained in the restaurant. Tommy later admitted to stabbing and killing the elderly lady during the robbery. Two years later, after an evaluation deeming him competent to stand trial and an unsuccessful motion to suppress his confession, Tommy implicated Nicole in the offense, hoping to get a good plea bargain. Police did not consider Nicole a suspect in the crime until Tommy accused her of being involved. At her trial, Tommy admitted, "I never had the intentions to pin it on her until I ran out of options." Tommy was offered a plea to second-degree murder in exchange for his testimony against Nicole and will likely be eligible for release before his 40th birthday. Nicole was convicted of felony murder in Macomb County and sentenced to life without possibility of parole. Nicole maintains that she had no involvement in the crime and unlike Tommy, who admittedly committed the homicide, Nicole was never offered a plea bargain.

It is rarely the juvenile and almost always an older co-defendant who is able to negotiate their way through the system and make a good plea bargain.

KEVIN BOYD

Kevin Boyd was 16 when his mother, who admitted to killing his father, initially implicated Kevin instead of her lover as her partner in the crime. After five hours of intense interrogation alone, and having been told that his mother had accused him, Kevin confessed. Kevin was charged as an adult with the murder of his father, a white male, and was never offered a plea. Kevin asserts the confession was false and believed the police would surely discover he had stayed at a friend's house all night,[33] but during the rigorous interrogation he confessed only after the police told him that everything would go smoothly and that he could go home if he just said he did it.

Kevin was charged as an adult with first-degree premeditated murder. Kevin could not believe what was happening and while held in a juvenile facility, he was diagnosed with severe depression and put on 24-hour observation after trying to hang himself. Kevin was convicted and given the adult sentence of life without parole.

On appeal, the court initially reversed his sentence stating, "Although defendant committed a very serious offense, experts testified at the sentencing hearing that defendant was a model prisoner, an excellent student, amenable to treatment, unlikely to disrupt the rehabilitation of other juveniles, not a danger to the public and remorseful for his actions." (Per Curiam Opinion, Oakland County Circuit Court, *State of Michigan v. Kevin Boyd,* 1998 WL 1991584, at *2 [Mich. Ct. App. June 5, 1998]). Without explanation, the court reversed itself three months later and reinstated Kevin's life without parole sentence. Kevin's mother is serving a life without parole sentence and admits she lied about Kevin's involvement to protect her lover.

Kevin has now served 26 years of his life sentence. He is currently a school porter but is no longer eligible for any other vocational programs due to life sentence. He spends his free time in prison writing music. One of the most rewarding experiences for Kevin is the work he does with younger inmates as part of a mentorship program within the prison. He provides guidance and tutors the younger inmates to help them get their GED and stay on track while in prison.

MICHIGAN CITIZENS CALL FOR REFORM

"I don't want somebody young and immature to be put away and also costing us more and more dollars to support them in prison when maybe if given a second chance could be a productive person and be functional in society." (Michigan citizen participating in a 2005 independent focus group on youth sentences)

"The 'mandatory' does not let the people there take into consideration the background of a particular case. I have a major problem with the mandatory part… I think it should be the possibility of parole in every case. That doesn't mean it will happen. The possibility should be there." (Michigan citizen participating in a 2005 independent focus group on youth sentences)

Michigan's inadequate indigent defense impact on youth in the adult system

Among youth charged with homicide:

75%

were represented by court-appointed counsel because their family could not afford to hire an attorney

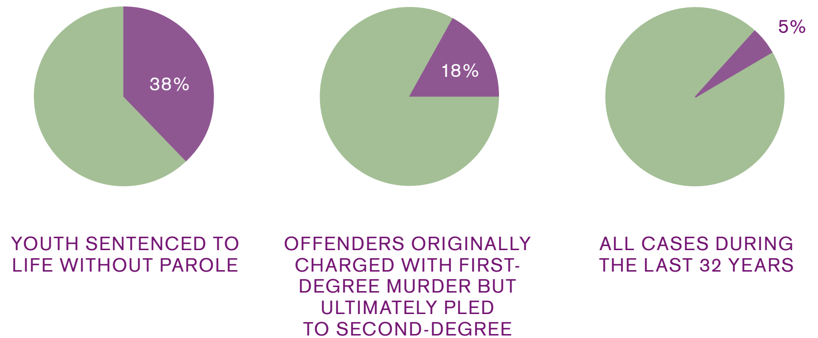


FIGURE 6

"The features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation." (Justice Kennedy, *Graham v. Florida*)

In the juvenile justice system, a guardian is appointed to act in the best interests of the child and assist in negotiating all aspects of the system. But in adult court, a child with no resources of their own relies heavily on court appointed counsel. Yet court appointed counsel in criminal proceedings receive no training in issues specific to juveniles. Attorneys receive no assistance to deal with the youth's immaturity, inexperience, and low level of competence, which renders child defendants less capable of meaningful participation in the adult legal process. Michigan's acknowledged troubled and ineffective public defense system especially disadvantages these young people.

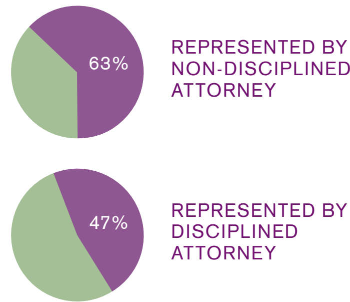
Additionally, many youth are negatively impacted by the conditions under which they are held pre-trial. A child held in a county jail facility is required to be separated from adults by sight and sound to protect them from predatory behavior of adults.[34] However, this federal regulation usually results in the child being held in isolation for months and in some instances, over a year. As a result of the severe psychological

Youth represented by a non-disciplined attorney were:

43%

more likely to accept a plea offer than youth represented by a disciplined attorney

PLEA OFFER RATES FOR YOUTH



Black defendants receiving a life without parole sentence were:

421%

more likely than white defendants, who negotiated a lesser sentence, to have been represented by a disciplined attorney

impact of solitary confinement, child defendants have a decreased ability to participate in their own defense.[35]

An attorney representing youth should be skilled in both juvenile justice and adult criminal proceedings, and knowledgeable of the interaction of the two systems and laws. But unlike many other states Michigan requires no specific training for representing an individual facing a murder charge and any person who has passed the bar, irrespective of a lack of experience or training, may represent a child charged with murder and facing life without parole.

Attorneys who have represented youth convicted and sentenced to life without parole in Michigan have an abnormally high rate of attorney discipline from the State Bar of Michigan, which polices attorneys.[36] In any given year, 0.3% of all attorneys are reprimanded, but 38% of counsel representing youth sentenced to life without parole have been publicly sanctioned or disciplined by the Michigan Bar Association for egregious violations of ethical conduct.

One proponent of correcting the state's public defense system is Michigan Governor Rick Snyder. On October 13, 2011, he issued an executive order creating a commission focused on improving legal services provided to Michigan's poorest communities. Appointed to the committee are members of the judiciary, attorneys, local governments, and the general public.

"A core principle of our criminal justice system is the guarantee that an individual charged with a crime be entitled to legal representation, even if they are unable to hire private counsel. The Commission will work to ensure that all criminal defendants receive effective assistance of counsel." (Governor Rick Snyder[37])

JAMIL ALLEN

Jamil was raised by relatives in Detroit. As a teen, he spent most of his time with a cousin. A youth gang in the neighborhood routinely bullied both boys and Jamil was beaten and robbed on multiple occasions. Finally, heeding the advice of his uncle, Jamil and his cousin decided to stand up to their tormentors. Jamil and his cousin took a gun for protection and during a fight Jamil shot and killed one of the boys.

In adult court Jamil had two trials—the first ending in a mistrial. Neither of Jamil's attorneys met with him until the day of trial and they did not call any witnesses on his behalf. Jamil did not understand that he was supposed to participate in his own defense. Jamil does not believe he was offered a plea, but is not sure. When Jamil was convicted of first-degree murder, he did not understand that he would spend the rest of his life behind bars. Instead, he believed a "life sentence" meant he would be released in 10 years.

Upon his placement in an adult prison, older prisoners repeatedly victimized the 16-year-old Jamil. Since entering prison Jamil has earned his GED and taken classes in legal writing and journalism.

Jamil is now 41 years old, and has been incarcerated for more than half of his life.

GREGORY WINES

Gregory had a dysfunctional family environment with a drug-addicted mother and a father intermittently hospitalized for mental illness. His grandmother obtained legal custody when he was five. As a child he was diagnosed with various emotional and behavioral challenges, and was enrolled in long-term counseling from an early age. When he was 16, Gregory learned that his girlfriend was pregnant. The teens decided to run away together and devised a plan, with an acquaintance named Stephen, to steal a car and drive out of state. The planned robbery escalated when Stephen brandished a gun and shot the owner of the vehicle. Gregory and his girlfriend escaped from Stephen's company and called the police to report the killing. They cooperated fully with the investigation, even locating the shell casings from the shooting.

Gregory was offered a plea to second-degree murder in exchange for his admission of guilt but rejected the offer, explaining that he could not confess to a shooting he did not commit. Gregory did not understand that, under the law in Michigan, his participation as a child in the planned robbery subjected him to the same punishment as an adult shooter—life in prison. He simply did not grasp that the justice system would sentence him to die in prison. Both Gregory and Stephen received the same sentence: life in prison without any possibility of parole.

An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.

SUPREME COURT JUSTICE ANTHONY KENNEDY
Graham v. Florida

CEDRIC KING

Cedric's mother raised him as a single parent until she died when he was six years old, and he was sent to live with his father. At age 11, after his father became incapable of caring for him, Cedric became a ward of the state where he was passed around to a series of group homes. At age 14, Cedric ran away at the urging of his 28-year-old brother Marc, who resided in Michigan.

When Cedric arrived in Michigan, Marc took him to the apartment of a man who had stolen some clothes from them. Cedric was joking around with another man at the apartment when an argument ensued and his brother shot the man in the thigh. Cedric did not have a gun nor did he shoot anyone. The man his brother shot did not die or sustain any life threatening injury. However, at age 14, Cedric was charged in Kent County with conspiracy to commit first-degree murder, which carries a life sentence. Cedric had no funds and was assigned a lawyer who told Cedric he could get a plea bargain of seven to ten years, but he would have to testify against his brother. Cedric would not testify against his brother. At the time of his trial, Cedric could not read or write and did not understand most of what happened during his trial. Nor did Cedric realize he was being tried as an adult and faced a sentence of life in prison for his actions that day.

Cedric was continually misidentified as being 15 years old. The trial lasted ten hours, no witnesses were called on his behalf, and Cedric was convicted of conspiracy to commit first-degree murder, sentenced to what the judge described as a natural life, and placed in an adult prison. Because his brother Marc was twice Cedric's age, and was designated as a habitual offender, he was convicted of assault with intent to commit murder and received a parolable life sentence.

Cedric is now 28 years old. He has spent more than half of his life behind bars for a crime in which he was just a 14-year-old tagalong, was not the shooter, and where no one died. The prosecutor was willing to have Cedric released after seven years, at the age of 21. Had he been tried as a juvenile, Cedric would have been sent to a youth facility, received an education, gotten counseling, and released at 21 years old. But because he was tried as an adult, the court had no choice but to sentence him to life in an adult prison. Cedric has no date of release.

The State of Michigan provides no funding, oversight, standards, or written guidelines to ensure that all criminal defendants receive adequate assistance of counsel.[38] Michigan is one of just seven states in the nation where funding for trial-level indigent defense is the sole responsibility of each county. While some counties choose to compensate public defenders at a flat rate, others elect to contract services out to private firms. Hourly compensation is $50 and flat-rates fall between $300 and $400 per trial, regardless of whether the defendant is accused of petty theft or murder.[39]

Already disadvantaged by an inability to meaningfully participate in their own defense and hampered by inadequate representation from counsel with insufficient resources to mount a proper defense, juveniles are left trying to navigate an adult system where the only hope of escaping a life without parole sentence lies with the unfettered discretion of a prosecutor. For at least two counties in Michigan, the prosecuting attorney's budget is nearly double the county's indigent defense budget.[40]

Who a juvenile defendant has as a defense counsel (and other factors unrelated to a youth's actions) can have a severe impact on both the conviction rate and length of sentence for juvenile defendants accused of homicide. It comes as no surprise, then, that a recent study conducted by the RAND Corporation confirmed that the skill of counsel directly affects both conviction and sentence rate.[41]

GIOVANNI CASPER

In 2006 Giovanni Casper was in the tenth grade when he attended an event at a local roller rink with his friends. A fight broke out early that night between Giovanni, his friends, and another group of teenagers, but was broken up by employees. Another fight began when Kenneth Dear approached Giovanni and began throwing punches.

Upon arrest, police interrogated Giovanni for hours without a parent present. The officers wrote out a statement and told Giovanni that if he signed it, he could go home. At the time of his arrest Giovanni was functionally illiterate. At trial, testimony was given stating that Giovanni was standing in front of Kenneth Dear at the roller rink when Dear suffered a single, fatal gunshot wound to the chest. The prosecution argued that although no one saw a gun in Giovanni's hand, his proximity to the victim and the testimony of prior bad blood between the two teens was sufficient to sustain a conviction. Giovanni was automatically charged and tried as an adult and subsequently convicted of first-degree premeditated homicide. Giovanni was sentenced as an adult to mandatory life without parole.

Giovanni did not meet with his court appointed attorney until the first day of trial. His attorney did not call any witnesses on his behalf and, against his wishes, would not allow Giovanni to testify. Giovanni's attorney never informed him that a plea was offered. When Giovanni received his paperwork after sentencing, he learned that the prosecutor had proposed a term of 13–22 years in exchange for a guilty plea. Giovanni remembers that his attorney asked him to sign a number of papers during trial but, because he could not read, he did not realize he was rejecting a plea offer.

Since his incarceration Giovanni has learned to read and write, and has also obtained his GED. He is in the fourth year of his sentence and will spend the rest of his life in prison.

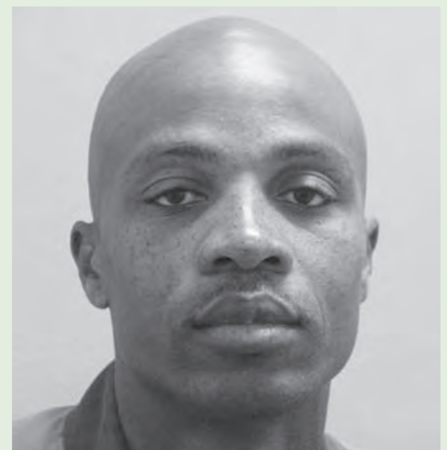
The features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation.

SUPREME COURT JUSTICE ANTHONY KENNEDY
Graham v. Florida

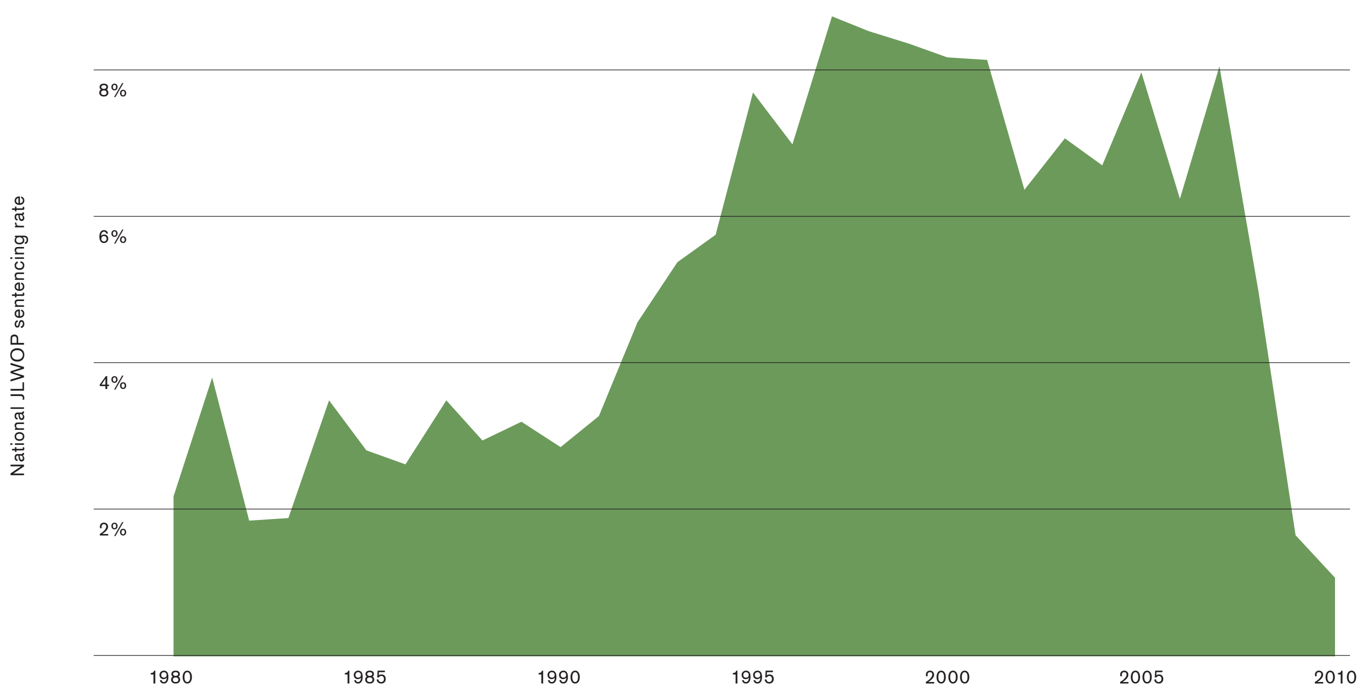
BEKEIBA HOLLAND

Bekeiba Holland was 17 years old when he was accused of accompanying his older brother and his brother's 19-year-old friend to commit a break-in at a known drug house, during which two people were killed. Although Bekeiba declared his innocence, the prosecutor produced a witness who claimed to have seen Bekeiba with the other two defendants. The two adult co-defendants were convicted of first-degree homicide and Bekeiba was convicted of aiding and abetting. All, including Bekeiba, received life without parole sentences. Bekeiba has claimed that he was never at the scene, did not know the victims, and is completely innocent.

Bekeiba's family hired an attorney who did not present testimony of witnesses who would have provided Bekeiba with an alibi. This attorney, who had several previous disciplines, was finally disbarred a few years after Bekeiba's trial.



Evolving standards of decency & Michigan's exceptionalism



In the late 1990s the laws that governed youth punishment became increasingly harsh, as states like Michigan began to treat children as adults. The most severe sentence available for any adult in Michigan—life without parole—was increasingly imposed on young people and peaked in 1998.

FIGURE 7 (ABOVE)
THIRTY YEARS OF NATIONAL JLWOP SENTENCING
JLWOP sentencing rates in the United States (1980–2010) according to year of offense and adjusted for reported homicides.

W. Virginia 0
Vermont 0
Rhode Island 0
New York 0
New Mexico 0
New Jersey 0
Montana 0
Maine 0
Kentucky 0
Kansas 0
Hawaii 0
Alaska 0
Wyoming 1
Utah 1
N. Dakota 1
Ohio 2
New Hampshire 2
Idaho 4
S. Dakota 5
Oregon 5
Connecticut 5
Delaware 10
Tennessee 12
Maryland 21
Washington 30
Oklahoma 39

Since then, our nation's understanding of adolescent development, theories of punishment, and judicial rulings have resulted in more children being treated as juveniles. Fewer states are now willing to impose the life without parole sentence on its youth.

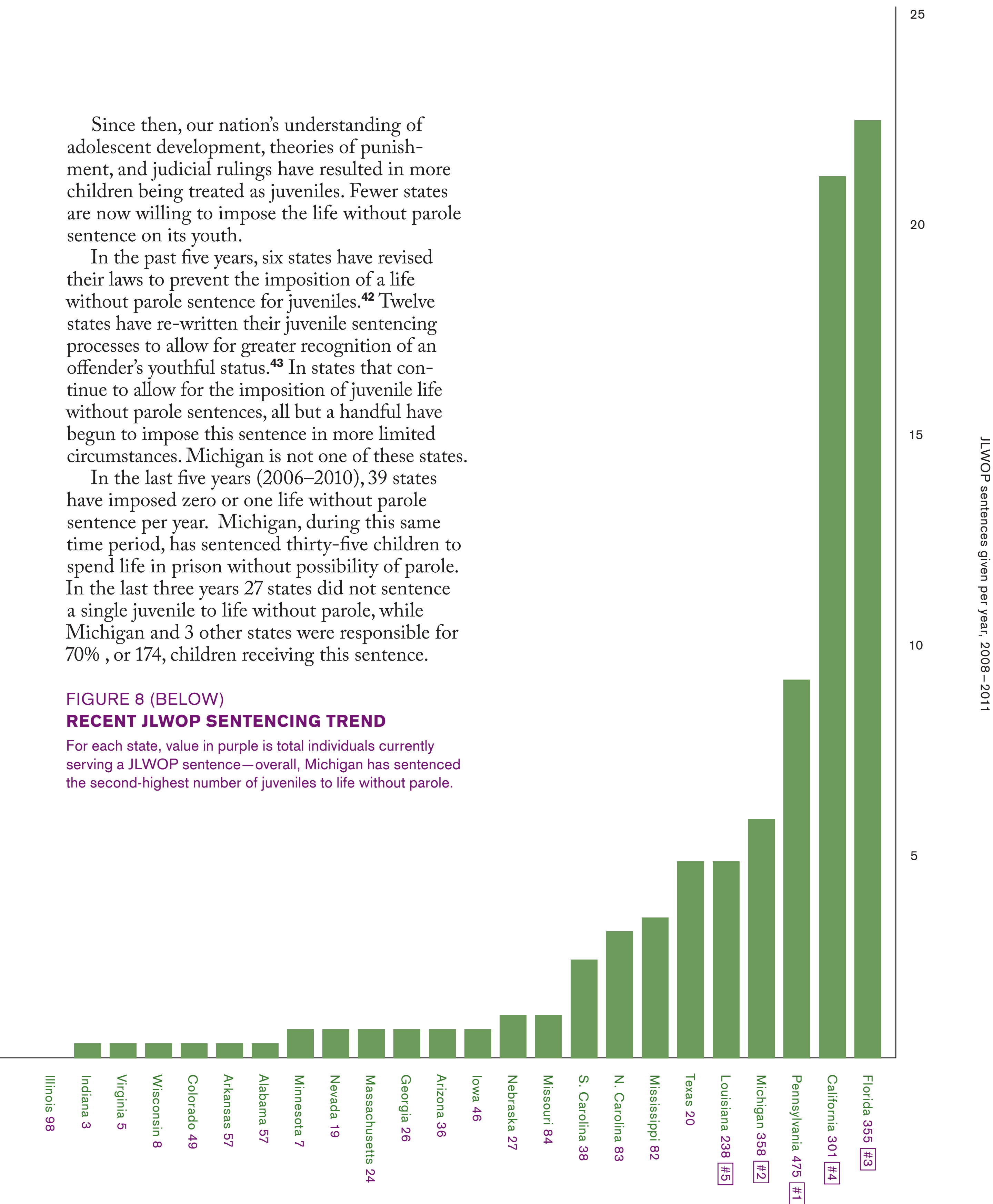
In the past five years, six states have revised their laws to prevent the imposition of a life without parole sentence for juveniles.[42] Twelve states have re-written their juvenile sentencing processes to allow for greater recognition of an offender's youthful status.[43] In states that continue to allow for the imposition of juvenile life without parole sentences, all but a handful have begun to impose this sentence in more limited circumstances. Michigan is not one of these states.

In the last five years (2006–2010), 39 states have imposed zero or one life without parole sentence per year. Michigan, during this same time period, has sentenced thirty-five children to spend life in prison without possibility of parole. In the last three years 27 states did not sentence a single juvenile to life without parole, while Michigan and 3 other states were responsible for 70% , or 174, children receiving this sentence.

FIGURE 8 (BELOW)

RECENT JLWOP SENTENCING TREND

For each state, value in purple is total individuals currently serving a JLWOP sentence—overall, Michigan has sentenced the second-highest number of juveniles to life without parole.



Michigan has the second highest number of children in the world sentenced to spend their life in an adult prison without possibility of parole.

KARY MOSS
Director, ACLU of Michigan

Michigan continues to have the second-highest number of juveniles serving life without parole in the country. This is not because the state has a higher youth population, or because Michigan young people commit more crime. To the contrary, juvenile arrest rates in Michigan are actually lower than national averages.[44] Despite the fact that children in Michigan account for merely 3% of the nation's youthful population,[45] our state accounts for nearly 14% of all children sentenced to life without the possibility of parole. Even Texas, despite its notorious reputation for harsh punishment, recognized the indecency of designating any child irredeemable and abolished its life without parole sentence for youth in 2009.[46]

What is different in Michigan is the automatic treatment of 14- to 17-year-olds as adults for a wide range of homicide related offenses, the requirement that 17-year-olds be treated as adults for all criminal charges, and the mandatory sentence of life without possibility of parole for all youth convicted of 1st degree homicide related offenses.

Absent a change in Michigan allowing adolescents to be viewed individually and constituent with their child status, the state's harsh, mandatory laws will continue to push Michigan to lead the nation in these sentences.

"Well, the first thing the Court is going to say, I don't know what good it will do, I find the limitations of this statute to be totally unfair to everyone concerned. However, I have to live with them and deal with them… So looking at all of it, I don't think I have a choice. I think I must sentence him as an adult, and I am going to impose a life sentence on the first count of first-degree felony murder… I have no choice." (Hon. Clarice Jobes, sentencing 16-year-old Jose Miguel Burgos to life without possibility of parole for his involvement in a shooting that occurred during an intended drug transaction)

"There are two sides to the argument [of youth sentencing]. On one hand, the people who would participate in that conduct are extremely dangerous. On the other, you're basically throwing the kid away… I have no problem keeping someone in prison who ought to be there… But, ten years later, someone ought to be able to look at it and see if [imprisonment] still makes sense." (Bay County Circuit Judge Harry P. Gill, "Locked up for life," *The Bay City Times,* Nov. 6, 2011)

FIGURE 9

COMPARING MICHIGAN & NATIONAL TRENDS

Best-fit lines for Michigan and the rest of the nation (excluding Michigan) according to the year of offense. Both data sets adjusted for homicide arrests.

The cost of Michigan's laws and practice: human rights and fiscal responsibility

Michigan sentences 30% of its youth arrested for 1st degree homicide crimes to live the rest of their lives behind bars. This despite the fact that one-third of these young people did not themselves commit a homicide. Michigan inflicts this punishment on its youth at a rate four times greater than the rest of the nation, which imposes life without parole in just 7% of cases.

In Michigan there is no review mechanism to evaluate youth to determine if, upon maturity, they can safely return to the community. As a result, Michigan spends over $10 million a year incarcerating individuals for crimes they committed as adolescents. A life without parole sentence for each adolescent, taking custody and health care costs into account, will exceed $2 million. To date, there are 376 children who have received this sentence in Michigan. Faced with an aging prison population, increased health care costs, and longer sentences, these costs are expected to grow.

"Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation… The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." (Justice Kennedy, *Graham v. Florida*)

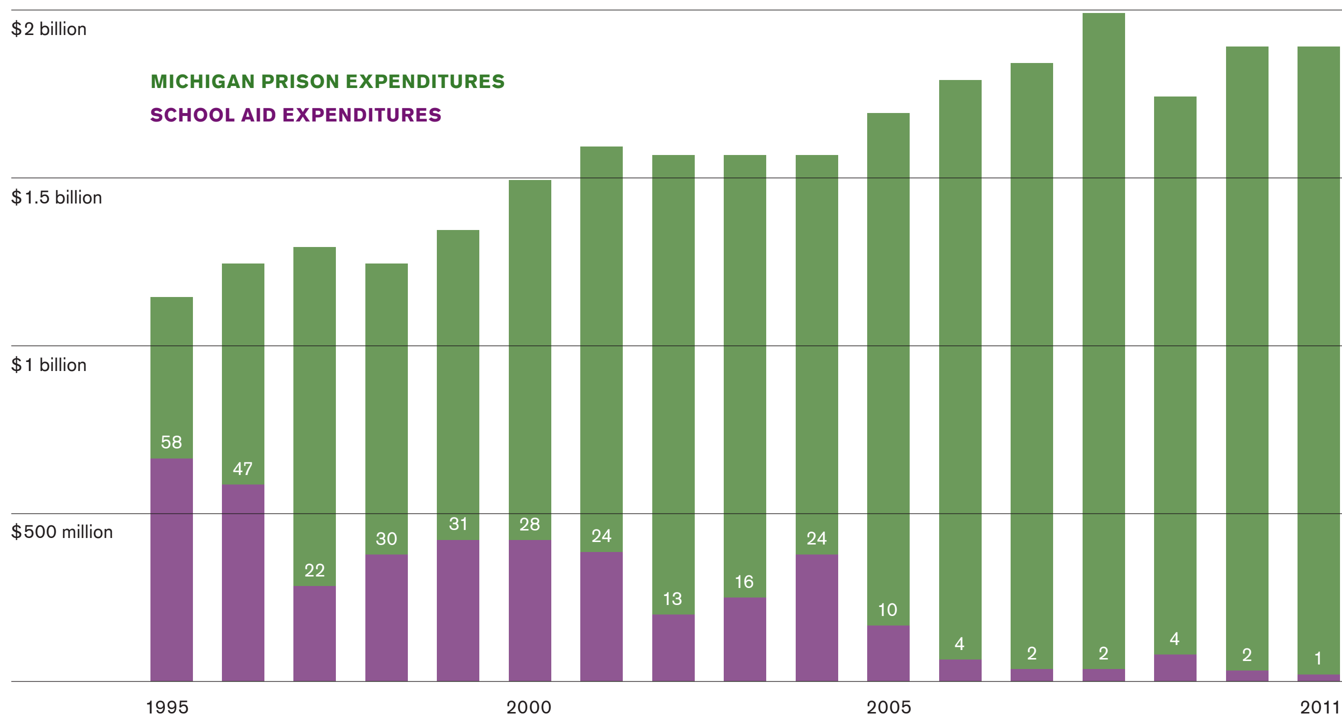


FIGURE 10
MICHIGAN EXPENDITURES: EDUCATION & INCARCERATION
Value shown above is School Aid spending as a percentage of spending by the Michigan Department of Corrections.

When a child is sentenced to spend the rest of his or her life in prison without a mechanism for re-evaluation or release, we all bear the fiscal, moral, and humanitarian costs. When it comes to the treatment of its youth, Michigan laws and practices are not only out of step with the rest of the United States, but are contrary to the basic human rights standards adopted by the rest of the world.

The Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) provide international recognition that youth need special protections that adults do not and that any juvenile charged with a criminal offense must be treated consistent with their child status.[47] These documents, signed by every nation, recognize that children, even those who commit crimes, cannot be viewed as miniature adults. They require that children who commit criminal offenses be incarcerated for the shortest possible duration necessary[48] and punishing youth with life imprisonment sentences is expressly prohibited.[49] The United States has refused to ratify the CRC and, while ratifying the ICCPR, reserved the right in exceptional circumstances to treat juveniles as adults. Michigan's routine treatment of children as adults and mandatory sentencing scheme are contrary to the express limited reservations of the United States; to take such action only in exceptional cases.

The CRC affirms that the rights of every child—including those youth alleged, accused, or determined guilty under penal law—are to be treated in a manner consistent with promoting the child's innate dignity and worth. This means that state laws applied to youthful offenders must be constructed in a manner that accounts for the child's age, the fact that they lack control over their environment, and have less experience than adults.

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Convention on the Rights of the Child, Article 3)

Michigan's failure to protect the basic human rights of its children has raised the concern of the U.N. Human Rights Committee, the U.N. Committee Against Torture, the U.N. General Assembly, and the Committee on the Convention for the Elimination of All Forms of Racial Discrimination.

Cost of K-12 education
for one pupil, 1998–2010:

$101,361

Cost of incarceration for
one youth prisoner, 1998–2010:

$323,995

Conclusion: a call for basic decency

Calls for reforming Michigan's laws sentencing youth to life without parole have come from all quarters—the judiciary, law enforcement, faith communities, human rights advocates, and families of both victims and youth.

Many judges oppose the law because it prohibits any individualized consideration of the child defendant. Judges are not only barred from evaluating mitigating factors such as the defendant's age, maturity level, family history, and capability for rehabilitation, but are also prohibited from considering their level of involvement in the crime.

Many in the law enforcement community also recognize a need for different treatment of youth.

"While I found rare a youth who seemed quite malignant in his orientation, most I dealt with were typical adolescents. The young offender's need for approval and belonging were the motivations for being part of a criminal enterprise and the crime of homicide, while predictable to any adult observer, was not anticipated by the youth. Anyone who has raised a child or worked with them professionally knows that adolescence is hormone driven and that peer esteem and belonging are often the most important parts of any decision a youth person makes." (Pamela K. Withrow, retired warden at Michigan Reformatory)

Former directors of the Michigan Department of Corrections have acknowledged a greater need for an individualized approach in sentencing practices and support abolishing life without parole sentences for youth.

"When you put a 14-year-old in an adult system, you've given up. Adult prisons are not designed for juveniles." (Patricia Caruso, former director of the Michigan Department of Corrections)

Groups as diverse as Right on Crime, The National PTA, The Boy Scouts, Mothers Against Murders, National Black Police Association, National Alliance of Faith and Justice, former family court judges, The American Medical Association, American Psychological Association, and United Methodist Church General Board of Church and Society have supported abolishing this sentence in favor of giving youth a chance for release upon maturity and rehabilitation.

This approach also makes sense fiscally. The cost of housing youthful defendants for the remainder of their lives is expensive, both morally and fiscally. Michigan is one of only four states that spend more on corrections than it does on higher education.[51] Consider, for instance, that the Michigan Department of Corrections prison population has tripled in the last 20 years. Even more alarming, the Michigan Department of Corrections budget has grown from $193 million in 1980 to $1.94 billion in 2011.[52] Michigan taxpayers could spend up to $2 million to house a single juvenile offender for the duration of his or her natural life.[53]

A financially responsible solution to these growing corrections costs would be to allow for a review of the youth offender; to determine years later whether that individual continues to pose a threat to public safety or whether that individual has demonstrated maturation and rehabilitation.

Faith-based supporters from across the state have also rallied to support the abolishment of the juvenile life without parole sentence as a moral imperative because it is fundamentally at odds with the principles of restorative justice embraced by interfaith traditions. As a society, the foundation for the protection of our children is contrary to a system of punishment that denies forgiveness and redemption to youth.

"[We] cannot support policies that treat young offenders as though they are adults. The actions of the most violent youth leave us shocked and frightened and therefore they should be removed from society until they are no longer dangerous. But society must never respond to children who have committed crimes as though they are somehow equal to adults, fully formed and conscious and fully aware of their actions." (Catholic Bishops of the South, 2000 USCCB Statement, "Responsibility, rehabilitation, and restoration: a Catholic perspective on crime and criminal justice")

BOSIE SMITH

In 1992 Bosie Smith was involved in the stabbing death of an adult male during a fight. Despite the fact that the adult male who initiated the fight was eight years older and twice the size of 103-pound Bosie, the jury rejected Bosie's claim of self-defense and convicted him on the charge brought by prosecutors: first-degree murder. At the time of his conviction, Bosie had completed schooling through the eighth grade. He was charged and tried as an adult without a judicial waiver hearing or any consideration of his juvenile status, mental age, or maturity.

"I wish I had some type of options because of the sentence that's mandatory… I truly wish that it was a sentence of, for instance… any number of years up to life. But I don't have that option… there's no option with the Court." (Trial Judge Hon. William F. Ager, Bosie Smith sentencing hearing, 1992)

AMY BLACK

Amy Black was 16 years old when, in 1990, her 19-year-old boyfriend stabbed a man to death. Amy participated in the robbery and she helped cover up the murder. She was convicted of aiding and abetting first-degree murder.

"I am sure that you have a lot of good points. I am sure, based on the testimony of several people who came in here to testify about your change in the last six months… you have the potential of making the best of what the rest of your life has to offer… The legislature has chosen to take away the judge's discretion in your case, and I have no choice in the sentence on the first-degree murder charge." (Hon. Ronald H. Pannucci, Muskegon County Circuit Court, Amy Black sentencing hearing, 1991)

"[T]he sentence is mandatory and there is nothing that I can do about it, and if there were, I would give some consideration in this case, but there is nothing that I can do about it, because the sentence is already set by law and there is nothing I can do about that." (Hon. Henry Heading, sentencing 15-year-old Robert Morton to life without possibility of parole)

RIGHT ON CRIME

Described as a "conservative solution" to the cost and public safety concerns of incarceration, Right on Crime advocates for policy reform to provide review for those convicted of crimes committed under the age of 18 and evaluate their ability to safely return to society. Right on Crime states that, "Victims should be notified about sentencing reviews, which will not guarantee release, but will ensure tax dollars are not wasted on people who have served time in prison for crimes committed as juveniles and no longer pose a threat to society. This is a fair, cost-effective, age-appropriate way to ensure that juveniles are held accountable for harm they have caused, which offers them an opportunity to redeem themselves."[50]

Recommendations

The U.S. Supreme Court recently ruled that youth, convicted of non-homicide crimes before their eighteenth birthday and sentenced to life in prison, must be given a meaningful and realistic opportunity for release to rejoin society. Ruling that a life without parole sentence is cruel and unusual punishment for these children, the Court recognized that adolescents are simply different than adults and these differences mean they are not as culpable for their actions and cannot be punished the same as adults. While recognizing that youth must be punished for their unlawful acts, the court held that their child status and unique capacity for growth must be taken into account when formulating an appropriate and proportional punishment for acts committed when still a child.

We recommend the following reforms to Michigan's mandatory punishment system, which fails to recognize the different culpability and rehabilitation potential of a child as compared to an adult, and to restore proportional and fair sentences for children who break the law but are deserving of a second chance upon maturation and rehabilitation:

1. Abolish Michigan's sentence of life without the possibility of parole for children who commit homicide offenses prior to the age of 18;

2. Require that a child's status, lack of control of their environment, susceptibility to peer pressure, lack of experience, immaturity, lesser culpability, underdeveloped sense of consequences, and unique capacity for growth be taken into consideration in imposing an appropriate proportional sentence of children convicted of homicide offenses occurring before their 18th birthday;

3. Provide for judicial resentencing for all individuals currently serving a life without parole sentence for an offense committed prior to their 18th birthday;

4. Provide an opportunity for parole for any youth having served ten years of a life sentence with annual reviews thereafter and mandatory public hearing every five years;

5. Amend Michigan's parole statute (MCL 791.235) to require:
    - *presumptive parole of any child sentenced to a life offense for acts committed prior to the age of 18;*
    - *the Parole Board to give greater weight to a youth's institutional record after maturation;*
    - *the Parole Board to take into consideration an individual's youthful status at the time of the offense, as a mitigating factor;*
    - *the Parole Board to waive an individual's lack of programming, education or work as a negative factor where lack of programming, work or education was due to a life without parole sentence and/or the individual's youthful status;*

6. Amend MCL 712A.2a and 712A.4 to eliminate automatic waivers of youth to circuit court and require a judicial waiver of any youth under the age of 18 prior to being tried and sentenced as if they were adults;

7. Prohibit the incarceration of any minor child under the age of 18, in an adult facility;

8. Require each county to maintain public data on the processing of youth under the age of 18 for criminal acts, including the age, date, race, gender and outcomes of, 1.) youth processed through the juvenile court system, 2.) youth designated for a blended or delayed sentence, and 3.) youth prosecuted in adult court;

9. Require CLE training as a prerequisite for any counsel appointed to represent a youth under the age of 18 charged with a homicide crime.

Methodology

This report is based on publicly available data produced by the Michigan Department of Corrections in April 2011, and from responses to surveys from individuals originally charged with first-degree murder in Michigan for crimes committed as youth and sentenced since 1975. One-quarter of all individuals whose original charge was first-degree murder could not be surveyed since they were no longer incarcerated. We received completed surveys from 87% of individuals who were contacted. Court documents such as trial transcripts, Pre-Sentence Investigation Reports, and Court of Appeals decisions were used to corroborate data acquired in the surveys. The MDOC's Offender Tracking Information System was also referenced to supplement the data. Follow-up interviews with the juveniles' trial or appellate counsel were used to obtain missing information.

Much of the data herein are based on MDOC data from 870 individuals and survey data from 573 individuals. The national trend analysis relied upon public records regarding juveniles serving life without parole sentences, gathered by The Sentencing Project in June 2010, and FOIA responses from state departments of corrections in 2011 and early 2012. The statistics on disciplined attorneys was obtained by examination of notices of discipline recorded in the "Disciplined Attorneys" database kept by the State of Michigan Attorney Discipline Board. Notices of discipline did not necessarily stem from juvenile criminal cases.

Notes

1 Sheryl Pimlott Kubiak & Terrence Allen, "Public Attitudes Toward Juveniles Who Commit Crimes: The Relationship Between Assessments of Adolescent Development and Attitudes Toward Severity of Punishment," Crime & Delinquency (2012).
2 Id. at 83.
3 Angela Wittrock, Juvenile Lifers Spark Second Thoughts on Law as Pace of Crime Slows, MLive.com, http://www.mlive.com/news/index.ssf/2011/11/juvenile_lifers_spark_second_t.html (accessed April 6, 2012).
4 See Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," Developmental Review (2008).
5 See N. Dickon Reppucci, "Adolescent Development and Juvenile Justice," American Journal of Community Psychology (1999).
6 Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).
7 Id. at 2030.
8 The seven states are Delaware, Florida, Massachusetts, Michigan, Mississippi, New Hampshire, and Pennsylvania.
9 Mich. Comp. Laws §712a (1972).
10 Neelum Arya, Campaign for Youth Justice, "State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System," April 2011, available online at: http://www.campaignforyouthjustice.org/key-research/national-reports.html#statetrends, April 2011 (accessed April 6, 2012).
11 Mich. Comp. Laws §764.1f (2006). Under the traditional waiver of jurisdiction, the prosecutor is required to make a motion before the juvenile court judge. The judge must then hold a hearing to determine whether the interest of the child and the public are best served by transferring the juvenile to adult court. The factors the court is required to evaluate include: seriousness of the crime, the juveniles culpability in the offense, the juvenile's prior record, the juvenile's programming history, and the adequacy of programming and punishment available in the juvenile system. See Mich. Ct. R. 3.950.
12 Between the years of 1988 and 1997, a judge could sentence the youth as a juvenile if under 17, requiring release at the age of 21. The court could not impose a lesser sentence than life without parole if sentenced as an adult.
13 Mich. Comp. Laws §712A.2d (2006).
14 The states that mandate LWOP for accomplices to felony murder include Alabama (Ala. Code §13A-6-2(a)(3)), Arkansas (Ark. Code Ann. §5-10-101(2)(B)), Florida (Fla. Stat. Ann. §777.011), Iowa (Iowa Code Ann. §703.2; Conner v. State, 362 N.W.2d 449, 455 (1985)), Massachusetts (Com. v. Nychypor, 643 N.E.2s 452, 455-56 (1994)), Michigan (People v. Aaron, 299 N.W.2d 304, 329 (1980)), Minnesota (Minn. Stat. §609.05, subd 2; §609.185(a)(3); State v. Pierson, 530 N.W.2d 784, 789 (1995)), Mississippi (§97-3-19(2)(e); Prater v. State, 18 So.3d 884, 891-92 (2009)), Nebraska (Neb. Rev. Stat. §28-206), New Hampshire (N.H. Rev. Stat. Ann. §626:8; State v. Rivera, 27 A.3d 676, 679-80 (2011)), North Carolina (N.C. Gen. Stat. §14-17; State v. Yarborough, 679 S.E.2d 397, 403 (2009)), Pennsylvania (Pa. Cons. Stat. Ann. §2502(b)), South Carolina (S.C. Code Ann §16-3-20; State v. Crowe, 188 S.E.2d 379, 382 (1972), and South Dakota (S.D. Codified Laws §22-3-3; Miller v. Leapley, 472 N.W.2d 517, 581 (1991)).
15 Graham, 130 S.Ct. at 2031.
16 The head prosecutor in Michigan, Attorney General Bill Schuette, referenced the Heritage Report, "Adult Time for Adult Crime: Life Without Parole for Juvenile Killers and Violent Teens" (2009) in arguing that the United States is not in violation of international human rights norms as the United States is not a signator to the Convention on the Rights of the Child.
17 This number is a conservative estimate of the average amount of time those adults, who were charged with 1st degree homicide, negotiated pleas and have since been released, spent behind bars as it includes both time spent in jail before sentencing and the parole period after release.
18 U.S. v. Ruiz, 536 U.S. 622, 632 (2002).
19 Daniel, M. Filler, Silence and the racial dimension of Megan's Law, 89 Iowa L. Rev., 1535, 1559 (2004).
20 Id. at 1561.
21 Graham, 130 S. Ct. at 2032.
22 Thomas Grisso, Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals, 13 (2005).
23 People v. McCauley, 287 Mich. App. 158, 163; 782 N.W.2d 520, 524 (2010).
24 Id. at 164, 782 N.W.2d at 524.
25 J.D.B. v. North Carolina, 131 S. Ct. 2394, 2397 (2011).

26 Id. at 2397, citing Roper v. Simmons, 543 U.S. 551, 569 (2005).
27 The Michigan parole board is vested with sole authority to determine whether a prisoner should be granted release. See Mich. Comp. Laws Ann. §791.235 (2006).
28 We use the terms shooter and non-shooter to differentiate between those juveniles who committed the homicide, and those who were found guilty not because they committed the homicide, but because they participated in the underlying felony or in some way aided the person who homicide. We recognize some homicides were not the result of gun violence. However, 72% percent of all homicides involving juveniles involved the use of guns, all of which were the legal property of adults. See Office of Juvenile Justice and Delinquency Prevention, “Statistical Briefing Book,” December 2001, available online at: http://www.ojjdp.gov/ojstatbb/offenders/qa03103.asp?qaDate=2009 (accessed April 6, 2012).
29 Eileen Poe-Yamagata and Michael A. Jones, National Council on Crime and Delinquency, “And Justice for Some, Differential Treatment of Youth of Color in the Justice System,” January 2007, available online at: http://nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf, (accessed April 6, 2012).
30 These estimates come from the most recent data available, which is 2008. National Center for Juvenile Justice," Easy Access to Juvenile Court Statistics: 1985-2008," for more information, see: http://www.ojjdp.gov/ojstatbb/ezajcs/ (accessed April 6, 2012).
31 United States General Accounting Office, “Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,” 1990, available online at: http://www.gao.gov/assets/220/212180.pdf (accessed April 6, 2012).
32 Prosecutors with limited resources may choose to pursue cases perceived as more disturbing to a majority of the community and which receive a significant amount of publicity. See e.g. Hans Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456, 466-67 (1981).
33 Legal scholars have acknowledged that youth are particularly vulnerable to false confessions. See, e.g. Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World. 82 N.C. L. Rev. 891, 945 (2004)(describing the over-representation of youth in false confession cases).
34 Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5633 (2006).
35 In the fall of 2011, a UN expert on torture called on all countries to ban the practice of solitary confinement, citing the severe mental pain and suffering experienced by those with mental disabilities and juveniles. For more information, see Special Rapporteur, Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, delivered to the General Assembly, A/66/268 (Aug. 5, 2011).
36 Thirty-eight percent (38%) of youth sentenced to life without parole were represented by counsel that have been publicly sanctioned or disciplined by the Michigan Bar Association for egregious violations of ethical conduct.
37 Exec. Order No. 2011-12, Indigent Defense Advisory Commission, Executive Office of the Governor, available online at: http://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf (accessed April 6, 2012).
38 American Civil Liberties Union, “Faces of Failing Public Defense Systems: Portraits of Michigan’s Constitutional Crisis,” 2011, available online at: http://www.aclu.org/racial-justice/faces-failing-defense-systems-portraits-michigans-constitutional-crisis (accessed April 6, 2012).
39 National Legal Aid & Defender Association, “A Race to the Bottom, Speed and Savings over Due Process: A Constitutional Crisis,” June 2008, available online at: http://www.mynlada.org/michigan/michigan_report.pdf (accessed April 6, 2012).
40 Complaint at 31, Duncan v. State, 284 Mich.App. 246, 774 N.W.2d (2009), aff’d on other grounds, 486 Mich. 906, 780 N.W.2d 843 (2010), reconsideration granted, order vacated, 486 Mich. 1071, 784 N.W.2d 51 (2010) order vacated on reconsideration, 488 Mich. 957, 790 N.W.2d 695 (2010) and order reinstated, 488 Mich. 957, 790 N.W.2d, 695 (2010) and rev’d, 486 Mich. 1071, 784 N.W.2d 51 (2010) order vacated on reconsideration, 488 Mich. 957, 790 N.W.2d 695 (2010)(Nos. 278652, 278858, 278860).
41 The RAND Corporation reviewed Philadelphia’s indigent defense system, and compared murder case outcomes for cases assigned to court-appointed private attorneys and those assigned to public defenders. The study found that public defenders significantly reduced both the conviction and amount of time served for their clients, as compared to those represented by court-appointed private attorneys. James M. Anderson & Paul Heaton, The RAND Corporation, “How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes,” December 2011, available online at: http://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf (accessed April 6, 2012).
42 The following states now prohibit the LWOP sentence for youth in certain circumstances: Alaska, Colorado, Kansas, Oregon, Texas (for those under age 17) and Virginia.
43 The states include Connecticut, Illinois, Mississippi, Arizona, Colorado, Virginia, Delaware, Indiana, Nevada, Utah, Washington, and Texas. For more information, see Arya, “State Trends.”
44 Michigan Committee on Juvenile Justice, “Michigan’s Statewide Juvenile Crime Analysis Report,” March 2008, available online at: http://michigancommitteeonjuvenilejustice.com/publications/disproportionate-minority-contact.html (accessed April 6, 2012).
45 US Census Bureau, State & County QuickFacts, available online at: http://quickfacts.census.gov/qfd/states/26000.html (accessed April 6, 2012).
46 Texas still allows the life without parole sentence for 17 year-olds. Tex. Penal Code Ann. §12.31.
47 International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR (No. 16) at 52, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976, Art.24; Convention on the Rights of the Child (CRC), G.A. res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, Art. 37(a).
48 For example, see CRC, Art. 37(b)(“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”).
49 See ICCPR, Art. 6(5)(“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age”).
50 For more information, see http://www.rightoncrime.com/priority-issues/juvenile-justice (accessed April 6, 2012).
51 The Detroit Regional Chamber of Commerce, “Reforming Michigan’s Corrections System,” available online at: www.detroitchamber.com/index.php?option=com_content&view=article&id=716 (accessed April 6, 2012).
52 Wittrock, “Juvenile Lifers Spark Second Thoughts on Law as Pace of Crime Slows.”
53 American Civil Liberties Union, Juvenile Life Without Parole Initiative, “Second Chances: Juveniles serving life without parole in Michigan prisons” 2004, available online at: http://www.aclu.org/human-rights-racial-justice/second-chances-juveniles-serving-life-without-parole-michigan-prisons (accessed April 6, 2012).

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APPENDIX J

Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?,* 54 Wayne L Rev 1725 (2008)

TRENDS IN THE COMMITMENT OF JUVENILES TO ADULT PRISONS: TOWARD AN INCREASED WILLINGNESS TO TREAT JUVENILES AS ADULTS?

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Table of Contents

I. INTRODUCTION 1725
A. Perspectives on the Changing Boundary between the Juvenile and Criminal Courts 1728
B. Research on the Consequences of Legislative Changes 1731
C. Michigan's Legislative Changes 1734
II. METHODS 1737
A. Data 1737
B. Analysis 1738
III. RESULTS 1739
A. The Number of Juveniles Committed to Adult Prisons 1739
B. Commitment Type 1746
C. Offense Characteristics 1748
D. Offender Characteristics 1751
E. Sentence 1755
IV. DISCUSSION 1756
V. CONCLUSION 1765

I. INTRODUCTION

Over the last several decades, almost every state in the United States has enacted legislative changes easing the process of treating juveniles as adults in the justice systems.[1] The rationales for these changes generally

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1. *See generally* Patricia Torbet et al., *State Responses to Serious and Violent Juvenile Crime: Research Report*, Washington, D.C.: United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1996) (hereinafter State Response); Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, United States Department of Justice, Office of Juvenile

centered on the perception that the rising juvenile crime rates in the late 1980s and early 1990s signified the emergence of an increasingly "dangerous" and "sophisticated" juvenile offender and that the juvenile court did not possess the tools to either adequately rehabilitate or punish this offender.[2] Proponents argued that transferring juveniles to the adult criminal justice system was a necessary alternative because it would provide adequate punishment for these offenders and promote public safety.[3] Thus, states passed legislation that sought to both increase the number of youth eligible to be transferred to the criminal justice system and to create decision-making mechanisms to ensure that more youth would be transferred and sentenced as adults.[4]

Given the nature and degree of legislative change, it is essential to examine the effects of these reforms. While a number of studies have examined the sentencing of juveniles tried as adults, none to date have focused on changes in the commitment of juvenile offenders to adult prisons. Prison commitments are an important indicator of the consequences of these policy changes because the goal of treating a juvenile as an adult is that he or she will be punished more significantly, presumably with a prison sentence, than if retained in the juvenile court.[5]

Justice and Delinquency Prevention (1998) (hereinafter State Response Update); Patrick Griffin et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1998); THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds. 2000); Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81 (2000); FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) (discussing legislative changes and the significance for juvenile justice administration).

2. *See generally* Zimring, *supra* note 1; Feld, *supra* note 1; Jeffrey J. Shook, *Contesting Childhood in the U.S.: The Transfer of Juveniles to the Adult Criminal Court*, 12 CHILDHOOD: A GLOBAL JOURNAL OF CHILD RESEARCH 461 (2005).

3. *See* Bishop, *supra* note 1, at 83-84; *see also* Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 407-24 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (discussing the rationale behind the legislative changes).

4. *See* Bishop, *supra* note 1, at 84 ("Besides streamlining the transfer process, most states expanded the list of cases eligible for transfer by making modifications in offense, age, and prior record criteria.").

5. *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, 487 (1987) (discussing the explicitly punitive dispositions of adult criminal courts versus the nominally rehabilitative dispositions of juvenile courts); Bishop, *supra* note 1, at 85 ("[Policy makers] trust that criminal punishment will ultimately prove beneficial to young offenders and to society by . . . incapacitating them for longer periods."); Zimring & Fagan, *supra* note 3, at 409 ("The major premise of such legislative proposals . . . is

Although several studies of sentencing have found that many juveniles convicted in the criminal court receive a jail or probation sentence,[6] a number of other studies have found that waived juveniles are likely to be sentenced to prison.[7] Further, there are multiple pathways through which juveniles might enter adult prisons—probation to prison—that are not revealed in studies focused on criminal court sentencing. Consequently, examining the commitment of juveniles to adult prisons can provide important insights on both legal- and policy-oriented questions regarding the consequences of these legislative changes, and theoretical questions pertaining to the criminalization of youth and the organization of the process through which the criminal responsibility of young people is assessed and assigned.

This Article examines these questions by analyzing trends in the commitment of juveniles to adult prisons over a twenty-year period—1984-2003—using data obtained from the Michigan Department of Corrections (MDOC) on all juveniles who entered an adult prison for an offense committed before their eighteenth birthday. Michigan enacted two major legislative reforms during this time period that are representative of the direction of transfer policy nationwide.[8] In addition to examining trends in the overall commitment of juveniles to adult prisons, this article identifies changes in the characteristics of juveniles being committed to prison over time—age, race/ethnicity, prior juvenile history, offense profile, sentence, type of commitment—in order to identify whether a different "type" of juvenile offender—younger,

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that more severe punishments for serious juvenile crimes are a good thing, and the minor premise is that transfer to criminal courts will achieve these harsher punishments.").

6. *See generally* SIMON I. SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM (1996); Simon I. Singer et al., *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENT TO THE CRIMINAL COURT 353-75 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996).

7. *See generally* State Court Sentencing of Convicted Felons, 1994, United States Department of Justice, Bureau of Justice Statistics, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf94i.pdf (last visited Jun. 4, 2009); Kevin J. Strom & Steven K. Smith, *Juvenile Felony Defendants in Criminal Courts*, United States Department of Justice, Bureau of Justice Statistics, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/jfdcc.pdf (last visited Mar. 10, 2009); Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Adult Outcomes in Criminal Court*, 42 CRIMINOLOGY 485 (2004); David Myers, *Adult Crime, Adult Time: Punishing Violent Youth in the Criminal Justice System*, 1 YOUTH VIOLENCE AND JUVENILE JUSTICE 79 (2003).

8. *See* MICH. COMP. LAWS. ANN. § 712A.4 (West 2002); *see also* 1996 Mich. Legis. Serv. 262 (West 1996); 1988 Mich. Legis. No. 182 (West 1988).

more/less serious offense profile, etc.—is being committed to adult prisons. Because seventeen-year-olds are considered to be adults in Michigan,[9] the data allows for comparisons between "transferred" youth and the seventeen-year-old group. The use of this comparison group provides further opportunities to assess the implications of the legislation, the "type" of juvenile being committed to adult prisons, and the pathways through which young people enter adult prisons.

Part I of the Article provides the general context of juvenile code changes in the United States over the last several decades. In particular, we examine perspectives on the changing boundaries between the juvenile and criminal courts and research on the consequences of these changes. Part II details the data and methods used in the analysis. In large part, the analyses are descriptive and emphasize two strengths of the data—that it includes the population of youth committed to adult prisons, and that it involves a twenty year time period that encompasses two different legislative reforms. Part III then presents the results, focusing on both changes over time and comparisons with the seventeen-year-old, or excluded, group. We conclude the Article in Part IV with a discussion of the implications of these changes for juvenile law, policy, and administration.

A. Perspectives on the Changing Boundary between the Juvenile and Criminal Courts

Legislation easing the transfer of juveniles to the adult criminal court has been a major component of juvenile code changes over the last several decades.[10] Between 1992 and 1997 alone, forty-five states and the District of Columbia enacted at least one legislative change that eased the process of waiving juveniles to the adult criminal justice system by lowering or eliminating minimum ages for transfer eligibility, expanding the range of offenses eligible for transfer, focusing transfer

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9. *See* MICH. COMP. LAWS ANN. § 712A.4 (West 2002).

10. *See* Torbet, *supra* note 1, at 4; Torbet & Szymanski, *supra* note 1, at 2; Robert O. Dawson, *Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 51-52 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("[L]egislatures have modified judicial waiver statutes to make waivers quicker, cheaper, easier, and more frequent than before."); Barry C. Feld, *Legislative Exclusion of Offenses From Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 51-52 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("Some of these initiatives simplify transfer of young offenders to criminal courts by excluding categories of offenses from juvenile court jurisdiction or by allowing prosecutors to 'direct file' and charge youths as adults."); Feld, *supra* note 1; Feld, *supra* note 5: Bishop, *supra* note 1.

criteria on offense-based characteristics, and shifting decision making discretion from judges to prosecutors.[11] To a lesser, but increasing extent, juvenile code changes have also focused on developing additional mechanisms, such as the blended sentence, for handling violent and serious juvenile crime.[12] Although the frequency of code changes has diminished and some states are re-evaluating their transfer policies and practices, it is clear that the result of this legislation has been a blurring of the boundary between the juvenile and criminal justice systems.

In seeking to explain the implications of the transformation of this boundary, scholars have offered a variety of perspectives. Several scholars have argued that the legislative changes represented an attempt to maintain the legitimacy and credibility of the juvenile court in response to attacks regarding its effectiveness.[13] Although acknowledging that these changes were not merely symbolic, these scholars suggest that the overall effect of the legislative changes would not produce a substantial redistribution of youth from the juvenile to the criminal justice system.[14] Similarly, other researchers have argued that because transfer processes adapt to the organizational and community contexts in which decision making occurs, the effects of these legislative changes would be mitigated and result in outcomes similar to those prior to the legislative changes.[15]

Other scholars have argued that the trend to enact provisions that exclude youth from juvenile court jurisdiction—statutory exclusion—or to shift power from judges to prosecutors—prosecutorial discretion—

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11. *See* Torbet, *supra* note 1, at 4; Torbet & Szymanski, *supra* note 1, at 2.

12. *See generally* Patrick Griffin, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*, *available at* http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf (last visited Jun. 4, 2009). Blended sentencing laws can expose even those who remain under the juvenile system to the risk of adult punishment. *Id.* at 1. These laws also work in the other direction to "move down" a juvenile for sentencing, who had been "moved up" to the criminal court for trial. *Id.* at 2.

13. *See generally* Singer, *supra* note 6; *see also* Henry G. White et al., *A Socio-Legal History of Florida's Juvenile Transfer Reforms*, 10 U. FLA. J. L. & PUB. POL'Y, 249, 251 (1999).

14. *See* Singer, *supra* note 6, at 187-96.

15. *See* Howard N. Snyder et al., *Juvenile Transfers to Criminal Court in the 1990's: Lessons Learned from Four Studies*, United States Department of Justice, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/181301.pdf (last visited Jun. 4, 2009); *see also* Donna M. Bishop et al., *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQUENCY 179 (1989); Singer *supra*, note 6, at 44-45; Jeffrey J. Shook, *Deciding that a Juvenile has Crossed the Line into Adulthood: Intersections of Individual and Contextual Characteristics*, paper under review (2009) (discussing how organizational and contextual contingencies influence how prosecutors determine if a juvenile has crossed the line into adulthood).

would increase the frequency with which juveniles are transferred to the criminal court.[16] Twenty-nine states now employ statutory exclusion provisions and fifteen states employ prosecutorial discretion provisions, representing a major shift in how the decision to treat a juvenile as an adult is made.[17] In large part, though not exclusively, these provisions focus on specific groups of violent and serious offenders[18] and critics and proponents alike contend that they will reduce barriers—for example, judges—to the transfer of youth to the criminal justice system.[19] Consequently, some scholars argue that the very nature of the reforms will increase the flow of youth targeted by these provisions from the juvenile to the criminal justice system.[20]

Another perspective extends this argument by moving beyond assertions that policy reforms are based on the changing behavior and nature of youth or that these changes are more symbolic in nature to argue that these changes are based on a new image of the juvenile offender as increasingly dangerous and responsible.[21] Embedded within this new image are ideas of race, ethnicity, and class that influence understandings of both the needs of and threats posed by violent and serious juvenile offenders.[22] In addition to influencing policy reforms such as transfer legislation, this new image of the juvenile offender has made the administration of juvenile justice more punitive and control oriented.[23] A key proposition of this argument is that new ideas regarding the dangerousness and culpability of juvenile offenders will lead to an increased willingness to treat juveniles as adults manifested in both policy and practice. The effects of this increased willingness to treat juveniles as adults, then, are posited to extend beyond the direct effects of policy changes by altering existing prohibitions or norms against

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16. *See* Bishop, *supra* note 1, at 89-94.

17. *Id.*; *see also* Feld, *supra* note 8, at 84-85; Bishop, *supra* note 1; MARK M. LEVIN & ROSEMARY C. SARRI, JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES. ANN ARBOR: UNIVERSITY OF MICHIGAN, NATIONAL ASSESSMENT OF JUVENILE CORRECTIONS (1974).

18. *See* Feld, *supra* note 10, at 106; Dawson, *supra* note 10, at 79-80.

19. *See* Bishop, *supra* note 1, at 89; Feld, *supra* note 6; 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, 670 (1994).

20. Bishop, *supra* note 1, at 154-55.

21. *See generally* Feld, *supra* note 1.

22. *Id.*; *see also* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 688-90 (2002).

23. *See generally* Feld, *supra* note 1; *see also* Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N. C. L. REV. 1083, 1105 (1991).

treating juveniles as adults and leading legal actors to subject a broader population of youth to criminal punishment.

B. Research on the Consequences of Legislative Changes

Assessing these arguments, and, more importantly, developing an understanding of the consequences of these legislative changes is extremely difficult given data limitations and the variety of factors that influence decisions to treat juveniles as adults. For example, the substantial decline in violent and serious juvenile crime rates over the last decade has decreased the number of young people eligible for transfer to the criminal justice system, making it difficult to compare across years.[24] Further, the large number of young people who enter the juvenile court each year and the nature of juvenile court referrals do not necessarily provide an adequate baseline from which to assess caseload shifts. Despite these and other limitations to assessing the effects of policy changes, there is some consensus in the literature that the legislative changes of the last several decades have not led to "large shifts in caseload from juvenile to criminal courts."[25]

At the same time, there is some agreement among scholars that these policies have led to increases in the number of youth transferred to and imprisoned in the adult criminal justice system.[26] Donna Bishop estimated that during the mid to late 1990s, between thirty thousand and forty thousand juveniles were transferred to the criminal court in addition to the approximately one hundred eighty thousand to two hundred twenty thousand youth she estimated were processed in the adult court for crimes committed before the age of eighteen in states where the jurisdiction of the juvenile court ended prior to age eighteen.[27] The number of youth she believed to be transferred to the criminal court represented a substantial increase over prior years and was driven, in her

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24. *See* Howard N. Snyder, *Juvenile Arrests 2006*, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf (last visited Jun. 4, 2009) (discussing the decrease in juvenile arrests for violent crimes since the 1990s).

25. Margaret K. Rosenheim, *The Modern American Juvenile Court*, *in* A CENTURY OF JUVENILE JUSTICE 356 (Margaret K. Rosenheim et al., eds., 2002) ("Almost every state passed some type of transfer enhancement law . . . but . . . no large shifts in caseload from juvenile to criminal courts occurred in the aftermath of the legislation.").

26. Bishop, *supra* note 1, at 85 (explaining that the recent expansion in transfer "has produced large increases in the number of juvenile offenders prosecuted, convicted, and sentenced to adult sanctions"); Mears, *infra* note 160; Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 264 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

27. Bishop, *supra* note 1, at 97.

opinion, by youth transferred through prosecutorial discretion and statutory exclusion provisions.[28] In fact, she estimated that more youth were transferred through each of these mechanisms independently than through judicial discretion provisions, representing a substantial change in policy and practice.[29]

Mears provided a very different assessment in estimating that approximately fifteen thousand juveniles were transferred in 2000.[30] In making this estimate, he argues that an equal number of youth were transferred through prosecutorial discretion and statutory exclusion provisions as were transferred through judicial discretion mechanisms.[31] These estimates not only point out that scholars have differed in their assessments of the consequences of these policy changes, but also demonstrate the fact that drawing conclusions about these policy changes is very difficult due to significant data limitations. These data limitations apply equally to information on the number of young people who enter adult prisons. Howard Snyder and Melissa Sickmund examined national data on commitments to prison of individuals under age eighteen over a twenty year period and found that they increased from 1985 to 1996 and then decreased from 1996 to 2002, producing only an eight percent increase over the entire period.[32] They used data, however, that examined age at the time of commitment as opposed to age at the time of the offense, excluding a potentially large group of youth who entered prison after age eighteen for offenses committed while juveniles.[33] Further, their analysis included limited information on the characteristics of these juveniles and did not control for other factors such as changes in the crime rate.

Given the limited information on the effects of these policy changes on the transfer of juveniles to the criminal court and commitment of juveniles to adult prisons, there remains a real need for additional research to examine these effects. While there is some consensus that there has not been a "substantial" redistribution of youth across these systems relative to the number of youth processed in the juvenile justice system, it also appears that there has been an increase in the number of

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28. *Id.*

29. *Id.*

30. Mears, *infra* note 160.

31. *Id.*

32. *See generally* Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: A 2006 National Report, available at* http://ojjdp.ncjrs.org/ojstatbb-/nr2006/downloads/NR2006.pdf (last visited Jun. 4, 2009).

33. *See generally id.*

youth being treated as adults.[34] Yet, there is limited information regarding the nature of this increase and the characteristics of these youth. This is problematic because caseload shifts do not necessarily have to be large to place new burdens on these systems or reflect poor policy or practice choices that have negative effects for different individuals or groups. Gaining a better understanding of the redistribution of youth to the adult system, particularly adult prisons, is important because increasing numbers of juveniles, even in small absolute numbers, require the adult system to adapt to a younger "clientele," and, presumably, to adopt procedures and services to meet the needs and challenges of this population.[35]

Research on the effects of these policy changes is also important because of the effects of criminal court processing and sentencing on juvenile offenders. For example, existing studies indicate that the experiences of youth in adult prisons differ from their experiences in juvenile institutions, including the levels of educational and vocational programming, counseling, relationships with staff, victimization—by both inmates and staff—and idleness.[36] These studies indicate that the experience of adult imprisonment is especially harmful to young people and suggest that differences in the experiences of youth in the adult system as compared to the juvenile justice system will lead to differences

34. Bishop, *supra* note 1; Daniel Mears, *A Critique of Waiver Research: Critical Next Steps in Assessing the Impacts of Laws for Transferring Juveniles to the Criminal Justice System,* 1 YOUTH VIOLENCE & JUVENILE JUSTICE 156 (2003).

35. States and counties have responded to these legislative changes in various ways. For example, some have created facilities in the adult system for juveniles while others have adopted formal and informal policies and practices in the court system. *See* SIMON I. SINGER, JEFFREY FAGAN & AKIVA LIBERMAN, THE REPRODUCTION OF JUVENILE JUSTICE (J. Fagan & F. E. Zimring, eds., 2000); Aaron Kupchik, *Prosecuting Juveniles in Criminal Court: Juvenile or Criminal Justice?* 50 SOCIAL PROBLEMS 439 (2003) (discussing the reproduction of juvenile justice in criminal courts in New York); Shook, *infra* note 58 (discussing formal and informal policies to address juveniles in a criminal court and the creation of a separate facility in the adult system for juveniles); *see also* James Austin, Kelly Dedel Johnson & Maria Gregoriou, *Juveniles in Adult Prisons and Jails: A National Assessment*, U.S. Department of Justice, Washington D.C., *available at* http://www.tgorski.com/articles/juveniles_in_adult_jails_&_prisons/jiajap01_toc.htm (last visited Jun. 4, 2009) (discussing how correctional authorities have adapted to juveniles in adult prisons). Inherent in these responses is the idea that juveniles, even when tried as adults, are different and require different treatment. These attempts to "reproduce" aspects of the juvenile justice system in the criminal justice system can pose significant challenges to courts and correctional facilities. At the same time, some states have done nothing or very little to adapt to the needs of juveniles in the adult system. *Id.*

36. *See* Bishop, *supra* note 1, at 86 ("[T]he adult penal system is limited in its capacity to respond to the needs of adolescent offenders."); Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 40 JUV. AND FAM. CT. J. 1 (1989).

in the outcomes of youth upon exiting correctional institutions.[37] Studies comparing the recidivism of youth exiting these two systems demonstrate one way that these different experiences may be manifested. These studies find that youth transferred to the criminal justice system are more likely to recidivate than youth retained in the juvenile system.[38] Thus, it is apparent that committing a juvenile to an adult prison has negative consequences for youth, the public, and the justice systems, and, in light of these consequences, there remains a need to gain a better understanding of the relationship between policy changes and trends in the commitment of juvenile offenders to adult prisons.[39]

C. Michigan's Legislative Changes

Similar to other states, Michigan significantly changed its transfer laws over the last several decades to ease the process of treating juveniles

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37. *See* Bishop, *supra* note 1, at 86 (linking the differential effects of juvenile and criminal justice processing to the "stigmatization that follows a criminal conviction, which reduces offenders' opportunities to obtain legitimate employment and become integrated into conventional social networks" after release).

38. *See* Robert Hahnet et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Department of Health and Human Services, Centers for Disease Control and Prevention, MORBIDITY AND MORTALITY WEEKLY REPORT (Nov. 30, 2007) at 7; Donna M. Bishop, Charles E. Frazier, Lonn Lanza-Kaduce & Lawrence Winner, *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?* 42 CRIME & DELINQUENCY 171 (1996); Jeffrey Fagan. *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996); Jeffrey Fagan, Aaron Kupchick & Akiva Liberman, *Be Careful What You Wish For: The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, Columbia Law School Public Law & Legal Theory Working Paper Group, Paper Number 03-61, *available at* http://papers.ssrn.com/sol3/papers.cfm-?abstract_id=491202 (last visited Jun. 4, 2009); David L. Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1 YOUTH VIOLENCE & JUVENILE JUST. 79 (2003); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQUENCY 548 (1997). It is important to note that the negative effects are not limited to adult imprisonment. In their study of recidivism, Fagan and his colleagues found that the method of being processed as adults heightened the risk of recidivism for all transferred youth, not just those committed to prison, when compared to those retained in the juvenile system. *See generally* Fagan, Kupchick & Liberman, *supra.*

39. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, United States Department of Justice, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf (last visited Jun. 4, 2009) (discussing the specific and general deterrent effects of transfer and concluding that "[t]he practice of transferring juveniles for trial and sentencing in adult criminal court has . . . produced the unintended effect of increasing recidivism").

as adults. These changes were passed in 1988 and 1996, resulting in a fundamental and philosophical shift in the process of handling serious and violent juvenile offenders in Michigan.[40] Prior to the 1988 legislative reform, Michigan maintained a judicial discretion provision allowing prosecutors to motion to transfer fifteen and sixteen-year-olds charged with any felony to the criminal court.[41] Juvenile court judges were required to consider specific criteria, affording equal weight to each one.[42] Upon conviction, a transferred juvenile could only receive an adult sentence and if retained in the juvenile system, a youth could only be held until his or her nineteenth birthday.[43]

The primary change mandated by the 1988 legislation was the enactment of a prosecutorial discretion mechanism for transferring juveniles to the criminal justice system.[44] This mechanism gave concurrent jurisdiction over fifteen and sixteen-year-olds charged with a short list of violent and serious crimes to the juvenile and criminal courts, allowing the prosecutor to decide in which forum to try the juvenile.[45] At the same time, it retained the judicial discretion mechanism for fifteen and sixteen-year-olds charged with all other felonies.[46] While juveniles transferred under the judicial discretion system were still only eligible for an adult sentence upon conviction, the legislation required the criminal court to hold a hearing for youth transferred under the prosecutorial discretion provision to decide whether to sentence the youth as a juvenile or an adult.[47] In addition, the legislation extended the maximum age of jurisdiction of the juvenile system over a youth from nineteen to twenty-one years-old for specific offenses.[48]

The reforms contained in the 1996 legislation built upon these changes to further consolidate the power of prosecutors and to expand the population of juveniles eligible to be treated as adults.[49] With regard to the prosecutorial discretion provision, this legislation produced three major changes. First, it lowered the minimum age for transfer from

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40. *See* Shook, *infra* note 58 (discussing the legislative changes in Michigan).

41. *See* MICH. COMP. LAWS ANN. § 712A.4 (West 2002). In Michigan, seventeen-year-olds are automatically adults for purposes of the justice system. *Id.*

42. *Id.*

43. *Id.*

44. *See* 1988 Mich. Legis. Serv. 182 (West 1988).

45. *Id.* The offenses included arson of a dwelling, assault with intent to murder, assault with intent to maim, attempted murder, conspiracy to commit murder, solicitation to commit murder, first degree murder, second degree murder, kidnapping, first degree criminal sexual conduct, armed robbery, and carjacking. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* 1996 Mich. Legis. Serv. 262 (West 1996).

fifteen to fourteen years old.[50] Second, it expanded the number of offenses within the prosecutorial discretion provision.[51] Third, it required mandatory adult sentences upon conviction for a majority of the offenses—referred to as specified juvenile offenses—under the prosecutorial discretion provision.[52] The minimum age for transfer was also lowered in the judicial discretion provision and the legislation required that greater weight be given to the offense and prior history when deciding whether to waive a juvenile to the criminal court.[53]

In addition, the 1996 legislation enacted what is referred to as the "designation" provision.[54] This provision allowed a youth to be tried as an "adult" in the juvenile court, providing the juvenile court judge with the discretion to sentence the youth as a juvenile, an adult, or to a blended sentence.[55] The designation provision directly mirrors the waiver provisions allowing prosecutors to decide to designate a youth who is charged with a specified juvenile offense, and a judge, upon a motion by the prosecutor and following a hearing, to decide to designate a youth charged with any other offense regardless of its severity.[56] Besides the sentencing options, the major difference between the designation and waiver provision is that the designation provision does not include a minimum age limit.[57]

The rationale behind these two separate legislative reforms was similar and centered on perceptions of an increasingly "dangerous" juvenile offender, perceptions that the juvenile justice system was unable to handle this juvenile offender, and perceptions that judges were reluctant to transfer this offender to the criminal justice system or

50. *Id.*

51. *Id.* Offenses include assault with intent to rob (armed), assault with intent to commit great bodily harm, escape from a facility, bank robbery, first degree home invasion (armed), and drug possession and delivery (six hundred and fifty grams). *Id.*

52. *Id.* These offenses can be separated into two categories—Type A and Type B offenses. Type A offenses are those for which an adult sentence is required and include arson of a dwelling, assault with intent to murder, assault with intent to maim, attempted murder, conspiracy to commit murder, solicitation to commit murder, first degree murder, second degree murder, kidnapping, first degree criminal sexual conduct, armed robbery, and carjacking. Type B offenses are those for which a juvenile sentence is still an option and include assault with intent to rob (armed), assault with intent to commit great bodily harm, bank/safe robbery, escape from a facility, first degree home invasion (armed), and drug possession and delivery (six hundred and fifty grams). *Id.*

53. *See* 1996 Mich. Legis. Serv. 262 (West 1996).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

sentence him or her as an adult.[58] The changes also focused on Wayne County, and especially Detroit, as a place where juvenile crime was most serious, and judges were most reluctant to transfer juveniles to the criminal court and sentence them as adults in the juvenile court.[59] Although the legislature did not provide a coherent rationale to guide decision making, one clear intention of these reforms was to increase the number of juveniles transferred to the adult court and sentenced to adult prisons, specifically youth from Wayne County.[60] Another was to provide a mechanism for younger juveniles to be treated as adults, and presumably, committed to adult prisons.[61] At the same time, the legislature expanded the tools of the juvenile court to deal with violent and serious juvenile offenders, offering potential alternatives to transfer and/or a means to widen the net of youth subject to adult or more punitive sanctions.[62]

II. METHODS

A. Data

The Michigan Department of Corrections (MDOC) provided data on every individual committed to an adult prison for an offense before his or her eighteenth birthday for the period 1984-2003. Because the maximum age of juvenile court jurisdiction in Michigan is sixteen years-old,[63] we define a youth committed for an offense before his or her seventeenth birthday as a "waived" or "transferred" juvenile and one committed for an offense at seventeen as an "excluded" juvenile. In some cases, a youth was committed for an offense that occurred both before and after these cutoff ages. For example, a youth might be committed for an offense at age sixteen and an offense at age seventeen. While the youth is technically committed for an offense while a "juvenile," we use the MDOC's commitment code to assign this youth to the waived or excluded group because this code identifies their committing offense and

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58. *See* Jeffrey J. Shook, *Treating Juveniles as Adults: A Case Study of Decision Making and Case Processing,* (2004) (Unpublished Ph.D. Dissertation, University of Michigan) (discussing the Michigan legislative reforms) (on file with author).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.*, Kevin Strom, Steven K. Smith & Howard N. Synder, *Juvenile Felony Defendants in Criminal Courts: State Court Processing Statistics*, *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/jfdcc.txt (last visited Jun. 4, 2009) [hereinafter *Juvenile Felony Defendants*].

provides a more conservative accounting of the number of waived and excluded juveniles entering prison. If the committing offense occurred after age seventeen, the case is omitted from the analysis.

The data set provided by MDOC included a total of 13,518 cases, or unique individuals, over this period.[64] Using commitment code as the indicator of which group a youth belonged in, the final data set included 2244 waived cases and 9735 excluded cases. The data include basic demographic, prior history, sentencing, and offense information on each juvenile. MDOC also provided information regarding subsequent commitments, parole and parole revocations, transits across facilities, discharge, and misconducts. Variables included in the analysis include the total number of youth committed to adult prisons, the type of commitment through which youth enter adult prisons—new commitment or probation commitment—the age at the time of the offense, race and gender of the youth, the prior history in the juvenile system—previous juvenile commitments and probations—of the youth and the committing county. We also include variables indicating the type of offense for which youth are committed to adult prisons and the minimum sentence lengths these youth received in the criminal court.[65]

State level data on waiver and designations in Michigan are limited to rough aggregate statistics over specific time periods. We use it very cautiously in our interpretations to provide context to the results of the study as it is primarily useful to present a broader picture of waivers in the state and because the MDOC data does not provide an indication of whether a juvenile was transferred through the prosecutorial or judicial discretion provisions, or was designated. Thus, although we can make some rough judgments about type of transfer based on time period and offense, these judgments are extremely limited.[66]

B. Analysis

Our analysis focuses on examining trends in the commitment of juveniles over time and comparing offender, offense, and sentencing characteristics across three specific time periods: (1) before the first legislative change (1984-1988); (2) between the two legislative changes

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64. Data set not available to public (on file with author).

65. The minimum sentence length was determined by using the controlling offense code provided by MDOC and including the two-year felony firearm term where appropriate.

66. MDOC did provide docket numbers that identify whether a youth was processed in the criminal or juvenile court. Using these docket numbers we are able to provide a rough estimate of the number of designated cases committed to adult prisons—twenty-five youth.

(1989-1996); and (3) after the two legislative changes (1997-2004). In examining trends over time, we use both offense and commitment year in the analyses. Offense year is used because it provides a more accurate assessment of the effects of the policy changes. It is limited, however, because there is a lag between offense and commitment, meaning that many youth, who were waived for offenses in the period 2001-2003, might not have been committed yet when we received the data. Consequently, we also use commitment year as an indication of the number of youth who were actually committed over each of the years from 1984-2004.

Because the focus of our analysis is on waived juveniles, we use the excluded group as a baseline to compare changes in the number and characteristics of waived juveniles entering adult prisons. Excluded youth provide an important comparison because, assuming that the crime rate patterns of these groups are similar, it allows us to control for the possibility that observed differences might have been the result of other policy and practice changes. It is also important because these youth are technically juveniles in thirty seven other states, and with regard to many aspects of law and policy in Michigan, a comparison to excluded youth provides a much broader examination of the commitment of "juveniles" to adult prisons.[67]

III. RESULTS

A. The Number of Juveniles Committed to Adult Prisons

Figures 1 and 2 present the total number of waived juveniles committed to an adult prison by both commitment year and offense year respectively.[68] As these figures show, the number of youth committed to adult prisons increased significantly from the 1980s to the 1990s.[69] Using commitment year, the number of youth committed to prison peaked in 1998, followed by a general decrease, and a slight increase in 2003.[70] The pattern for the offense year line differs somewhat in that 1997 was

67. *See* Annie E. Casey Foundation, *2008 Kids Count Data Book, A Road Map for Juvenile Justice Reform, available at* http://www.aecf.org/~/media/PublicationFiles-/AEC180essay_booklet_MECH.pdf (last visited Jun. 4, 2009). This number does not include Connecticut or the District of Columbia. Connecticut's maximum age of juvenile court jurisdiction will increase from fifteen to seventeen in 2010. *Id.* The maximum age of juvenile court jurisdiction is seventeen years old in the District of Columbia. *See, e.g.*, *Juvenile Felony Defendants*, *supra* note 63.

68. *See* Figures 1 & 2, *infra* pp. 1740-41.

69. *Id.*

70. *Id.*

the peak year; the substantial drop in cases from 2001 to 2002 is the effect of the lag between offense and commitment, meaning that many youth with offense years in this range where not yet committed to prison when we received the data. Despite this limitation, offense year is important because it identifies that there were substantial increases in the number of waived youth immediately following both the 1988 and 1996 legislative reforms—forty-six and forty-four youth respectively—suggesting that these legislative reforms did have some effect on the number of youth committed to adult prisons.[71]

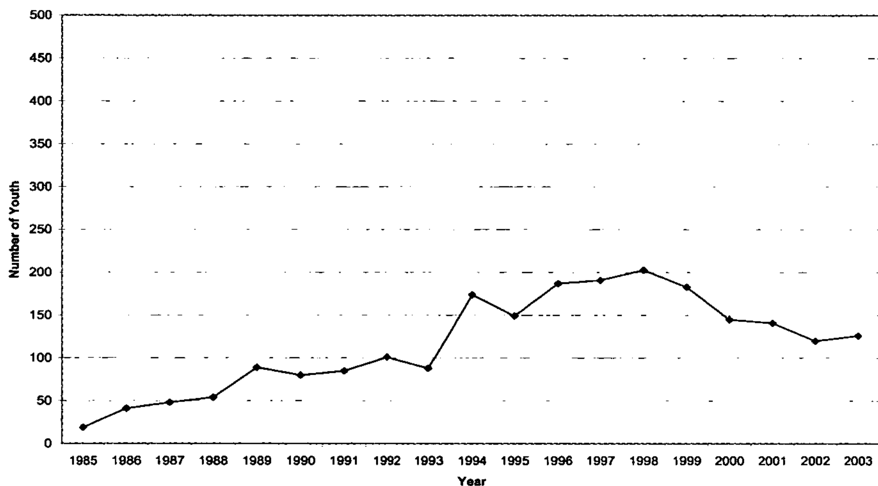
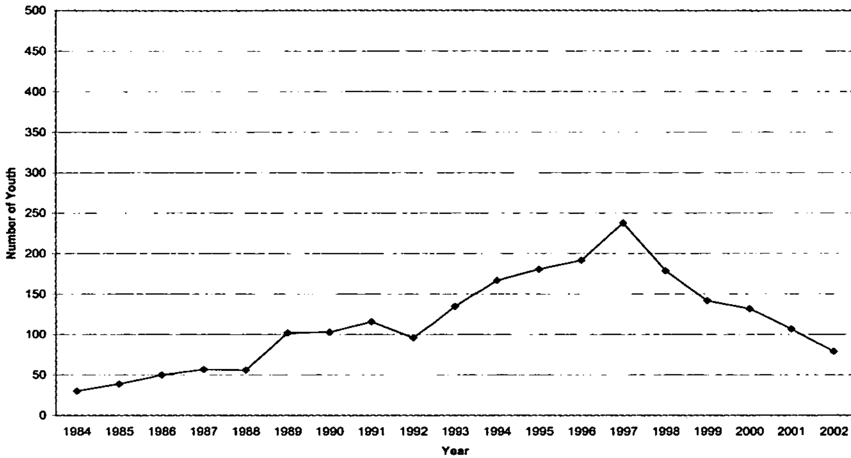


Figure 1: Number of Juveniles Committed to Adult Prisons 1985-2003 (Commitment Year)

71. Interestingly, the offense profiles across 1988-1989 and 1996-1997 stayed fairly stable. *See* Figure 1, *supra*, and Figure 2, *infra* p. 1741. Between 1988-1989 there was an increase in the number of murder cases as a percentage of total commitments from nineteen percent to twenty-nine percent and a decrease in robbery cases from twenty-one percent to fourteen percent, but most other offenses stayed relatively stable. *See* Figure 1, *supra*, and Figure 2, *infra* p. 1741. For the period of 1996-1997, CSC cases increased from six percent to ten percent of the total and assaults dropped from twenty-six percent to eighteen percent. *See* Figure 1, *supra*, and Figure 2, *infra* p. 1741. At the same time, commitments for property cases increased from thirteen percent to twenty percent. *See* Figure 1, *supra*, and Figure 2, *infra* p. 1741.

Figure 2: Number of Juveniles Committed to Adult Prisons 1984-2002 (Offense Year)



Figures 3 and 4 report the rate of fifteen to sixteen-year-olds (per one hundred thousand) entering adult prisons by commitment and offense year.[72] This age group was chosen because it was consistent across the entire twenty-year period. As is evident from these figures, the rate of fifteen to sixteen-year-olds entering adult prisons increased substantially from the 1980s to mid-1990s before decreasing in 1999.[73] The figure also shows that despite this decrease, the rate of juveniles in the fifteen to sixteen-year-old age group is higher following the legislative reforms than it was prior to the legislative reforms.[74]

72. *See* Figures 3 & 4, *infra* p. 1742.
73. *Id.*
74. *Id.*

Figure 3: Rate of Juveniles Committed to Prison 1984-2003 (Commitment Year)

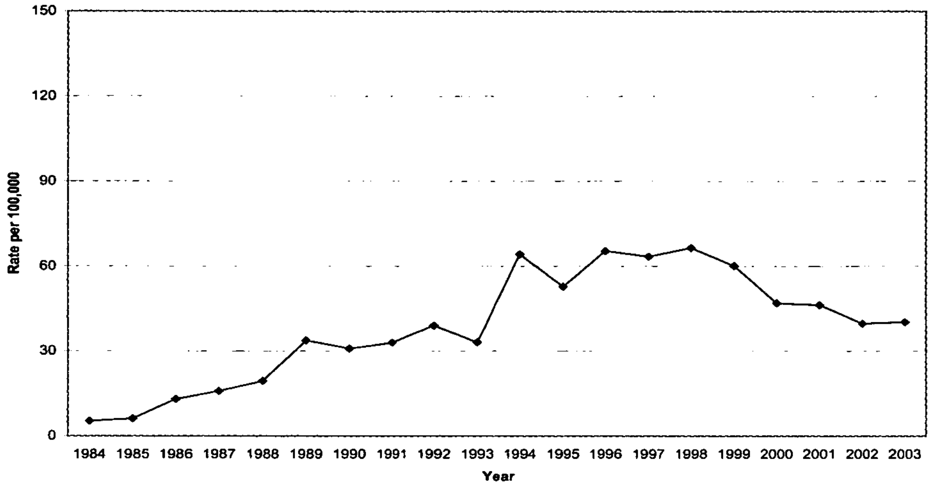


Figure 4: Rate of Juveniles Committed to Prison 1984-2002 (Offense Year)

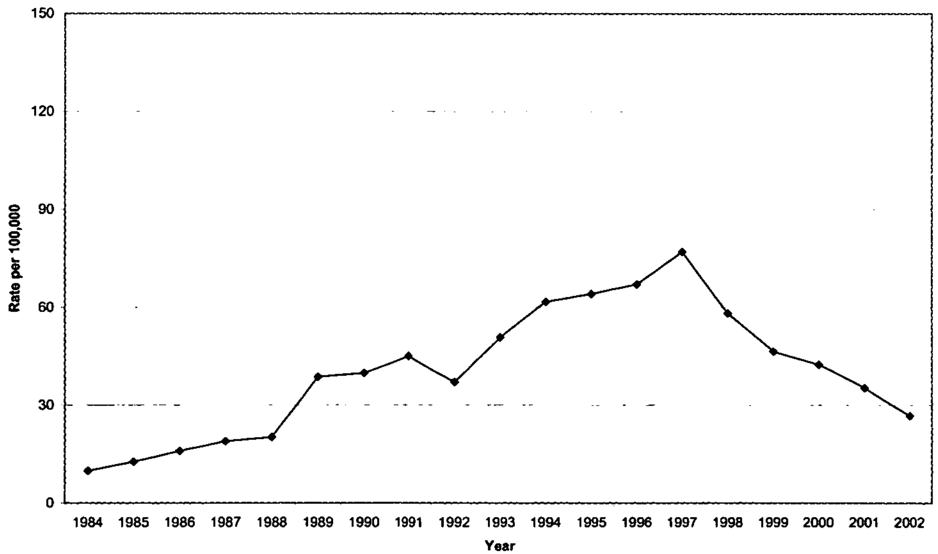


Figure 5 presents the waived juvenile commitment rate as a percentage of the excluded juvenile commitment rate to control for changes in policies and practices that might influence the flow of cases into adult prisons.[75] As this figure shows, the percentage of waived youth entering prison relative to seventeen-year-olds increased following both of the legislative changes.[76] Despite the fact that there was a general increase in this percentage from 1988 to 1997, the two largest spikes occurred immediately following the legislative reforms, suggesting that these reforms did have some effect on the number of waived juveniles entering adult prisons. At the same time, the figure shows that the percentage of waived youth entering prison relative to the excluded group has decreased since its peak in 1997.[77] While we cannot draw any firm conclusions regarding this trend, it is likely that the enactment of the designation provision has decreased the number of youth being waived to the criminal justice system and entering adult prisons. In fact, there is direct evidence from one county that the designation provision has served as an alternative to waiver and aggregate evidence that the designation provision has been increasingly used in other counties.[78]

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75. *See* Figure 5, *infra* p. 1744.

76. *Id.*

77. *Id.*

78. *See generally* Shook, *supra* note 15; Jeffrey J. Shook & Rosemary C. Sarri, Juveniles in the Justice Systems in Michigan: Treating Juveniles as Adults, Report prepared for the Workgroup on Juvenile Waiver, Lansing, MI (2004) (on file with author).

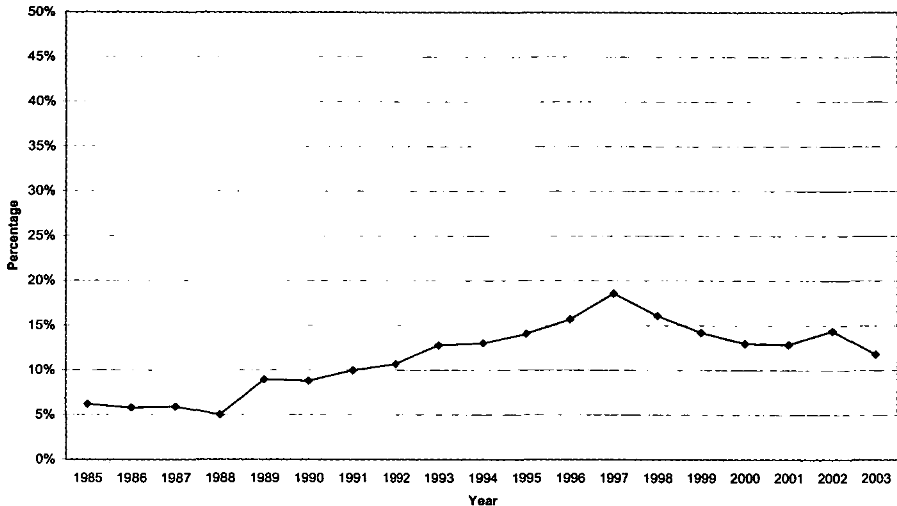

Figure 6[79] presents the juvenile commitment rate—fifteen to sixteen as a percentage of the violent index crime rate.[80] We chose the violent crime rate because it includes many of the offenses included in the prosecutorial discretion provision, and because it includes the offenses that many argue are appropriate for transfer consideration given their severity. Although an imprecise comparison in many respects, this figure does control for changes in violent and serious juvenile crime, and shows that an increasing number of young people are entering adult prisons relative to the rate of violent crime.[81] In part, it is likely that the increase in juvenile commitments to adult prisons relative to violent juvenile crime is directly related to the direct file and mandatory sentencing aspects of the legislative changes that have reduced the discretion of juvenile or criminal court judges. At the same time, it might also indicate a broader shift in practices regarding the transfer of juveniles to the criminal justice system and their commitment in adult prisons.

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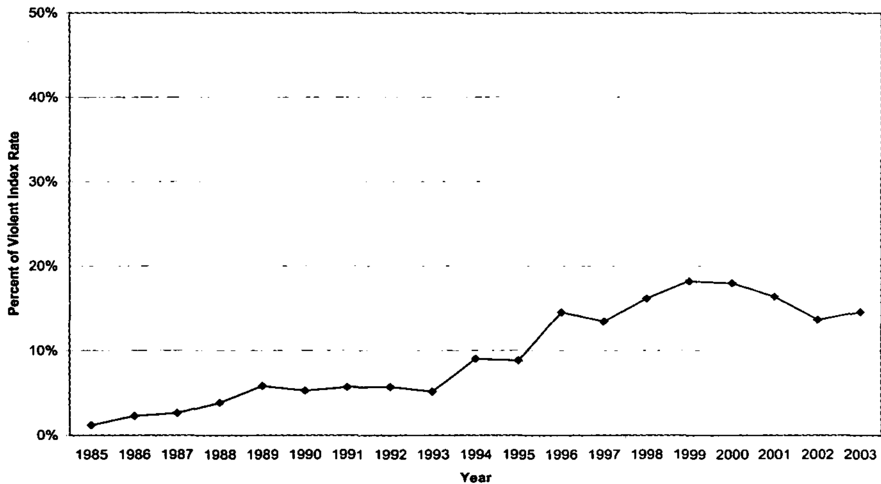
79. *See* Figure 6, *infra* p. 1745.

80. We use the violent crime index rate for ten to sixteen-year-olds based on data provided by the Michigan State Police. Data provided by Michigan State Police (on file with author). Given that youth are committed for many offenses not included in this index, and that the rate includes data on violent index arrests for ten to fourteen-year-olds in addition to fifteen to sixteen-year-olds, it is important to note that we are only employing this comparison as a general guide to the relationship between prison commitments and violent juvenile arrests.

81. *See* Figure 6, *infra* p. 1745.

As discussed previously, the reluctance of judges in Wayne County to waive juveniles to the criminal court and sentence them as adults was an impetus behind both legislative reforms.[82] Examining the effects of these legislative changes on the percentage of youth committed to adult prisons from Wayne County, as compared to the rest of the state, can help determine whether these changes had a direct effect in Wayne County, and can help set the context for understanding other changes in the commitment of juveniles to adult prisons. As Table 1 shows, the percentage of youth being committed to adult prisons from Wayne County decreased substantially across each of these periods.[83] Whereas Wayne County was criticized for being reluctant to waive and sentence juveniles as adults, it actually accounted for fifty-five percent of all adult prison commitments of juveniles prior to the 1988 legislative reforms.[84] Following the 1996 legislative reforms, however, it accounted for only eighteen percent of adult prison commitments.[85] The reasons for this change are not reflected in the crime rate in Wayne County as compared



to the rest of the state, but instead through both the resistance to the redistribution of youth from the juvenile to the criminal justice system in

82. *See* Shook, *supra* note 58.
83. *See* Table 1, *infra* p. 1746.
84. *Id.*
85. *Id.*

Wayne County[86] and the increasing use of waiver in other counties throughout the state.[87]

Table 1: Comparison of Wayne County and the Rest of the State			
Waived Youth			
	1984-1988	1989-1996	1997-2003
Wayne County	135 (55%)	253 (23%)	159 (18%)
Rest of State	111 (45%)	839 (77%)	742 (82%)
	246	1092	901
17-Year-Olds			
	1984-1988	1989-1996	1997-2003
Wayne County	835 (40%)	1357 (28%)	514 (18%)
Rest of State	1261 (60%)	3472 (72%)	2296 (82%)
	2096	4829	2810

B. Commitment Type

MDOC provided a code which indicates the type of commitment—probation technical, probation new sentence, or new commitment—through which a juvenile enters an adult prison. This code identifies whether a juvenile was given a prison sentence directly by the criminal court, or whether a juvenile initially received a probation sentence and subsequently violated parole—technical—or received probation but was then committed for a new offense—new sentence. It is important because it indicates the degree to which youth are directly committed to adult prisons, or whether they enter through another avenue. Table 2 presents the percentage of youth entering adult prisons through a new commitment or probation violation/new sentence.[88]

86. *See* Shook, *supra* note 15.

87. Using commitment year as the basis for calculating the average number of youth entering adult prisons because of the incomplete offense year data for the period following the legislative changes, the average number of youth from Wayne County committed to adult prisons increased from 21.2—prior to the legislative changes—to 28.9 following the legislative changes. At the same time, the average number of youth committed to adult prisons from outside of Wayne County increased from 14.6 youth per year to 129.1 youth per year.

88. *See* Table 2, *supra*.

Table 2: Commitment Type of Transferred and Excluded Youth			
Waived Youth			
	1984-1988	1989-1996	1997-2003
New Commitment	213 (87%)	746 (69%)	506 (56%)
Probation Technical	15 (6%)	209 (19%)	227 (25%)
Probation New Sentence	17 (7%)	134 (12%)	168 (19%)
	246	1092	901
Excluded Youth (17-Year-Olds)			
	1984-1988	1989-1996	1997-2003
New Commitment	1193 (57%)	2622 (54%)	1329 (47%)
Probation Technical	631 (30%)	1685 (35%)	1079 (38%)
Probation New Sentence	272 (13%)	522 (11%)	402 (14%)
	2096	4829	2810

As evident from the table, there has been a substantial increase in the number of juveniles entering prison after initially being sentenced to probation.[89] MDOC urged some caution in distinguishing between probation technical violations and probation new sentences because some workers use these codes interchangeably.[90] It is clear from this table, however, that the percentage of youth entering adult prisons after first being sentenced to probation has increased dramatically, for both those who commit technical violations and those who are charged with a new offense and receive a new sentence.[91] The degree that this change can be

89. *See* Table 2, *supra*.

90. It is also important to view the absolute percentage with some caution because a number of youth who entered through probation did so for serious offenses and under the new probation sentence code, and it was somewhat unclear whether all of these youth were coded correctly. However, these cases were distributed across the entire time period, and although we are not fully confident in the overall percentage of youth, we are confident in the trend that youth are increasingly entering adult prisons in Michigan after first being sentenced to probation. Further, it is not unlikely that youth received probation and subsequently picked up a serious offense for which they were committed to prison.

91. *See* Table 2, *supra*. The increase represented by this trend is not merely associated with a decrease in the number of youth entering adult prisons as new commitments, but includes an absolute increase in the number of youth entering adult prisons through the probation system. *See* Table 2, *supra*. In the period preceding these legislative changes, an average of six youths per year entered adult prison through one of these mechanisms. *See* Table 2, *supra*. Following the first legislative change, this number increased to an

linked directly to the 1988 and 1996 legislative reforms is limited.[92] Although the table also shows that there has been an increase in the percentage of excluded youth who enter prisons following an initial probation sentence, this increase is much less than that reported for waived juveniles. Thus, it is apparent that the overall magnitude of this increase is the result of factors other than changes in probation policies and practices. While we are not able to draw definitive conclusions, one plausible explanation is that there was an increase in the number of youth waived for offenses likely to receive a probation sentence.

C. Offense Characteristics

MDOC employs more than four hundred offense codes,[93] and juveniles were committed for approximately one hundred and thirty-seven of these offenses.[94] Breaking these offense codes into analytical categories is difficult, given the wide variation of offenses for which juveniles are committed to adult prisons. Consequently, we use seven categories to capture changes in the offense profiles of young people entering adult prisons. Table 3[95] presents the percentage of juveniles committed for murder, manslaughter, a SJO[96]—mandatory adult commitment offense (not including murder), a SJO—non-mandatory adult commitment offense, other person offense, property offense, and a drug/weapon offense.[97] As this table shows, there has been a substantial

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average of forty-three youth per year. In the period following both legislative changes, this number increased to fifty-seven youth per year. *See* Table 2, *supra* p. 1747.

92. The 1996 legislative reform did require that greater weight be attached to the offense and prior history of the juvenile when assessing the factors under the judicial waiver provision. *See* discussion, *supra* note 49. Because youth waived through the judicial discretion provision are more likely to receive a probation sentence, this change might have had some effect on the number of youth being judicially waived and receiving probation. Firmly drawing this conclusion, however, is not possible given the available data.

93. *See, e.g.*, MICR Arrest Charge Codes, *available at* http://www.michigan.gov/-documents/MICRArrestCodes_June06_163082_7.pdf (last visited Jun. 4, 2009).

94. Many youth were committed to prison for multiple offenses. We use the MDOC commitment code to identify the specific commitment offense identified here. Because many youth initially receive probation and subsequently pick up a new offense, the commitment offense may not necessarily always represent the offense for which they were transferred to the criminal court.

95. *See* Table 3, *infra* p. 1750.

96. *See* discussion, *supra* note 52 (discussing the specified juvenile offenses).

97. This coding system mirrors the degree of seriousness attached to these offenses by the legislature. The legislature enacted changes in 1988 and 1996 that allowed prosecutors to transfer juveniles to the adult criminal justice system for what are termed specified juvenile offenses. *See generally supra* pp. 1734-37. Twelve of these offenses—

decrease in the number of juveniles committed for murder across these legislative periods.[98] At the same time there were increases in the number of juveniles committed for SJO—mandatory adult sentencing offenses and SJO—non-mandatory adult sentencing offenses.[99] As is evident from the table, there has also been an increase in juveniles committed for other person and property offenses and a decrease in drug or weapon offenses.[100] These offenses vary dramatically and the largest contributors include burglary, manufacture or delivery of a controlled substance less than fifty grams, larceny, unarmed robbery, and auto theft. Comparing waived juveniles to the excluded group, Table 3 reveals that there has not been much change in the offenses for which "excluded" juveniles are committed to adult prisons.[101]

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referred to here as mandatory adult sentencing offenses, required an adult sentence upon conviction. Thus, we separated out murder, based on its severity and the substantial decrease in young people committed for murder, and further separated out the SJOs by whether they involved a mandatory or non-mandatory adult sentencing offense. It is important to note that there is tremendous variation in type of offenses included in the other person, property, and drug or weapon offense categories. It is also important to note that the labels employed here are for comparability only and do not have the same legal meanings across the entire time period.

98. The percentage changes in the commitment of murder cases are not necessarily a decrease in the number of murder offenders entering adult prisons, but instead are indicative of the increase of youth with other offenses entering adult prisons. Prior to the two legislative changes, approximately 14.5 youth entered adult prisons for a murder offense per year. Between these changes, approximately 27.5 youth entered adult prisons for murder each year. Following the changes, approximately 11.5 juveniles entered adult prison for murder each year. These trends are largely in accord with the overall national decline in violent crime by juveniles after 1994. *See* Snyder, *supra* note 24.

99. Including murder in the SJO—mandatory adult sentencing offense category shows that there has been an overall decrease of ten percent in the number of youth entering adult prison for one of these offenses across these time periods.

100. *See* Table 3, *infra* p. 1750.

101. *See* Table 3, *infra* p. 1750.

Table 3: Offense Characteristics of Waived and Excluded Offenders			
Waived Youth			
	1984-1988	1989-1996	1997-2003
Murder	29%	20%	9%
Manslaughter	6%	2%	1%
SJO - Mandatory Adult Sentence	29%	31%	35%
SJO - Non-Mandatory Adult Sentence	9%	13%	17%
Other Person	9%	12%	14%
Property	11%	14%	19%
Drug/Weapon	7%	9%	4%
	246	1092	901
Excluded Youth (17-Year-Olds)			
	1984-1988	1989-1996	1997-2003
Murder	5%	5%	3%
Manslaughter	2%	2%	1%
SJO - Mandatory Adult Sentence	19%	20%	24%
SJO - Non-Mandatory Adult Sentence	2%	2%	3%
Other Person	12%	14%	19%
Property	45%	33%	36%
Drug/Weapon	15%	24%	14%
	2096	4829	2810

These results reveal that prior to the legislative reforms, more than one third of juveniles committed to adult prisons were committed for murder or manslaughter. Following these changes, however, approximately one in ten juveniles were committed for murder or manslaughter.[102] There has been an increase, though, in the percentage of youth committed to adult prisons for the other offenses deemed by the legislature to be the most serious (SJO-mandatory and SJO-non-mandatory offenses).[103] This increase suggests that the shift to

102. *See* Table 3, *supra*.
103. *See* Table 3, *supra*.

prosecutorial direct file for these crimes (1988 and 1996 reforms),[104] and the requirement of mandatory adult sentences for many of these crimes (1996 reform),[105] has had some effect on the number of young people who enter adult prisons. Further, it suggests that youth are entering adult prisons for a broader range of offenses than prior to the legislative reforms, a finding that is corroborated by the increase in the number of youth committed for property offenses and for other person offenses.[106]

D. Offender Characteristics

Examining offender characteristics over time provides further information regarding whether there have been changes in the "type" of juvenile offender being committed to adult prisons. Table 4 presents information on the characteristics of youth and shows that there have been a number of notable changes over time.[107] While the increase in fourteen-year-olds is clearly attributed to the 1996 legislative reform, it is obvious that this change has not driven the increase in the number of youth being committed to adult prisons.[108] Further, although the enactment of the designation provision has widened the net of adult sanctions and subjected a small number of young youth to adult imprisonment, it has not driven the increase in youth entering adult prisons. In part, this increase can be explained through the increase in the percentage of sixteen-year-olds[109] even after juveniles fourteen-years-old and younger became eligible to be sentenced to adult prison. This result indicates that an increasing number of "older" youth were being committed to adult prisons over this time period.[110]

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104. *See* discussion, *supra* notes 44, 49.
105. *See* discussion, *supra* note 49.
106. *See* Table 3, *supra* p. 1750.
107. *See* Table 4, *infra* p. 1752.
108. *See* Table 4, *infra* p. 1752.
109. *See* Table 4, *infra* p. 1752.
110. *See* Table 4, *infra* p. 1752.

Table 4: Demographic and Prior History Characteristics of Waived Youth			
	1984-1988	1989-1996	1997-2003
16-year-olds	67%	73%	72%
15-year-olds	33%	27%	22%
14-year-olds	0%	0%	6%
Under 14 years old	0%	0%	<1%
African American	74%	65%	55%
White	25%	30%	39%
Hispanic	1%	2%	5%
Other	0%	3%	1%
Male	98%	98%	97%
Female	2%	2%	3%
Prior Juvenile Commitment	39%	47%	46%
Prior Juvenile Probation	55%	53%	67%
Prior Commitment and Probation	31%	40%	42%
	246	1092	901

Table 4 presents several other interesting results that are important in assessing changes in the "type" of juvenile being committed to adult prisons.[111] In particular, it is clear that young people entering adult prisons have more extensive prior histories in the juvenile system over time as the number of youth with a prior commitment or probation experience has increased.[112] The average number of probation and commitment experiences for youth committed after the two legislative changes was 2.58 compared to 1.67 prior to the changes and 2.20 between the changes.[113] Further, the percentage of sixteen-year-olds who were committed to prison for a property or other person offense (excluding SJOs and manslaughter) and had at least one commitment or prior probation experience increased from eleven percent prior to the legislative changes to twenty-one percent following the legislative changes.[114] For the period 2001-2003, this type of youth made up

111. *See* Table 4, *supra*.
112. *See* Table 4, *supra*.
113. *See* Table 4, *supra*.
114. *See* Table 4, *supra*.

twenty-four percent of the population of waived juveniles committed to adult prisons.[115] Thus, it is apparent that there has been an increase in the number and percentage of sixteen-year-olds with a prior history in the juvenile justice system, but a less serious committing offense, entering adult prisons.[116] Although we are limited in drawing this conclusion definitively, these findings suggest that a broader population of youth were increasingly being waived to the criminal court, and, subsequently, entering adult prisons following the two legislative reforms.[117]

Similarly, there have been changes in the prior history profiles of more serious offenders who enter adult prisons across these time periods. Prior to the legislative reforms, thirty-seven percent of youth entered adult prisons without a prior commitment or probation experience.[118] Between the legislative changes, that percentage dropped to twenty-seven percent.[119] Following the two legislative reforms, it increased to thirty percent.[120] The vast majority (eighty percent) who enter adult prisons without a prior commitment or probation experience do so for a SJO.[121] Prior to and between the two legislative changes, murder comprised thirty-six percent and thirty-three percent of cases that entered adult prisons without a prior commitment or probation experience, whereas following the legislative changes it comprised only fourteen percent of these cases.[122] At the same time, robbery cases comprised fourteen percent and eighteen percent of the cases that entered adult prison without a prior commitment or probation experience, but forty-one percent of the cases that entered adult prison without a prior commitment or probation experience following the legislative changes.[123]

In conjunction with several of the findings that have been previously presented, these results suggest several key changes in the commitment

115. *See* Table 4, *supra* p. 1752. This percentage is likely higher because many youth who fit this profile are likely to have been committed subsequent to 2003 for offenses committed in this period, particularly if they were initially sentenced to probation. Similarly, the percentage of commitments for this type of youth is likely to increase for the period following the legislative reforms as well.

116. *See* Table 2, *supra* p. 1747.

117. *See generally* Table 2, *supra* p. 1747.

118. *See* Table 4, *supra* p. 1752 (referencing those that do not have a prior commitment or probation).

119. *See* Table 4, *supra* p. 1752 (referencing those that do not have a prior commitment or probation).

120. *See* Table 4, *supra* p. 1752 (referencing those that do not have a prior commitment or probation).

121. *See* Table 4, *supra* p. 1752.

122. *See* Table 3, *supra* p. 1750; Table 4, *supra* p. 1752.

123. *See* Table 3, *supra* p. 1750; Table 4, *supra* p. 1752.

of juveniles to adult prisons. Prior to the legislative changes, the commitment of juveniles to adult prisons was more likely to be confined to a narrow group of youth who committed very serious offenses (for example, murder) and many of these youth did not have a prior history in the system evidenced by a previous juvenile commitment or probation experience.[124] Following the first legislative reform, a broader group of offenders entered adult prisons, including those committed for a variety of SJOs and other person and property offenses.[125] These youth were more likely to have a prior history in the juvenile justice system as evidenced by prior commitments and probation experiences.[126] After both legislative reforms, the group of offenders committed for a property or other person offense expanded and a large majority of these youth had prior histories in the juvenile system.[127] This change, at least in part, might be attributable to changes in the judicial waiver provision that gave greater weight to the offense and past history of the youth in making the transfer determination. It is also likely to be associated with changes in practice with regard to the transfer of juveniles to the adult criminal justice system in which a broader population of youth were deemed to be deserving of "adult" punishment.[128] At the same time, a somewhat broader group of youth was also committed for the serious and violent crimes labeled by the legislature as SJOs and many of these youth did not have prior histories in the juvenile justice system.[129] While it is quite likely that this result is directly associated with the 1996 legislative reforms that enhanced the power of prosecutors at the expense of judges, it is also likely, at least in part, that it is the result of changing norms regarding whether a juvenile is deserving of adult punishment.

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124. *See supra* p. 1752.
125. *See supra* p. 1752.
126. *See supra* p. 1752.
127. *See supra* p. 1752.
128. One prosecutor we interviewed indicated that there was a change in practice in her county around this time that was driven by a realization that they could not keep giving youth "a slap on the wrist." In large part, she attributed this realization to increases in violent and serious juvenile crime in the early 1990s and that, in her opinion, the system needed to become tougher with juveniles. Interview with Chief Juvenile Prosecutor, Michigan (Apr. 15, 2004) (name and location of employment confidential). A second factor that contributes to this change in practice concerns the issue of resources. In Michigan, a county must pay half the cost of committing a youth to the juvenile system, whereas it pays nothing to send a youth to adult probation or prison. *See* Shook & Sarri, *supra* note 78. A number of legal actors we interviewed stated that resources did increasingly drive case processing decisions in their county, including decisions to waive a juvenile to the criminal court. *Supra* note 78.
129. *See generally supra* pp. 1752-54.

Also important in this table is the decrease (nineteen percent) in the percentage of youth committed to adult prisons who were African American across these time periods.[130] In large part, this change is related to the fact that the share of youth from Wayne County has decreased substantially.[131] The youth population of Wayne County is approximately fifty percent youth of color[132] and the vast majority of youth committed to adult prisons from Wayne are youth of color (ninety percent).[133] Thus, the decrease in the percentage of African American youth being committed to adult prisons is, in part, a function of the relative stability in the number of youth committed to adult prisons from Wayne County and the substantial increase in the commitment of juveniles to adult prisons in other parts of the state.[134] Despite this trend, however, it is clear that the problem of the overrepresentation of youth of color to adult prisons in Michigan[135] remains very serious.

E. Sentence

Perhaps the most striking change over time has been the change in minimum sentence lengths presented in Table 5.[136] As the table shows, the percentage of juveniles receiving a sentence of ten or more years dropped from forty-four percent to eighteen percent following the two legislative changes.[137] At the same time, the percentage of juveniles receiving sentences of two to five years increased from twenty-four percent to forty-six percent.[138] Youth receiving minimum sentences of less than five years (the median for the full group) was sixty-one percent compared to thirty-six percent prior to the legislative changes and the median minimum sentences for juveniles dropped from eight years for the period before the legislative changes to three and a half years for the period following the two legislative reforms.[139] At the same time, the minimum sentences of excluded youth only changed slightly over these three time periods.[140] Consequently, it is apparent that transferred

130. *See supra* p. 1752.

131. *See* Table 1, *supra* p. 1746.

132. *See generally* From a Child's Perspective, *available at* http://www.cus.wayne.-edu/content/publications/CENSUS_FACT_SHEET_3.pdf (last visited Jun. 4, 2009).

133. *See* Table 1, *supra* p. 1746.

134. *See* Table 1, *supra* p. 1746.

135. *See generally supra* p. 1752.

136. *See* Table 5, *infra* p. 1756.

137. *See* Table 5, *infra* p. 1756.

138. *See* Table 5, *infra* p. 1756.

139. *See* Table 5, *infra* p. 1756.

140. *See* Table 5, *infra* p. 1756.

juveniles are increasingly committed to adult prisons with shorter sentence lengths, suggesting that youth are increasingly being committed to adult prisons for what are considered by criminal courts to be less serious offenses.[141]

Table 5: Minimum Sentences of Waived and Excluded Youth			
Waived Youth			
	1984-1988	1989-1996	1997-2003
0-2 years	27 (11%)	117 (11%)	136 (15%)
2-5 years	59 (24%)	384 (35%)	417 (46%)
5-10%	52 (21%)	276 (25%)	187 (21%)
10+ years	108 (44%)	315 (29%)	161 (18%)
	246	1092	901
Excluded Youth (17-Year-Olds)			
	1984-1988	1989-1996	1997-2003
0-2 years	695 (33%)	1473 (31%)	958 (34%)
2-5 years	966 (46%)	2386 (49%)	1382 (49%)
5-10 years	242 (12%)	571 (12%)	295 (11%)
10+ years	193 (9%)	399 (8%)	175 (6%)
	2096	4829	2810

IV. DISCUSSION

Parsing out the effects of legislative changes that have eased the process of treating juveniles as adults is a difficult task given the variety of factors that can affect the flow of youth from the juvenile to the adult criminal justice system and the degree to which these factors can change over time and vary across space. It is an important task, however, given the consequences of this practice on youth, the public, and the justice system. This article adds to an understanding of the effects of these changes through an examination of the commitment of juveniles to adult prisons over a twenty-year period. The results indicate that there have been some important changes in the commitment of juveniles to adult prisons that contribute to broader understandings regarding the effects of these reforms, and, more generally, the criminalization of youth and the organization of sentencing.

141. *See generally* Table 5, *supra*.

One key change pertains to the number of youth entering adult prisons across the twenty-year period. No other study has examined this question using offense age as the basis for determining whether an individual entered adult prison for a crime committed as a juvenile.[142] Based on a number of measures, it is clear from these findings that there has been an increase in the number of juveniles committed to adult prisons following the two legislative changes.[143] In absolute numbers, this increase does not necessarily represent a large redistribution of youth from the juvenile to the adult criminal justice system. It does, however, indicate that there has been a significant increase in the number of juveniles who are committed to adult prisons in the state.[144] In fact, although 1998 represents a peak in the commitment of juvenile offenders and the period of 1999-2003 exhibits a general decrease, the average number of youth committed during this latter period is approximately four and a half times greater than prior to the legislative reforms.[145] Using the rate of excluded youth entering adult prisons (seventeen-year-olds) and the violent juvenile crime rate as controls further evidences the fact that more juveniles are being committed to adult prisons than prior to the legislative changes, despite substantial decreases in violent and serious juvenile crime.[146]

With regard to the total number of juveniles committed to adult prisons and the size of the increase over this period, it is important to note that the definition of "juvenile" for justice system purposes in Michigan does not include seventeen-year-olds.[147] Incorporating seventeen-year-olds in these analyses would mean that between four hundred and nine hundred juveniles were committed to adult prisons across most of these years.[148] If seventeen-year-olds were defined as "juveniles" in Michigan, as is the case in thirty-seven other states,[149] a conservative estimate suggests that an equal number of seventeen-year-olds would be waived and committed to adult prisons as fourteen to

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142. *See* Snyder & Sickmand, *supra* note 32.

143. *See generally supra* pp. 1740-56.

144. *Id.*

145. We use commitment year to make this calculation because offense year undercounts the number of youth for the period following the legislative changes given that additional youth will have entered prison following when we received the data.

146. *See* Snyder, *supra* note 24.

147. MICH. COMP. LAWS ANN. § 712A.4 (West 2002).

148. This number reveals the importance of using age at offense as opposed to age at commitment to indicate the numbers of juveniles who enter adult prisons each year as approximately sixty-two percent of these youth had a commitment date after age eighteen.

149. *See* discussion, *supra* note 67.

sixteen-year-olds, meaning that between approximately one hundred and four hundred "juveniles" would have been committed to adult prisons in Michigan across this time period.[150] Thus, while these findings might not necessarily reveal a large caseload shift from the juvenile to the criminal justice system, they do indicate that a significant number of youth traditionally considered to be part of the caseload of the juvenile justice system are committed to adult prisons in Michigan.

Another key finding pertains to the issue of how juveniles enter adult prisons. As is evident from the findings, a large and increasing percentage of juveniles enter adult prisons after first being sentenced to probation in the criminal court.[151] When excluded youth are included, the total number of youth who receive adult probation and subsequently, enter adult prison is very large.[152] This finding has several key implications. The first concerns the need to understand the experiences of youth on adult probation, the services and supervision that they receive, the pathways they take to adult prison, and the question of why some youth succeed on probation and others end up in prison. Young people, at least arguably, require different types of programs, services, and forms of supervision than adults. As evident from our findings, however, it is clear that many juveniles do not "succeed" on probation,[153] raising questions regarding both the utility of transferring juveniles to the criminal court who will receive probation sentences and the types of programs, services, and supervision that they receive on probation. Given that a number of other studies have found that many waived juveniles receive probation in the criminal court,[154] there is a real need for additional research on the experiences of these youth on adult probation.

The second implication involves theoretical considerations regarding the process of assessing and assigning criminal responsibility to young offenders. In large part, what this finding reveals is that studies that focus on the sentencing of juvenile offenders neglect a key dimension of this process when they do not look at what Simon Singer has termed the

150. This estimate was derived by assuming that two-thirds of the most serious offenders (murder, specified juvenile offenses, and manslaughter) would have been transferred had they been eligible for the juvenile court and that approximately ten percent of the other person, property, and drug/weapon offenders would have been transferred.

151. *See supra* p. 1752.

152. *See supra* p. 1752.

153. *See generally supra* p. 1752.

154. *See* Feld, *supra* note 5.

"back end" of the criminal justice system.[155] The "back end" of the criminal justice system refers to decision-making points that occur after an individual is sentenced and involves the tremendous discretion provided to prison officials, parole boards, parole officers, probation officers, and other officials who routinely assess offenders and make decisions regarding issues of punishment, rehabilitation, and dangerousness.[156] Important here is the idea that the categories of "juvenile" and "adult" are socially constructed and that decisions to treat a juvenile as an adult involve contestations and negotiations over the legal and cultural parameters of these categories.[157] These contests and negotiations occur across a series of decision-making points and involve a variety of values, norms, symbols, resources, actors, and institutions.

Thus, it is clear that the justice system is not a monolithic entity, but, instead, consists of an array of actors, agencies, and institutions that are "loosely coupled" across time and space.[158] Focusing solely on one decision-making point neglects attention to the ways in which these labels can be reaffixed or renegotiated at subsequent decision making points. Further, it neglects how decisions at one stage are influenced by those at previous or subsequent decision-making points. Consequently, future research and theoretical attention to the process through which the criminal responsibility of juveniles is assessed and assigned must focus on how these labels are constructed, contested, and negotiated across

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155. Simon I. Singer, *Incarcerating Juveniles into Adulthood: Organizational Fields of Knowledge and the Back End of Waiver*, 1 YOUTH VIOLENCE AND JUVENILE JUST., 115 (2003).

156. *See generally id.*

157. The idea that the category of juvenile is socially constructed does not mean that there are not differences between juveniles and adults. In fact, numerous studies have found that children and youth differ from adults on a variety of key dimensions including decision-making, risk taking, and the effects of peers on behavior. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Capacity, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003). Instead, a social constructionist view asserts that the cultural category of juvenile, as distinct from biological immaturity, is not universal or natural but is dependent upon the meanings and significance attached to it across time and space. These meanings are clearly informed by developmental differences, but are also informed by a variety of other discourses, symbols, and institutions. *See* CHILDHOOD, YOUTH, AND SOCIAL WORK IN TRANSFORMATION (Lynn Nybell, Jeffrey J. Shook, and Janet Finn, eds., Columbia University Press 2009) (discussing the socially constructed nature of the category of childhood).

158. *See* Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Justice*, 33 WAKE FOREST L. REV. 509 (1998); John Hagan, *Why is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links between Organization and Power*, 26 J. RES. IN CRIME & DELINQUENCY 116 (1989); SINGER, *supra* note 6.

these "back end" decision making points,[159] not merely the transfer or sentencing decision.[160]

A third implication involves what this finding reveals about the "type" of juvenile offender being committed to adult prisons. The increase in the percentage and total number of juveniles entering adult prisons from probation was relatively large over the study period.[161] In part, it is possible that this increase is related to changes in probation policies and practices evidenced by the fact that a larger percentage of excluded youth also entered adult prisons after being initially sentenced to probation.[162] Yet, the increase in waived juveniles entering adult prisons after first being sentenced to probation is much larger than that of excluded juveniles, indicating that this trend is not wholly attributable to probation policies and practices.[163] Instead, it is likely that it is, in large part, the result of policy and practice changes regarding the transfer of juveniles to the criminal court that have resulted in a broader population of juveniles being waived to the criminal court and subsequently, entering adult prisons.

In many respects, this conclusion is corroborated by the changing offense, prior history, and sentencing profiles of juveniles discussed previously. The decrease in the length of the minimum sentence that transferred youth receive is particularly demonstrative of the reality that a less serious offender is increasingly entering adult prisons in Michigan.[164] This finding not only suggests that decision makers are increasingly determining that a broader population of youth should be treated as adults, but at a practical level it means that juveniles will be eligible for release at increasingly younger ages, raising questions concerning the utility of treating them as adults with regard to both punishment severity and public safety concerns.

Although we are limited to the extent that we can draw definitive conclusions regarding the relationship between the policy reforms and our finding that a broader population of juveniles are being waived to the criminal court and committed to adult prisons in Michigan, our findings suggest that these policy reforms have had a direct effect on the commitment of youth to adult prisons. In part, this effect can be observed

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159. *See* Singer, *supra* note 155.

160. *See* Daniel P. Mears, *The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes*, 32 LAW & SOC'Y REV. 667 (1998) (critiquing the focus of waiver research on the decision to transfer or waive a youth to the criminal court).

161. *See supra* p. 1752.

162. *See supra* p. 1752.

163. *See supra* p. 1750.

164. *See supra* p. 1750.

by the increases in the number and proportion (relative to excluded youth) of juveniles entering adult prisons following the legislative reforms.[165] It can also be observed, at least somewhat, in the decrease in youth entering adult prison for murder and increase in youth entering for other SJOs.[166] These findings suggest that shifting power to the prosecutor (1988 reform) and expanding and consolidating that power in the prosecutor's office (1996 reform) has led to a broader range of "serious" juvenile offenders being committed to adult prisons.

The decrease in the rate of fifteen to sixteen-year-olds entering prison relative to excluded youth[167] points toward another potential legislative effect. As discussed previously, the 1996 legislative reform included a mechanism—the designation provision—that allowed juveniles to be tried as "adults" in the juvenile court.[168] Although we cannot fully determine, based on our data, whether the designation led to the decrease in juveniles being committed to adult prisons relative to excluded youth, there is some evidence that it may be contributing to this decrease.[169] Interviews with prosecutors and judges revealed that these legal actors viewed the designation as an alternative to the traditional dichotomous juvenile/adult decision and as providing additional "tools" through which to hold youth accountable in the juvenile court.[170] In light of the consequences of transferring juveniles to the criminal court and despite the critiques of prominent criminologists and juvenile court scholars,[171] there remains a need to further examine the role of mechanisms such as the designation provision on the transfer of youth to the criminal court.

While these results appear to reflect several direct effects of the legislative changes on the commitment of juveniles to adult prisons, we argue that our finding that a broader population of juveniles was being committed to adult prisons cannot be fully attributed to the direct effects

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165. *See supra* p. 1744.

166. *See supra* p. 1745.

167. *See generally supra* p. 1747.

168. *See* Shook, *supra* note 15.

169. *See* Shook & Sarri, *supra* note 78; Shook, *supra* note 15. This explanation is consistent with a study from Minnesota that found a similar provision to serve as an alternative to transfer. Fred Cheesman II, Thomas Cohen, Denise Dancy, Matthew Kleiman, Nicole Mott & Heidi Green, Blended Sentencing in Minnesota: On Target for Justice and Public Safety, *available at* http://www.ncsconline.org/WC/-Publications/Res_Senten_BlendedSentenceMNPub.pdf (last visited Jun. 4, 2009).

170. *See* Shook, *supra* note 15.

171. *See* Franklin E. Zimring, AMERICAN JUVENILE JUSTICE (2005); Marcy R Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997 (2001).

of these reforms. Instead, we argue that this finding reflects an increased willingness to treat juveniles as adults among legal actors in Michigan. As has been argued by Barry Feld and others, the policy changes of the last several decades depict changing ideas regarding the juvenile offender.[172] Reflected through descriptions of juveniles as "superpredators," assertions of their increased "dangerousness" and "culpability," and pronouncements that "adult crime" required "adult time," the transfer reforms of the last several decades have increasingly recast the image of the juvenile offender, at least some juvenile offenders, from that of a wayward youth in need of help and protection to a rational and capable actor in need of punishment and control.[173]

The significance of this new image of the juvenile offender and changing discourses of juvenile crime and punishment extends much farther than the direct effects of legislative reforms pertaining to the transfer of juveniles to the criminal court. With regard to our findings, we argue that these changing discourses have served to alter longstanding prohibitions or norms against treating juveniles as adults, leading to an increased willingness to transfer a broader range of youth to the criminal court, and, subsequently, commit these youth to adult prisons. Thus, young people are more easily recast as "adults" as opposed to "children" based on the acts they commit, or are increasingly thought to be "undeserving" of being treated as "juveniles." This latter explanation is important because our county-level research revealed that decisions to treat juveniles as adults are often as reflective of local culture and institutional contingencies as they are of some sort of objective determination that a particular individual is no longer a "juvenile."[174] For example, counties in Michigan are required to pay half the cost of sending youth to juvenile residential facilities, a cost that can be very high and prohibitive for some counties.[175] Counties, however, do not have to pay to send a youth to the adult system, meaning that resources factor into determinations about whether a youth is deserving of being treated as a juvenile.[176] As one prosecutor stated, "there are a lot of factors that go into deciding whether to transfer juveniles and resources are a very important one."[177]

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172. *See, e.g.*, Feld, *supra* note 1; Shook, *supra* note 2; Nunn, *supra* note 22.

173. *See, e.g.*, Feld, *supra* note 1; Shook, *supra* note 2; Nunn, *supra* note 22.

174. *See* Shook, *supra* note 15; Shook & Sarri, *supra* note 78 (discussing the factors that influence whether prosecutors decide to treat juveniles as adults).

175. *See generally* State Juvenile Justice Profiles: Michigan, *available at* http://www.ncjj.org/stateprofiles/profiles/MI06.asp (last visited Jun. 4, 2009).

176. *See generally id.*

177. Interview with Chief Prosecutor (Oct. 2004) (name and location of employment confidential).

This example is important for another reason. Although we argue that discourses of juvenile crime and punishment have changed substantially over the last several decades and have led to an increasing willingness to treat juveniles as adults, the effects of these discourses on decisions to treat juveniles as adults differ across space. In some localities, they might intersect with factors such as "resources," "get tough" views on crime, or local tensions and perceptions of race and class to intensify and expand the population of youth who are treated as adults.[178] In other localities, however, they might meet with resistance and challenges to power that reflect norms and values opposed to treating juveniles as adults.[179] For example, it is clear that while the rest of the state increasingly committed young people to adult prisons over this twenty-year period, Wayne County largely resisted this trend despite evidence that the legislation was directly targeted at Detroit.[180] Thus, it is evident that decisions to treat juveniles as adults and commit them to adult prisons vary considerably from county to county, requiring that explanatory frameworks do a better job of incorporating organizational and contextual characteristics in the decision making process.

In addition, the effects of changing discourses regarding juvenile crime and punishment also vary across time. For example, depictions of youth as "superpredators" and concerns of an "epidemic" of youth violence[181] have waned since the mid-1990s, and some states are reconsidering, at least in part, policies and practices pertaining to the treatment of juveniles as adults.[182] In large part, these changes in discourses of youth crime and punishment are the result of dramatic decreases in juvenile crime over the last decade as violent and serious juvenile crime rates are at some of their lowest levels of the last four decades.[183] Further, they are also the result of research indicating the ineffectiveness of waiver. Yet, as we argue, ideas regarding the nature of the juvenile offender have changed, serving to alter longstanding

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178. *See, e.g.*, Ira M. Schwartz et al., *The Impact of Demographic Variables on Public Opinion Regarding Juvenile Justice: Implications for Public Policy*, 39 CRIME & DELINQUENCY 5 (1993).

179. *See, e.g.*, Curt Guyette, *Juvenile Injustice*, Metro Times (Dec. 31, 2006) *available at* http://metrotimes.com/-editorial/story.asp?id=9966 (last visited Jun. 4, 2009).

180. *See supra* p. 1745.

181. *See, e.g.*, Youth Violence: A Report of the Surgeon General, *available at* http://www.surgeongeneral.gov/library/youthviolence/summary.htm (last visited Jun. 4, 2009).

182. *See* discussion, *supra* note 67.

183. *See* Howard N. Snyder, Juvenile Arrests 2003, National Criminal Justice Reference Service, *available at* http://www.ncjrs.gov/html/ojjdp/209735/contents.html (last visited Jun. 4, 2009).

prohibitions against treating juveniles as adults and leading to an increased willingness to treat juveniles as adults in Michigan. Further, the legislative changes of the last several decades have transformed the boundary between the juvenile and criminal justice systems by lowering minimum ages, expanding eligible offenses, focusing criteria on offense based characteristics, and shifting power to and consolidating power in the prosecutors' office.

The net effect of this increased willingness to treat juveniles as adults and transformation of the boundary between the juvenile and criminal justice systems is the creation of an "infrastructure" that has eased the process of transferring juveniles to the criminal court and committing them to adult prisons. Because ideas concerning the nature of the cultural categories of "childhood," "adolescence," and "juvenile" are fluid, it is quite likely that increases in violent and serious juvenile crime will serve to reify ideas of the juvenile offender as a dangerous, rational, and responsible actor, thereby not only increasing the volume of youth eligible to be treated as adults but intensifying the willingness of legal actors to treat them as adults. Thus, theoretical attention to the process through which the criminal responsibility of young people is assessed and assigned must consider both the socially constructed nature of these categories and examine their variation across both time and space. We must also develop ways to incorporate emerging research on adolescent and brain development into these frameworks, and, more importantly, into decision making mechanisms.

Our finding that there is an increased willingness to treat juveniles as adults in Michigan is also important for public safety reasons. In particular, the changing offense, prior history, and sentencing profile of these youth committed to adult prisons have potential implications for the subsequent recidivism of these youth. Several recidivism studies have shown that a more extensive prior history and conviction for a property offense are associated with a greater likelihood of recidivism.[184] Further, David Myers found that the transferred youth in his sample who received probation or shorter prison sentences were more likely to recidivate than those who received longer sentences.[185] Given our finding that these are the "type" of youth who are increasingly being committed to adult prisons, and, presumably, are increasingly being transferred to the criminal court, this trend has significant implications for public safety in Michigan in that the juvenile most likely to recidivate is increasingly

184. *See* Myers, *supra* note 38.
185. *See generally id.*

being committed to adult prisons.[186] This possibility indicates a need for additional research on the characteristics related to recidivism for youth committed to adult prisons.

V. CONCLUSION

Despite increased attention to the proliferation of legislative reforms over the last several decades that have eased the process of treating juveniles as adults, there is still only limited knowledge regarding the consequences of these policies. This Article adds to the knowledge base by examining the commitment of juveniles to adult prisons over a twenty-year period and found that there has, in fact, been a significant increase in the commitment of juveniles to adult prisons in Michigan over this period. Further, it is clear from our data that a broader population of juveniles was increasingly committed to adult prisons in Michigan. In part, this increase is directly attributable to Michigan's legislative reforms, particularly the shift to and consolidation of power in the prosecutor's office. At the same time, we argue that this increase is indirectly related to the legislative reforms through an increased willingness to treat juveniles as adults among legal actors. This increased willingness to treat juveniles as adults is consistent with social constructionist arguments regarding a changing image of the juvenile offender and signals that longstanding norms and prohibitions against treating juveniles as adults have been altered.

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186. In a separate analysis, we examined the factors related to youth being recommitted to adult prisons for a new offense upon release. Our findings indicate that youth with more extensive prior histories, who committed property offenses, and who were younger when last released were significantly more likely to be recommitted to prison for a new offense. These findings are consistent with the research of Myers' study of juvenile offenders in Pennsylvania and suggest that the current trends in Michigan are negatively affecting public safety. *See id.*

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APPENDIX K

The Superpredator: The Child Study Movement to Today, (2021)
Campaign for the Fair Sentencing of Youth

THE ORIGINS OF THE SUPERPREDATOR

THE CHILD STUDY MOVEMENT TO TODAY

May 2021

The CAMPAIGN for the FAIR SENTENCING of YOUTH

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INTRODUCTION

The 1995 superpredator narrative is often called out as the impetus for our nation's harmful sentencing policies for Black children. After all, 75 percent of all kids sentenced to life without parole (JLWOP) were sentenced in the 90s or later, and 70 percent of this population are kids of color (60 percent Black). But the pseudo-scientific, unsubstantiated, and racialized superpredator theory is actually part of an American tradition of deeming some children something other than children.

The term superpredator first appeared in a publication by American political scientist John J. DiIulio, Jr. in 1995. DiIulio predicted that a wave of teenagers driven by "moral poverty" numbering in the tens of thousands would soon be on the streets committing violent crime. [1] These "hardened, remorseless juveniles" were framed in the article as a pressing "demographic crime bomb." [2] DiIulio's narrative used racist tropes to further stoke fear — broadly attributing "moral poverty" to "Black inner-city neighborhoods" and families and specifically and repeatedly calling attention to gang violence and "predatory street criminals" among "Black urban youth." [3]

Five years later, DiIulio renounced the superpredator theory, apologizing for its unintended consequences. While Dilulio predicted that juvenile crime would increase, it instead dropped by more than half. [4] Conceding that he made a mistake, Dilulio regretted that he could not "put the brakes on the super-predator theory" before it took on a life of its own. [5]

Despite his later distancing from the idea, DiIulio's terminology spread like wildfire through major news outlets and academic circles. [6] Coming just a few years after headlines using "wilding" and "wolf pack" to describe five teenagers convicted and later exonerated of raping a woman in Central Park, the rhetorical dehumanization of youth suspected of violence was not new, but DiIulio's coining of "superpredator" lent new credibility and energy. [7] The superpredator myth reinforced and sought to legitimize longstanding fears of Black criminality, disguised as developmental science and resting on pseudo-scientific assumptions that certain children are not children at all.

While the widespread adoption and popularization of DiIulio's rhetoric and the broader tough on crime atmosphere of the 1990s is instructive in examining our extreme sentencing policies, it is important to place them in the context of our long history of only regarding some children as worthy of protection. This report highlights the superpredator theory as one manifestation of a longstanding practice in which policymakers, lawyers, and academics classify children on the basis of moral and racial beliefs. These classifications permit racially biased perceptions of deviance to replace chronological age as the defining characteristic of youth.

This report takes as its jumping off point the Child Study movement of the 19th century, which had long lasting impact on the contours of academic inquiry and the American legal system. The Child Study movement itself was of course rooted in a deeply racist culture, profoundly influenced by the justifications used to uphold slavery and Jim Crow, and with its own ideological predecessors dating back to the Enlightenment of the 18th century.*

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A BRIEF HISTORY OF THE ORIGINS OF THE SUPERPREDATOR MYTH

John DiIulio's since debunked "Superpredator" myth was part of a long history of classifying certain children as deviant and less deserving of protection.

1870s

Child psychologists begin measuring children's bodies to establish **developmental "norms."** Using white children as a baseline, these studies were used to assert racial superiority as **biological**.

1899

The **first juvenile court** in the United States is established in Illinois. While intended to provide age-appropriate care, these courts separated out the **"incorrigible."** Increasing fears around immigration and racial impurity mean that frequently "rehabilitation" meant conforming to Anglo-Protestant values.

1904

G. Stanley Hall, later called **"the father of adolescence"** argues that "the child and the race are keys to each other" and that criminal behavior is linked to "morphological deviance from the normal". Hall's conclusions about race's relevance in identifying the causes of crime inspired and influenced research and policy for decades to come.

1945

By 1945, every state and the federal government had a juvenile court system, and most had mechanisms for transferring children to the adult system. The **transfer system** permitted courts to identify deviance and incorrigibility via racial stereotype.

1966

Kent v. United States affords procedural protection to youth facing transfer. In so doing, it also reinforced the belief that criminal activity could replace age as a yardstick to measure developmental maturity.

1968

Congress enacts **JJDPA**, marking part of a broader shift in federal funding priorities from social welfare to law enforcement.

1972-1978

Federal funds go to studies using unchecked racial classifications to study crime. These **flawed studies** advocated more punitive approaches for Black youth and ignored evidence of racial profiling contributing to heightened police contact.

1985-1994

The number of juveniles tried as adults nationally grew by 71%. Among youth transferred to the adult system **racial disparities** are stark. Despite representing only 14% of youth, Black children make up almost half of those transferred.

1995

John DiIulio publishes **"The Coming of the Superpredators"** in the Weekly Standard.

THE CHILD STUDY MOVEMENT AND THE JUVENILE JUSTICE SYSTEM

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I. The Child Study Movement

In the eighteenth and nineteenth centuries, experimental psychologists treated children's anatomy as a window into the nature of human progress. In an effort to establish developmental "norms," child psychologists in Europe and the United States began measuring children's height, weight, head size, arm length, and growth rate. [8] Even when scientists adopted empirical research methods, many believed that children could be classified according to racial group, social status, and intellectual ability.

By importing scientific language to justify these unfounded assumptions, marginalized children were frequently identified as sub-human, deviant, and dangerous. [9] In addition to measuring children's bodies, social scientists and medical doctors in the late nineteenth century conducted studies of African and Indigenous bodies in order to prove racial superiority as a biological fact. [10] In so doing, these researchers collapsed the distinctions between scientific classification and racial taxonomy: by comparing children of color to "savage races," childhood studies reinforced the belief that nonwhite children represented a different class of children altogether, which placed them outside the boundaries of "normal" development. [11]

G. Stanley Hall, one of the founders of the Child Study movement, analogized child psychological development to macro human development, which tracked a Darwinian process from the "less evolved savage races" to a fully-realized (and civilized) adulthood. [12] Later identified as the "father of adolescence," Hall argued that "the child and the race are each keys to each other," and explained that "degeneration of mind and morals is usually marked by morphological deviations from the normal." [13]

In 1891, as Hall's course and theories gained prominence within the academy, the Whittier State School in California institutionalized these ideas that criminal behavior could be predicted by race and body type into practice. Based on this pseudo-scientific pretext, Black, Mexican, and Filipino children at the school were deemed "feeble-minded" and irredeemable to justify their confinement and sterilization. [14]

II. The Juvenile Justice System

Hall's contributions to child psychology and developmental science influenced subsequent research and informed public policy. Although later scientists critiqued Hall's methods as deficient, Hall's conclusions about racial classification and its relevance for identifying the "causation of crime" had already taken root.

THE JUVENILE JUSTICE SYSTEM AND INCORRIGIBILITY

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In the same era during which Harvard, Yale, and Princeton established child development programs to research and explain the differences between children and adults, the Illinois legislature passed the Juvenile Court Act and established the first juvenile justice system. [15] In this way, childhood studies intersected with a burgeoning progressive movement, which sought to “rehabilitate” wayward children by providing juveniles with support, guidance, and intervention from the state. [16]

The motivating impulse of the juvenile justice system was to protect youth from the "corrupting influence" of adults, in order to provide children with age-appropriate care. [17] However, not all children were perceived to be amenable to this intervention. Just as the child study movement adopted scientific language to justify racial classification, the juvenile justice system created a distinct pseudo-scientific class of "incorrigible" children, whose criminal status served as proof of their moral and physical maldevelopment. [18] By 1945, every state and the federal government had enacted a juvenile court system. [19] In almost all of these states, juvenile courts were permitted to transfer juvenile cases into the adult justice system, when the child explicitly or implicitly was perceived incorrigible. [20] And because of the influence of the child study movement and related racialized perceptions of children — in addition to racial segregation in education, housing, and social welfare — conceptions of the incorrigible child were conflated with Black children, Indigenous children, and children of color, thus depriving them of the protections of their chronological age. [21]

III. The Due Process Revolution

While reformers nurtured a growing trend of separating children who broke the law from adults, Black children continued to be confined in adult prisons and excluded from protections extended to white children. Far from the reformers goals of rehabilitative programming and social support, during this time Black children were subjected to racial terror under Jim Crow. While states were adopting juvenile justice systems into the 1940s, in 1944 South Carolina, 14-year-old George Stinney was executed after a one-day trial before an all white jury. [22]

Movements to end structural racism in juvenile justice informed efforts to reform the juvenile waiver system. [23] In 1966, the Supreme Court attempted to address these concerns by affording procedural protections to youth facing transfer proceedings. [24] However, these protections did not challenge race-based and crime-based classifications of children. Instead, sentencers and legislatures continued to believe that a child’s offense could serve as a more reliable measure of a child’s disposition than a child’s chronological age. [25]

The decades following the so-called “Due Process Revolution” reveal the consequences of these crime-based waiver statutes: Between 1985 and 1994, the number of juveniles tried as adults

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nationally grew by 71 percent, with more than 12,000 juvenile cases being waived into adult criminal court. [26] Among youth transferred to adult custody, racial disparities increased. Between 1985-1995, Black youth were more likely than their white counterparts to be transferred to adult criminal court for all offense types, all age categories, and all years. [27] Today, despite representing 14 percent of the total youth population, Black youth make up almost half of the youth transferred into adult custody. [28]

IV. The War on Crime

Backlash to the Civil Rights Movement and Due Process Revolution influenced juvenile justice reforms and the development of social science in subsequent decades. [29] In response to racial justice uprisings, the Johnson and Ford Administrations responded with efforts to promote "domestic tranquility." [30] Although the first Civil Rights Era legislation directed at juvenile justice authorized funding for state and local governments through the U.S. Department of Health, Education, and Welfare, subsequent legislation shifted control away from social welfare agencies to the U.S. Department of Justice. [31] In 1968 Congress passed the Juvenile Delinquency Prevention and Control Act (JJDPA), which authorized the Department of Justice to fund the growth of state law enforcement personnel and programs to address social inequalities. [32] By treating juvenile justice as a matter of crime control rather than a response to systemic racial discrimination and economic deprivation, the United States government contributed to the false narrative that children and adolescents, and particularly Black adolescents, required adult criminal punishment for the sake of public safety.

The federal government's "War on Crime" created a financial incentive for social scientists to develop a research agenda focused on crime-control. However, as with the juvenile transfer statutes, crime-based rhetoric left racial classifications unchecked. In 1972, for example, University of Pennsylvania law professor Marvin Wolfgang received federal funding for a study that reinforced the assumption that police contact could be used as a valid instrument to identify and predict criminal behavior. [33] Notwithstanding racist assumptions driving arrests in Philadelphia, Wolfgang did not credit African American delinquency to anti-Black discrimination. Instead, his report stated simply that "more social harm is committed by nonwhites." [34]

As criminologists and law professors competed for federal grants to conduct similar research, their focus on contact with the justice system continued to exacerbate misleading assumptions about the relationship between race, adolescence, and criminal behavior. In 1995, Princeton professor John Dilulio coined the term "superpredator" to describe the "thickening ranks" of "radically impulsive, brutally remorseless youngsters." [35] Rather than treat adolescence as a transient period, Dilulio and other academics characterized teenagers who commit crime as permanently morally deficient.

THE "SUPERPREDATOR" AND SENTENCING CHILDREN TO LIFE

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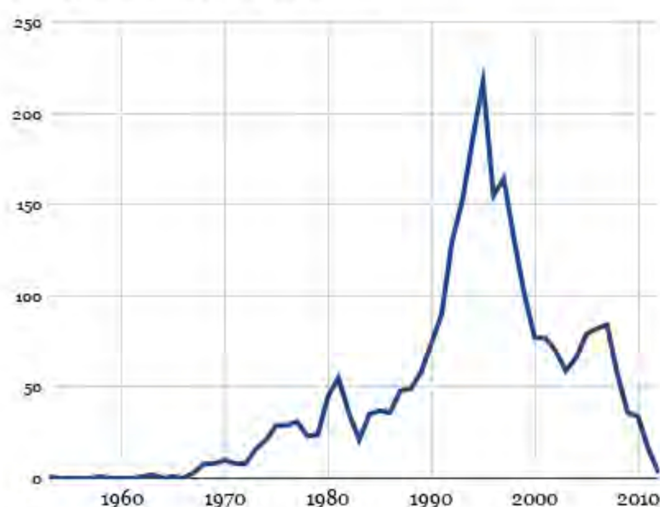
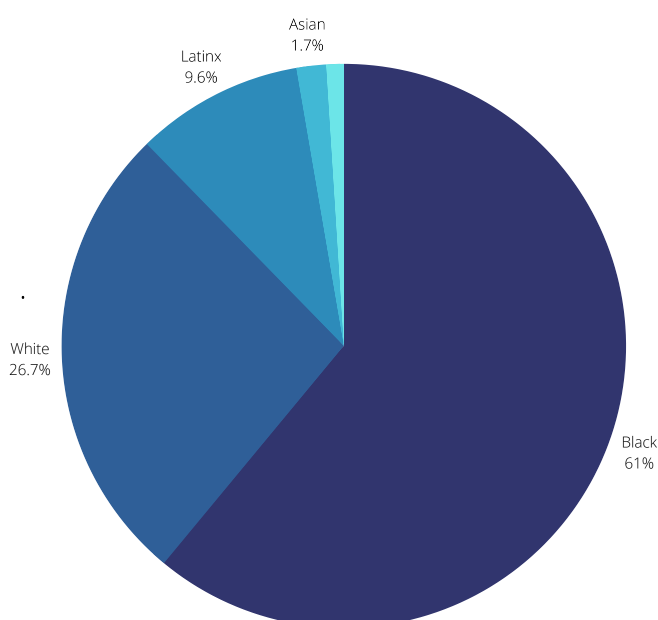
V. JLWOP and Other Extreme Sentences

Convinced by federally-funded studies that "nothing works," state legislatures determined that juvenile deviancy could only be addressed through incapacitation. [36] Between 1992-1997, nearly every state changed its laws to increase penalties for juvenile offenders and facilitate the automatic transfer of children into adult custody. [37] Mandatory minimums replaced discretionary review and the Supreme Court announced that sentencing guidelines need not include rehabilitation measures of any sort. [38]

For this reason, the War on Crime's research agenda provided sentencing courts with scientific language to justify extreme sentences for youth, without addressing or correcting entrenched racial assumptions in the justice system and within the Academy. Reflecting this wave of policy changes and legislative priorities, the number of juvenile life without parole sentences imposed peaked in the mid-1990s. [39] These sentences were fueled by mandatory sentencing laws and the wholesale abolition of parole inspired by the tough on crime notions of the era and legislation like the 1994 Crime Bill. [40]



These sentences also bear the stain of extreme racial disparity and prejudice — of the more than 2,800 children ever sentenced to life without parole, 70 percent are children of color.



More than 60 percent are Black. [41] Recent intervention from the U.S. Supreme Court has led to increased judicial discretion in sentencing children, but racial disparities have actually worsened in that time - of children sentenced to life without parole with this guidance, almost 70 percent are Black. [42]

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RECOMMENDATIONS FOR RECTIFYING THE HARM

While the Supreme Court has recently weighed in to limit life without parole for youth, there is much work to be done to address the harm caused by the superpredator theory, the historic injustice it built upon, and the related tough-on-crime rhetoric. As of May 2021, twenty-five states and the District of Columbia have banned the practice of sentencing children to die in prison, and six more have no one serving. [43] While this momentum has led to a sea change of reform, too many states still allow children to die in prison either via life without parole or other extreme sentences. States must continue to act to undo harmful 1990s sentencing statutes and ensure regular meaningful opportunities at sentence review for all kids.

As states have acted, federal legislation can help challenge and change this systemic undervaluing of children of color as well. Historically, federal statutes like the Violent Crime Control and Law Enforcement Act (known as the 1994 crime bill) created incentives for states to impose harsher prison sentences. In order to repair these harmful practices, legislative reform can help re-shape the narrative around youth and criminal justice.

Recently, several federal bills have been filed that take some steps to undo this harm. The Childhood Offenders Rehabilitation and Safety Act of 2021 would:

- Raise the age of criminal responsibility in federal court;
- Prohibit the placement of children in federal adult correctional facilities;
- Eliminate the application of the felony murder rule to people under 18;
- Ensure childhood trauma, foster care placement, and adverse childhood experiences are considered at sentencing;
- Provide a grant for local child welfare and juvenile justice department collaborations that meet the needs of families and their children who are excluded from adult or criminal adjudication by age to ensure trauma-focused, developmentally appropriate services are delivered by multidisciplinary teams that create treatment plans with the children, family, stakeholders, and service providers. [44]

Sara's Law and the Preventing Unfair Sentencing Act (H.R.2858) would:

- Prohibit federal judges from sentencing juveniles to life in prison without parole and bring federal law into compliance with the 2012 Supreme Court decision *Miller v. Alabama*. Juveniles sentenced to life in prison would be guaranteed a parole hearing after serving 20 years;
- Provide that juveniles found guilty of crimes against persons who sexually trafficked, abused, or assaulted them shall not be required to serve the mandatory minimum sentence otherwise associated with the crime;

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RECOMMENDATIONS FOR RECTIFYING THE HARM

- Allow judges to consider "the diminished culpability of juveniles compared to that of adults" when sentencing those who committed crimes as juveniles and allow federal judges to depart from mandatory minimum sentences by up to 35 percent if deemed appropriate based on the juvenile's age and prospects for rehabilitation. The presiding judge may also suspend any portion of an otherwise applicable sentence if the circumstances so warrant. [45]

The Protecting Miranda Rights for Kids Act (H.R. 8685) would:

- Require law enforcement to notify and contact parents or guardians in the event a child is arrested or detained;
- Require children to consult with their parent in person, by phone, or by video conference and consult with legal counsel in person before they can waive their Miranda rights;
- All interrogation of a minor should take place with an appointed (not a stand in substitute) legal counsel physically present at the time of interrogation;
- Make inadmissible in any criminal prosecution brought by the U.S. or District of Columbia, any statement given by a minor during a custodial interrogation that does not comply with the requirements;
- Define minor as an individual 17 years or younger. [46]

Rather than classify youth according to race, class, or criminal history, federal policy makers can incentivize states to pursue non-carceral reforms, implement restorative justice programs, revive meaningful parole consideration, and implement age-appropriate intervention. Congress can also convene a truth and reconciliation commission to explore ways in which we can begin to repair the specific harms of the superpredator myth and the policy change it is symptomatic of. As John Dilulio recanted his baseless theory and joined efforts to end extreme sentences for youth, so too must advocates renounce intra-child classifications and protect all youth from unconstitutional punishment.

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*This report draws from and was made possible by extensive research done by Hannah Duncan (Yale Law '21).
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APPENDIX L

House Legislative Analysis for 2019 Public Acts 97 through 112,
December 20, 2019

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Legislative Analysis

RAISE THE AGE

Phone: (517) 373-8080
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Analysis available at
http://www.legislature.mi.gov

House Bill 4133 as enacted
Public Act 98 of 2019
Sponsor: Rep. Roger Hauck

House Bill 4134 as enacted
Public Act 99 of 2019
Sponsor: Rep. Douglas C. Wozniak

House Bill 4135 as enacted
Public Act 100 of 2019
Sponsor: Rep. Julie Calley

House Bill 4136 as enacted
Public Act 101 of 2019
Sponsor: Rep. Ryan Berman

House Bill 4140 as enacted
Public Act 102 of 2019
Sponsor: Rep. Vanessa Guerra

House Bill 4142 as enacted
Public Act 103 of 2019
Sponsor: Rep. Brian K. Elder

House Bill 4143 as enacted
Public Act 104 of 2019
Sponsor: Rep. Leslie Love

House Bill 4145 as enacted
Public Act 105 of 2019
Sponsor: Rep. Graham Filler

House Bill 4443 as enrolled
Public Act 106 of 2019
Sponsor: Rep. Michele Hoitenga

House Bill 4452 as enacted
Public Act 107 of 2019
Sponsor: Rep. LaTanya Garrett

Senate Bill 84 as enacted
Public Act 108 of 2019
Sponsor: Curtis S. VanderWall

Senate Bills 90, 100, and 101 as enacted
Public Acts 109, 113, and 114 of 2019
Sponsor: Sen. Peter J. Lucido

Senate Bill 93 as enacted
Public Act 110 of 2019
Sponsor: Sen. Stephanie Chang

Senate Bill 97 as enacted
Public Act 111 of 2019
Sponsor: Sen. Curtis Hertel, Jr.

Senate Bill 99 as enacted
Public Act 112 of 2019
Sponsor: Sen. Ruth Johnson

Senate Bill 102 as enacted
Public Act 97 of 2019
Sponsor: Sen. Sylvia Santana

House Committee: Judiciary
Senate Committee: Judiciary and Public Safety
Complete to 12-20-19

BRIEF SUMMARY: The bills, known as the "Raise the Age" (RTA) legislation, are intended to treat individuals who are 17 years of age as juveniles in criminal proceedings rather than automatically treating them as adults, provide a funding mechanism to provide juvenile justice

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services to those individuals 17 years of age adjudicated as juveniles, and create the Raise the Age Fund.

The bills take effect October 1, 2021. An individual 17 years of age or younger who commits a crime on or after that date will be considered a juvenile.

FISCAL IMPACT: The bills have various fiscal implications for state and local government. See **Fiscal Information**, below, for a detailed discussion.

THE APPARENT PROBLEM:

Forty-six states and the District of Columbia automatically treat youths 17 and under who commit a crime as juveniles. Michigan is one of only four states that automatically try 17-year-olds as adults, sentence them as adults, and send them to adult jails or prisons. Advocates for raising the age of who is treated as an adult from 17 years of age to 18 point to research that overwhelmingly documents that adolescent brains do not fully develop until closer to 25 years of age. Thus, a 17-year-old does not possess the judgment or impulse control of an adult. Seventeen-year-olds are also more likely to be victimized by older adults when incarcerated, and data show higher rates of depression, suicide, and recidivism when 17-year-olds are sent to adult jail or prison.

Data also show that juveniles respond well to rehabilitative programs and counseling. The juvenile justice system is built on the premise of identifying the needs of the juvenile and ordering services and programming to meet those needs. For some, services such as counseling, substance abuse treatment, and/or home detention may be enough. More violent youths may still require being tried as adults. But, some say, having the flexibility to send 17-year-olds to the juvenile justice system instead of automatically trying them as adults may get some young people the help they need to turn their lives around. A bipartisan package of legislation has been introduced to "raise the age"—from 17 to 18 years of age—of individuals subject to automatic waiver to adult criminal court.

THE CONTENT OF THE BILLS:

House Bills 4133 to 4136 and 4142 and Senate Bills 84, 90, 93, and 99

These bills amend existing provisions of, or add new sections to, various acts to raise the age of who is considered to be a juvenile for purposes of adjudication or prosecution of criminal offenses, and the age that determines where a juvenile is to be detained, from children under 17 years of age to those under 18. (See **Brief Discussion**, below, for an overview of the juvenile justice system.)

House Bill 4133 amends the Juvenile Code within the Probate Code to allow the Family Division of Circuit Court to continue to have jurisdiction over a person who is the subject of a juvenile petition (delinquency petition), and to hear and dispose of that petition, even after the person's eighteenth birthday (raised from seventeenth). Further, the bill changes references to the collection of a juvenile's "fingerprints" to "biometric data."

MCL 712A.11

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House Bill 4134 amends the Mental Health Code to revise the definition of "juvenile" to mean a person who is less than 18 years of age (instead of less than 17 years of age) who is the subject of a delinquency petition.

MCL 330.2060a

House Bill 4135 amends the Code of Criminal Procedure. Previously, eligibility for placement under the Holmes Youthful Trainee Act (HYTA) was limited to an individual who committed a crime on or after his or her seventeenth birthday but before his or her twenty-fourth birthday. The bill instead limits eligibility to an individual who committed a crime on or after his or her eighteenth birthday but before his or her twenty-fourth birthday.

Further, a court may not assign an individual to youthful trainee status if the court determines that the offense involves certain factors that constitute the criminal sexual conduct offenses. The bill amends the factors listed for criminal sexual conduct in the third or fourth degree to include an offense in which the victim is between 16 and 26 years old and receiving special education services and the actor is a teacher or other school employee or the actor is a volunteer or governmental employee assigned to provide services to the school and used that position to gain access to or establish a relationship with the victim.

[Under the HYTA, although an eligible individual must plead guilty to the criminal charge, he or she may have that charge dismissed upon successful completion of any sentence or conditions of probation imposed by the court. Youthful trainee status allows a young person to avoid having a criminal conviction on his or her record.]

MCL 762.11

House Bill 4136 amends the Juvenile Diversion Act. Previously, the term "minor" as used in that act meant an individual less than 17 years of age. The bill defines "minor" as an individual less than 18 years of age. The bill also requires the record of a minor to be destroyed within 28 days after the minor reaches 18 (rather than 17).

MCL 722.822 and 722.828

House Bill 4142 amends the Code of Criminal Procedure. Previously, the code generally required that a child less than 17 years of age must be taken immediately before the Family Division of Circuit Court when arrested. If during the pendency of a criminal case it was learned that the child was less than 17 years of age, the case had to be transferred immediately to the Family Division in the county where the offense was alleged to have been committed. The bill retains these provisions, but raises the age to *less than 18 years of age*, to apply the provisions to 17-year-olds.

Previously, if during the pendency of a criminal case in a court other than the Family Division it was determined that the child was 17 years of age, the case could be transferred to the Family Division upon a motion by the prosecuting attorney, the child, or his or her representative—but only if the court found that any of the conditions existed as outlined in section 2(d) of the Juvenile Code. The bill eliminates this provision.

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[Section 2(d) of the Juvenile Code allows the Family Division concurrent jurisdiction with an adult criminal court of a child between 17 and 18 years old for whom voluntary services have been exhausted or refused for certain delinquent conduct on the part of the child; for example, repeated addiction to drugs or alcohol or associating with certain types of people.]

MCL 764.27

Senate Bill 84 amends the definition of "adult" in the Michigan Indigent Defense Commission Act to change references to an individual "17 years of age or older" to "18 years of age or older" and "less than 17 years of age" to "less than 18 years of age."

MCL 780.983

Senate Bill 90 amends the Juvenile Code within the Probate Code to do the following:

- Raise the age in the definition of "juvenile." "Juvenile" means a person who is less than 18 years of age (rather than less than 17) who is the subject of a delinquency petition. (The term does not include a juvenile who has been waived to adult criminal court to be tried and sentenced as an adult.)
- Raise the age (from 16 to 17) of a person whose criminal case must be transferred to the Family Division of Circuit Court. Previously, if a person was found to be under the age of 17 while he or she was being charged with a crime in a court other than the Family Division, the case had to be transferred to the Family Division without delay. The bill applies this provision to a person under *18 years of age.*

MCL 712A.1 and 712A.3

Senate Bill 93 amends the Youth Rehabilitation Act. Previously, to meet the definition of "public ward," a court needed to acquire jurisdiction over the youth, and the act for which the youth was being committed had to have occurred, before the youth's seventeenth birthday. The bill raises the age to apply to the court's obtaining jurisdiction over the youth, and to acts committed, before the youth's eighteenth birthday.

MCL 803.302

Senate Bill 99 amends the Code of Criminal Procedure. Under the bill, for violations of a personal protection order related to domestic violence or stalking, a person less than 18 (instead of less than 17) who is the subject of the PPO is subject to dispositional alternatives listed in the Juvenile Code. An individual 18 years of age and older (instead of 17 years of age and older) is subject to criminal contempt of court.

MCL 764.15b

House Bills 4140, 4143, and 4145 and Senate Bill 97

Generally speaking, these bills amend various acts pertaining to confining juveniles in adult detention facilities or holding juveniles in the same area or vehicle as adults to apply current practices to those under 18 years of age.

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House Bill 4140 amends the Juvenile Code within the Probate Code to do all of the following:

- Prohibit confining a juvenile under the age of 18 (raised from 17), who was taken into custody or detained, in any police station, prison, jail, lock-up, or reformatory, or transporting the juvenile with, or compelling or permitting the juvenile to associate or mingle with, criminal or dissolute persons.
- Eliminate a provision allowing the Family Division of Circuit Court to commit a child at least 17 years of age to a county jail within the adult population for violating a PPO.
- Raise the age from under 17 years of age to under 18 in a provision that allows the Family Division to incarcerate a juvenile in a county jail for up to 30 days in a room or ward out of sight and sound from adult prisoners for certain violations of probation imposed under an order of disposition that delays imposition of sentencing.

MCL 712A.16, 712A18, and 712A.18i

House Bill 4143 amends the Michigan Penal Code to prohibit a child under 18 years of age (raised from under 16), while under arrest, confinement, or conviction for a crime, from being:

- Placed in an apartment or cell of a prison or place of confinement with adults who are under arrest, confinement, or conviction for a crime.
- Transported in any vehicle used to transport inmates with adults charged with or convicted of a crime.

MCL 750.139

House Bill 4145 amends section 27a of Chapter IV of the Code of Criminal Procedure. With some exceptions, section 27a prohibits a juvenile from being confined in a police station, prison, jail, lock-up, or reformatory, or being transported with, or compelled or permitted to associate or mingle with, criminal persons (e.g., adults) while awaiting trial. However, the act allows a juvenile or an individual less than 17 years of age who is under the jurisdiction of the circuit court (adult criminal court or the Family Division of Circuit Court if being tried as an adult) for committing a felony to be confined in the county jail pending trial, if he or she is held physically separate from adult prisoners and the county sheriff has given prior approval. The bill applies this provision to a juvenile or individual less than 18 years of age.

Upon a motion by a juvenile or individual less than 17 years of age who is subject to confinement in a county jail as described above for committing a felony, a court may order the juvenile or individual to be confined as otherwise allowed by law. The bill applies this provision to a juvenile or individual less than 18 years of age who is subject to confinement.

MCL 764.27a

Senate Bill 97 amends the Juvenile Code within the Probate Code. In certain circumstances, juveniles under the age of 17 could be housed in a jail, prison, or other place of detention used to house adults as long as the juveniles were physically separated (out of sight and sound) from the adult offenders. The bill revises provisions within the Juvenile Code pertaining to the detention or incarceration of juveniles under the age of 17 years to instead apply to juveniles under the age of 18 and deletes two obsolete provisions pertaining to foster care home services.

MCL 712A.14 and 712A.15

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House Bills 4443 and 4452 and Senate Bill 100

These bills amend provisions in various acts pertaining to commission of a ***specified juvenile violation*** to apply to juveniles less than 18 years of age (raised from 17).

> ***Specified juvenile violation*** refers to a list of more serious offenses, such as rape, arson, assault with the intent to commit murder, and armed robbery, among others.

Senate Bill 100 amends the Juvenile Code within the Probate Code to grant the Family Division of Circuit Court exclusive original jurisdiction over a juvenile under 18 years of age (instead of a juvenile under 17) in certain circumstances, including truancy, running away from home, and disobedience to his or her parents or guardian. Under the bill, the court also has jurisdiction over a juvenile under 18 years of age (instead of under 17) when a juvenile over 14 years of age is charged with a specified juvenile violation and the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant (known as an *automatic waiver*) to waive the juvenile to adult criminal court. (See **Brief Discussion**, below.)

MCL 712A.2

House Bill 4443 amends the Code of Criminal Procedure to allow a prosecutor to file a complaint and warrant with a magistrate in district court (adult criminal court) charging a juvenile 14 years or older but less than 18 (raised from less than 17) believed to have committed a specified juvenile violation (known as an *automatic waiver*).

MCL 764.1f

House Bill 4452 amends the Revised Judicature Act (RJA) to specify that the circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and under 18 (raised from under 17) years of age.

MCL 600.606

Senate Bill 101

Senate Bill 101 amends the Social Welfare Act to revise the manner in which funding is provided to counties related to providing juvenile justice services to juveniles. The bill incorporates services provided to a juvenile who was at least 17 years of age, but under 18 years old, who becomes eligible for such services under the Raise the Age legislation.

Generally speaking, the Social Welfare Act establishes a juvenile justice funding system for counties that are not county juvenile agencies that is administered by the Department of Health and Human Services (DHHS). The funding system includes establishment of a child care fund. The act provides for the distribution of money appropriated by the legislature to reimburse counties for the cost of providing juvenile justice services. Juvenile justice services include such things as intake, detention, detention alternatives, probation, foster care, and diagnostic evaluation and treatment. For a county that is not a county juvenile agency, the amount distributed, with some exceptions, must equal 50% of the annual expenditures from the county's child care fund (section 117a(4)(c)). This provision is not amended by the bill.

However, beginning October 1, 2021 (the date the bills in the Raise the Age package take effect), the bill requires the state to pay 100% of the cost to provide juvenile justice services when a court (Family Division of Circuit Court) exercises jurisdiction over a juvenile who is at least 17 years old, but under 18, at the time of the offense. For those youth under the court's jurisdiction for a criminal offense or certain delinquency activities, or if under concurrent jurisdiction with an adult court for delinquency activities, the costs must include all expenditures listed in section 117a(4)(b) until such time as the court's jurisdiction is terminated. The bill specifies that there will be no change in funding provided for juveniles who are under 17 years old at the time of the offense.

[Section 117a(4)(b) lists the costs to be reimbursed for expenditures for children not placed with the MDHHS for care, supervision, or placement. Expenditures listed include direct expenditures for out-of-home and in-home care and administrative or indirect expenditures for out-of-home and in-home care. See the act for a complete list of expenditures required to be included under each category.]

Beginning October 1, 2025, the reimbursement rate for all juveniles changes to a new percentage rate. Using data from FY 2021-22, FY 2022-23, and FY 2023-24, the new percentage rate is calculated as the quotient of the following:

- The sum of the total state expenditures under section 117a(4)(c) for juveniles under age 17 at the time of the offense and the total expenditures for 17-year-old juveniles under section 117a.
- Divided by the total expenditures under section 117a for all eligible juveniles.

MCL 400.117a

Senate Bill 102

Senate Bill 102 adds a new section to the Social Welfare Act to create the Raise the Age Fund, which will reimburse a county, court, or tribe for costs related to providing services under the Raise the Age legislation that are not eligible for reimbursement from the Child Care Fund.

The Raise the Age Fund is created within the state treasury. Money or other assets from any source can be received by the treasurer for deposit into the fund. The treasurer must direct investment of the fund and credit to it interest and earnings from the fund's investments. Money in the Raise the Age Fund at the close of a fiscal year remains in the fund and does not lapse to the general fund.

The Department of Health and Human Services (DHHS) is tasked with administering the Raise the Age Fund. The department must expend money from the fund, as appropriated by the legislature, to support the cost of raising the age of criminal responsibility for costs not eligible for reimbursement through the Child Care Fund as provided in the act (section 117a(4)(j)). Eligible costs include those listed and associated with a court's exercising jurisdiction under section 2 of the Juvenile Code (within the Probate Code) *over a juvenile who is 17 years of age but under the age of 18 at the time of the offense*. A request for reimbursement must be accompanied by substantiating documentation, as determined by DHHS.

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A county, court, or tribe receiving money from the Raise the Age Fund must report expenditures made with the money. The report must include at least the following:

- Personnel costs for staff providing direct services to the youth, including full or appropriately prorated salaries and training.
- Contracted staffing, programming, and services.
- Youth placement and care costs, including at least room and board, clothing, incidentals, incentives, transportation, and treatment.
- Indirect administrative costs, including at least judicial staff and operational expenditures necessary to carry out the judicial process.

A request for reimbursement is subject to approval by the department. A court, tribe, or county may appeal a reimbursement that was not approved. An appeal must be conducted according to the Administrative Procedures Act. An appeal from a final order issued in an administrative hearing must be made to the court that has jurisdiction with respect to the cases pertaining to costs eligible for reimbursement as in nonjury cases under the authority provided in section 631 of the RJA. (That section provides that such matters be brought before the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham County.)

MCL 400.117i

BACKGROUND INFORMATION:

With the exception of Senate Bill 102, which is new to the package this session, the bills are reintroductions of legislation introduced in both the 2015-16 and 2017-18 legislative sessions.

BRIEF DISCUSSION:

The juvenile court process is quite different from the process in place for adults. Currently defined as a person less than 17 years of age, a juvenile who commits a criminal offense is typically adjudicated in the Family Division of Circuit Court. If the juvenile committed a felony, depending on the nature or seriousness of the offense, the juvenile may receive a typical juvenile disposition in Family Division (referred to as a delinquency proceeding), receive an adult sentence in Family Division, or be waived to adult criminal court and tried and sentenced as an adult.

Delinquency proceeding: An adjudication in the Family Division of Circuit Court, also referred to as a *delinquency proceeding*, is not considered to be criminal, and the philosophy of the court is rehabilitation and treatment for the delinquent youth rather than punishment. The judge has wide discretion and can dismiss the petition against the juvenile, refer the juvenile for counseling, place the juvenile on probation (diversion), or place the case on the court's formal calendar or docket and allow charges to go forward. If the juvenile admits responsibility or is found responsible for (as opposed to "guilty of") committing the offense, the terms of *disposition* (similar to "sentencing" for adults) may include, among other things, probation, counseling, participation in programs such as drug or alcohol treatment, placement in a juvenile boot camp, restitution to victims, community service, placement in foster care, and/or payment of a crime victim rights assessment fee and reimbursement of court appointed attorney fees and other court services expenses.

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A juvenile being adjudicated in a delinquency proceeding is often made a temporary ward of the county and supervised by the court's probation department. A juvenile who needs more intensive services may be made a ward of the state and supervised by the Michigan Department of Health and Human Services; known as an "Act 150" case, the juvenile may be placed in a residential treatment program. Upon completion of the term of residential care, the juvenile is often placed on "aftercare," where his or her progress and behavior can be monitored by the juvenile corrections department for a period of time, similarly to the role parole plays for an adult offender.

Juvenile charged as adult: A juvenile who is charged with a felony may be treated and sentenced as an adult. This happens in three ways:

Traditional waiver: A traditional waiver applies to a juvenile 14 to 16 years of age who is charged with any felony. The prosecuting attorney may petition the Family Division to ask that the court waive its delinquency jurisdiction and allow the child to be tried as an adult in a court of general criminal jurisdiction (adult criminal court). The Family Division retains discretion to waive the case to adult court or to proceed as a delinquency proceeding. If waived to adult court and convicted, the juvenile must be sentenced as an adult.

Designated proceedings: Some more serious offenses are known as "specified juvenile violations" and include such crimes as arson, rape, assault with attempt to commit murder, and armed robbery. If a juvenile is charged with a specified juvenile violation, the prosecutor has the authority to designate the case to be tried in the Family Division but in the same manner as for an adult (this includes sentencing the juvenile as an adult).

The prosecutor can also ask the Family Division to designate a case that does not involve a specified juvenile violation for trial in the Family Division; this requires the juvenile to be tried in the same manner as an adult, and a guilty plea or verdict results in a criminal conviction. However, the court retains discretion to issue a typical juvenile disposition order, impose any sentence that could be imposed on an adult if convicted of the same offense, or delay sentencing and place the juvenile on probation.

Automatic waiver: If a juvenile who is 14 to 16 years old commits a specified juvenile violation, the prosecutor has the discretion to initiate automatic waiver proceedings to waive the juvenile to adult criminal court by filing a complaint and warrant in District Court, rather than petitioning the Family Division. A preliminary hearing must be held to determine probable cause that the juvenile committed the offense or offenses; if so, the case is bound over to adult criminal court. If the juvenile is convicted of one or more very serious specified juvenile violations, the juvenile must be sentenced in the same manner as an adult. If the juvenile is convicted of an offense that does not require an adult sentence, the court must hold a juvenile sentencing hearing to determine whether to impose an adult sentence or to place the juvenile on probation and make the juvenile an Act 150 ward of the state.

(Information derived from the *Juvenile Justice Benchbook*, 3rd Edition, Michigan Judicial Institute, and from information on juvenile delinquency available on the Clare County Prosecuting Attorney Office website.)

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FISCAL INFORMATION:

Overall, the "Raise the Age" legislative package would increase both state and local costs. A report commissioned by the State of Michigan Legislative Council Criminal Justice Policy Commission was released on March 14, 2018 (the "Report").[1] The Report presents an overall range in net cost increases from $27.0 million to $61.0 million annually. The House Fiscal Agency forecasts that these net costs would increase over a 3- to 5-year period and would plateau thereafter, as the applicable population phases in due to the Probate Code's provision that the circuit court family division maintains jurisdiction over juveniles for 2 years beyond the maximum age of when the offense occurred.

There are three primary factors that inhibit a precise fiscal impact estimate of the bills:

- State statute still would allow for judicial discretion to move juvenile cases under the age of 18 to adult circuit and district courts. If a moderate percentage of these cases are moved, then the fiscal impact would lessen.
- State statute still would allow for prosecuting attorneys to request that a juvenile case be tried in the same manner as an adult in a court of general criminal jurisdiction. Again, if a moderate percentage of these cases are moved, then the fiscal impact would lessen.
- State statute allows for a variety of placement discretion for juveniles. Juveniles can be placed in secure child caring institutions, which have annual costs of $75,000 to $120,000, or can be referred to less expensive in-home services.

The Report notes a wide range cost estimates related to separating 16- and 17-year-old juveniles from adults. Those costs can range from re-opening or contracting for unused child caring institution beds to building new child caring institutions. These different local-level decision options make it difficult to determine a precise fiscal estimate.

Department of Health and Human Services (DHHS)

Senate Bill 101

Currently, the state and counties share the cost of juvenile justice services in a 50/50 state-local cost sharing model. For the cases in which the county is the first payer, the state is required to reimburse counties for 50% of eligible expenses from county Child Care Funds for the costs of juvenile justice services. The state makes these reimbursements from the state Child Care Fund (CCF), which is a fund appropriated in the DHHS budget from which the state reimburses counties for 50% of eligible expenditures concerning the care and treatment for children who are court wards. In the current fiscal year, FY 2019-2020, the state Child Care Fund is appropriated $228.2 million (2019 PA 67). The Fund reimburses counties for programs that serve neglected, abused, and delinquent youth, and funding may be expended for out-of-home placements such as foster homes or county-operated facilities. Expenditures may also be made for in-home services which allow children to remain in their own homes, and may include job training skills, intensive probation, community wraparound services, mentoring, family counseling, electronic tethers, alternatives to detention, and other community-based services.

[1] Hornby Zeller Associates, Inc. *The Cost of Raising the Age of Juvenile Justice in Michigan: Final Report*. March 14, 2018. http://council.legislature.mi.gov/Content/Files/cjpc/MIRaisetheAgeFinalReport03.14.2018.pdf

In addition to the currently required 50% reimbursement to counties for other eligible expenses, the bill would require that beginning October 1, 2021, the state pay 100% of the cost of juvenile justice services for 17-year-olds at the time of the offense who are under a circuit court's Family Division's jurisdiction for a criminal charge or are under concurrent jurisdiction with an adult criminal court for certain delinquency activities.

Senate Bill 101 would also require that, beginning October 1, 2025, the reimbursement rate for all juveniles would change to a new percentage rate. Using data from FY 2022, FY 2023, and FY 2024, the new rate would be calculated as the quotient of the following:

- The sum of the total state expenditures under section 117a(4)(c) for juveniles under age 17 at the time of the offense and the total expenditures for 17-year-old juveniles under section 117a.
- Divided by the total expenditures under section 117a for all eligible juveniles.

Under current law, 17-year-old offenders are treated as adults and are not adjudicated under juvenile court jurisdiction. Therefore, the fiscal impact of this bill only occurs if the other bills that are part of the "Raise the Age" legislative package are enacted. If these bills were enacted along with this bill, there would be additional costs to the state and minimal additional costs to local units of government related to providing juvenile justice services. While the specific amount of these additional costs is not known at this time, a recently released legislatively commissioned report has provided estimates of the additional amount using historical data and surveys.

The Report presents a range of what the estimated additional costs might be to the state Child Care Fund should this category of 17-year-olds be adjudicated under juvenile courts and provided with juvenile justice services. The Report states that the amount of increase to expenditures from the state Child Care Fund (under the current 50/50 state-local cost sharing model) is expected to be between $9.6 million and $26.8 million. Under the bill's provisions that the state pay 100% of eligible expenses, instead of the current law's 50% requirement, this estimated range of expected additional costs would be doubled and the range of costs would be approximately $19.2 million to $53.6 million to the state.

Within this range, it is important to note that the amount of additional costs incurred by the state would be dependent upon a variety of factors. These would include factors such as judicial and prosecutorial discretion, the type and security level of the residential placement required for each juvenile, as well as their length of stay.

House Bills 4134 to 4136 and 4142 and Senate Bills 93 and 99

These bills would increase costs to DHHS and to county Child Care Funds, and the increase would be included in the overall range of net cost increases presented by the Report of $27.0 million to $61.0 million annually. These Child Care Fund costs would increase over a 3- to 5-year period and would plateau thereafter, as the applicable population phases in.

The bills would increase costs for services such as probation, foster care placement, or institutional placement, and for many of these 17-year-old offenders, these costs could now qualify for child care funding under the provisions of the bills as cases under the authority of the Probate Code are funded by DHHS and counties. For children who are court wards, county courts initially pay for the required care and treatment, and DHHS reimburses 50% of those

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eligible expenditures back to the county through the Child Care Fund (50/50 state-local cost share). The increased cost to DHHS and county governments would depend upon the number of 17-year-old offenders who now fall under the authority of the family division of the circuit court and on the placement decisions made by the court.

Currently, if 17-year-old offenders are tried in criminal courts, found guilty, and incarcerated by the Department of Corrections (DOC), their care and treatment is funded by DOC. However, if under the bills these 17-year-old juveniles are categorized public wards of either the family division of the circuit court or DHHS, the expenses for their care and treatment would shift to DHHS and county governments. In most cases, the expenses of the youth's care and treatment would be paid through 50/50 state-local cost sharing.

While the specific amount of these additional costs is unknown, the Report suggests that the increased cost to the Child Care Fund state share (under the current 50/50 state-local cost sharing model) could be between $9.6 million and $26.8 million annually, while the increased cost to Child Care Fund local share could be expected to range between $16.9 million and $34.1 million annually. Under the provisions of Senate Bill 101, these increased costs for 17-year-olds would be paid 100% by the state until October 1, 2025. After that date, a new cost-sharing percentage rate would replace the current 50/50 state-local cost sharing model and these additional costs would be incorporated in the calculation of the new rate.

House Bills 4140 and 4143 and Senate Bill 97

House Bill 4140 and Senate Bill 97 would increase the number of juveniles receiving juvenile justice placements and services resulting in a cost increase to DHHS.

House Bill 4143 would have no fiscal impact on the state, but would affect local units of government. Under the bill, 16- and 17-year-olds would be prohibited from being placed with adults under arrest, confinement, or conviction. Currently, the law prohibits youth under the age of 16 from being placed with adults who are under arrest, confinement, or conviction; from remaining in a courtroom during the trial of adults; and from being transported in a vehicle with adults who are charged or convicted of crimes. Provisions of the bill, as written, reflect current policies of the Department of Corrections with regard to 16- and 17-year-olds.

Local units would incur costs for complying with provisions of the bill related to transporting 16- and 17-year-olds. Costs would depend on the extent to which current transportation and housing systems needed to be changed. When juveniles are placed at a juvenile detention or residential facility, in most cases, the expenses for these placements and other juvenile justice services will be paid by the state and the county in equal amounts through the Child Care Fund (50/50 state-local cost share).

House Bills 4443 and 4452

The bills could increase costs to DHHS and to local county governments by an unknown amount. Any increase in costs to DHHS and county governments would depend upon on how many additional juveniles would no longer be tried as adults and would now be placed under DHHS or local court supervision through judicial discretion in the disposition of their cases and what placements or services might be ordered by the court.

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Senate Bill 102

The bill would have no immediate fiscal impact on DHHS, but could eventually have an indeterminate fiscal impact to the department. Under the bill, DHHS would administer the new Raise the Age Fund and would expend money from the fund upon appropriation by the legislature. Any increased costs to the department would be dependent upon additional administrative costs that might be incurred for the administration of the fund and any reimbursement request appeals.

Courts

House Bill 4140 and Senate Bill 97

The bills would result in a cost increase to local courts because there would be more juveniles under court supervision. It is difficult to project the actual impact on each local unit due to variables such as prosecutorial practices, judicial discretion, and case types. When juveniles are placed at a juvenile detention or residential facility, in most cases, the expenses for these placements and other juvenile justice services will be paid by the state and the county in equal amounts though the Child Care Fund (50/50 state-local cost share). Because of the increase in the number of juveniles receiving juvenile justice placements and services, there would be a similar cost increase to DHHS.

Senate Bills 90 and 99

The bills would have an indeterminate fiscal impact on local units of government. The impact on courts would depend on the number of cases transferred from adult circuit and district courts to juvenile circuit courts (Family Division of Circuit Court). It is anticipated that adult circuit and district court costs would be reduced, while juvenile circuit court costs would be increased. An increase or decrease in the number of arraignments and the number of hearings affects processing, scheduling, and the overall management of court caseloads. Also, juvenile matters tend to be more time-consuming than adult proceedings. While there is an anticipated decrease in adult circuit and district court caseloads, and a corresponding increase in juvenile circuit court caseloads, there is also potential for shifting court resources, which could mean a cost-neutral situation for local units that have the ability to shift. Incremental costs would be incurred by prosecuting attorneys for handling juvenile cases versus adult cases, and county jails should see a decrease in the number of jail inmates. It is difficult to project the actual impact on each local unit due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, and case types. The impact of the bills would be unique to each local jurisdiction, and some jurisdictions would be affected more than others.

According to the Report, cost increases to courts, prosecuting attorneys, and jails could be $4.7 million annually, detailed as follows:

Estimated Court Costs	
District Court	($397,153)
Circuit Court	$6,363,677
Prosecuting Attorneys	$1,027,240
Sheriff	($2,289,040)
TOTAL	**$4,704,723**

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The Report estimated the size of the population that would be re-classified, as well as the type of destination to which each one would be assigned as a juvenile. Based on the number of 17-year-olds charged over calendar years 2014 through 2016, and on Michigan law and past experience in trying juvenile offenders as adults, the Report projected the number of 17-year-old offenders expected to be treated as juveniles and the number expected to be waived to adult court. (Throughout the Report, population figures represent 2016.)

According to the Report, it is estimated there were 7,253 17-year-old defendants in 2016 statewide. If those defendants had been treated as juveniles, as the bill package proposes, 763, or 11%, would likely have been waived over to adult courts; 4,081, or 56%, would likely have been tried as juveniles. The remaining 2,409 of those 17-year-old defendants, or 33%, had traffic violations. Of those with traffic violations, only 7% would likely have proceeded further into the juvenile system, with the balance likely to have exited the system entirely. The percentage of 17-year-olds who likely would have been treated as adults involved in circuit courts ranged from 4% for Kent County to 40% for Macomb County; Oakland County would likely have had 14%, and Wayne County 4%. It was stated in the Report that the numbers for future years could be quite different, because the overall trend in arrests of both 17-year-olds and juvenile offenders has been declining steadily over several years.

House Bills 4443 and 4452 and Senate Bill 100

The bills would have an indeterminate fiscal impact on local court funding units. The impact would depend on the number of cases involving 17-year-olds who would no longer be tried as adults. It is difficult to project the actual impact on each local unit due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, and case types. Typically, juvenile proceedings are much more time-consuming than adult proceedings.

Senate Bill 102

The bill would have no immediate fiscal impact on the state or on local units of government, but could eventually have an indeterminate fiscal impact on local court funding units. It could cost a county, court, or tribe to report on expenditures made with funding they receive from the Raise the Age Fund. However, costs to report could most likely be supported with existing financial resources. Local court systems could incur additional costs depending on the number of appeals cases (appealing disapproved reimbursements from the Raise the Age Fund) to go before the courts and how appeals cases affect overall caseloads and related administrative costs.

Department of Corrections

House Bill 4140 and Senate Bill 97

The bills would have an indeterminate fiscal impact on the Department of Corrections. The bills would result in a general fund/general purpose savings for the department, over time, if offenders aged 17 and under were no longer sentenced, under any circumstances, to adult prison facilities. This would depend solely on judicial placement decisions. As of June 30, 2019, the department was housing 29 prisoners aged 17 and under.

If the department did not house any offenders until they reached the age of 18, the department could potentially close half of one housing unit that houses this population, saving approximately $2.5 million GF/GP. If the department did not house any offenders who

committed their offenses prior to the age of 18 until they reached the age of 21, the department could close about 200 beds over the next 5 years, saving approximately $3.0 million GF/GP.

House Bill 4143
The bill would have no fiscal impact on the state, but would affect local units of government. Under the bill, 16- and 17-year-olds would be prohibited from being placed with adults under arrest, confinement, or conviction. Currently, the law prohibits youth under the age of 16 from being placed with adults who are under arrest, confinement, or conviction; from remaining in a courtroom during the trial of adults; and from being transported in a vehicle with adults who are charged or convicted of crimes. Provisions of the bill, as written, reflect current policies of the Department of Corrections with regard to 16- and 17-year-olds.

Local units would incur costs for complying with provisions of the bill related to transporting 16- and 17-year-olds. Costs would depend on the extent to which current transportation and housing systems needed to be changed. When juveniles are placed at a juvenile detention or residential facility, in most cases, the expenses for these placements and other juvenile justice services will be paid by the state and the county in equal amounts through the Child Care Fund (50/50 state-local cost share).

House Bill 4145
The bill would have no fiscal impact on the state Department of Corrections, but would impact local units of government, in particular, the cities of Detroit and Flint. Currently, the Department of Corrections is paid by the City of Detroit to operate the Detroit Detention Center, which serves as the city's single lock-up center, housing 200 offenders. Also, the department funds and operates the lock-up for the City of Flint. Under the bill, offenders less than 18 years of age who are picked up and detained pending arraignment could no longer be confined at these and other locally operated detention centers/lock-ups.

Though local units would save on costs as a result of fewer lock-ups, they would incur costs for their responsibility to detain these individuals in another way that meets the requirements of the bill. When juveniles are placed at a juvenile detention or residential facility, in most cases, the expenses for these placements and other juvenile justice services will be paid by the state and the county in equal amounts through the Child Care Fund (50/50 state-local cost share). However, any local construction or other capital improvement costs needed to ensure 16- and 17-year-olds are placed with adults are not eligible for state Child Care Fund reimbursement.

Senate Bills 90 and 99
The bills could produce marginal general fund/general purpose savings for the Department of Corrections. Under Senate Bill 92, there would be fewer 17-year-olds under HYTA probation supervision and prison status. In 2018, there were fewer than 200 HYTA probationers at any given time. Under Senate Bill 92, the department would no longer be responsible for supervising these youth, which, in FY 2018, cost roughly $3,600 per supervised offender.

The impact from the number of 17-year-old HYTA prisoners would be minimal, as there were only 5 as of July 1, 2019. Also, as of that same date, the department was housing 29 prisoners aged 17 and under, so any savings to the department from housing fewer prisoners would be nominal. If the department did not house any offenders until they reached the age of 18, the

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department could potentially close half of one housing unit that houses this population, saving approximately $2.5 million GF/GP.

House Bills 4443 and 4452 and Senate Bill 100
The bills would have an indeterminate fiscal impact on the state Department of Corrections. The impact would depend on the number of cases involving 17-year-olds who would no longer be tried as adults. A savings could be realized by the MDOC if fewer juveniles are tried as adults and sentenced to adult prisons.

Department of Licensing and Regulatory Affairs (LARA)

Senate Bill 84
The bill would be unlikely to have a significant fiscal impact on LARA or on funding units of local indigent defense systems. By revising the definition of "adult" to include persons age 18 or older, rather than 17 or older, the bill could decrease the number of persons who would qualify for indigent defense. Given the manner by which indigent defense services are provided in this state, the potential reduction of 17-year-olds receiving indigent defense would be unlikely to result in any significant cost savings for the Michigan Indigent Defense Commission within LARA or for local funding units. Furthermore, fewer individuals qualifying for indigent defense services could result in lower revenues from partially indigent defendant reimbursements. Any resulting reduction of revenues is likely to be nominal.

ARGUMENTS:

For:

Advocates, employers, and former inmates who were incarcerated as adults at age 17 presented many reasons why Michigan should join the 46 other states that have already "raised the age" and stopped automatically treating 17-year-olds as adults. A brief list of those reasons includes the following:

- The experience of other states in raising the age to 18 has been overwhelmingly positive. Most have not seen the expense predicted to incorporate 17-year-olds into the juvenile system, some have begun to see savings, and most have not seen a large influx of 17-year-olds into their juvenile justice systems. (Some have seen overall decreases in the number of older juveniles entering the criminal justice system, perhaps due in part to development of better and more efficient programming and services for juveniles.)
- RTA recognizes scientific evidence that the human brain does not fully mature until the mid-twenties.
- Juveniles, including those presenting to the criminal justice system at 17, are more amenable to being rehabilitated through the types of services and programming available in the juvenile justice system (which can also include services to the family).
- Juveniles in the adult system, even if not incarcerated, do not have access to beneficial services and programming that may lead to less recidivism (by some reports, juveniles who exit the adult system are 34% more likely to reoffend, reoffend sooner, and escalate to committing more violent crimes than those who remain in the juvenile justice system).

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- Young people of color are disproportionately impacted; RTA can provide greater access to age-appropriate services and not separate these children from the adults in their lives.
- Most juvenile offenders are victims of trauma such as abuse and/or neglect, been in foster care, and/or have mental health issues or developmental disabilities. All of these are known to increase the risk of being involved in the criminal justice system, but timely and appropriate age-related services and support can turn lives around.
- Youth sentenced to jail or prison, including 17-year-olds, are more likely to be physically and/or sexually assaulted (by staff and other prisoners), experience depression, and attempt or commit suicide (36% more likely) than those kept within the juvenile justice system.
- Treating 17-year-olds is not soft on crime; most 16- and 17-year-olds commit misdemeanors (79% by some studies) rather than serious felonies. Most first-time 17-year-old offenders are arrested for nonviolent offenses such as shoplifting, vandalism, and disorderly conduct. Holding them (and their families) accountable through the types of services and court oversight provided to juveniles can end the cycle of crime before the progression to more serious offenses.
- Youth sent to adult prison average 40% less in lifetime earnings, which increase the likelihood of needing government assistance in the future.
- Keeping more youth in the juvenile justice system allows more to avoid a criminal record that can impede the ability to pursue education, military service, employment, and housing.

For:

The Raise the Age legislation would not prevent a youth 17 or under from being tried as an adult. Youth who commit serious and violent crimes could still be waived or designated to adult court and tried as adults. A 17-year-old who would be waived or designated to adult court today most likely would still be transferred to adult court after the bills take effect. The main difference the legislation makes is that a 17-year-old who commits a crime would first be within the jurisdiction of the Family Division of Circuit Court. This gives judges and prosecutors more flexibility in considering mitigating factors and the need for services than the adult system provides. Though some may question whether a juvenile entering the criminal justice system at 17 has enough time to turn his or her life around, it has been reported that 17-year-olds show re-offense patterns similar to younger teens regarding cessation of criminal activity.

For:

By some estimates, when the bills take effect, over 7,500 additional youthful offenders could be eligible for county services as juveniles instead of automatically being treated as adults in the adult criminal justice system. Despite broad support for the legislation, concern as to how counties could absorb that many youth into their juvenile justice systems was a concern. In some cases, juvenile justice services can be much more expensive than dispensing adult sanctions. Plus, because a juvenile may need extensive programming and services such as counseling, the average cost for juvenile justice services per individual tends to be higher per year than if the individual were sent to the adult system. However, broader access to community-based services at 17 could turn more lives around. In time, savings could be realized if fewer went on to commit more, or more serious, crimes.

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Senate Bills 101 and 102, as enacted, represent a different approach from earlier versions of the bills. First, 17-year-olds will not be automatically diverted to the juvenile justice system until October 1, 2021. This will provide some time for counties to begin to prepare for an influx in the number of juveniles requiring services. Second, the state will cover the costs for the first few years while data are being collected and analyzed. Based on that data, in October of 2025, a new percentage rate for reimbursements to counties will be put into place. In addition, Senate Bill 102 enables counties to seek reimbursement, from a newly created fund, for services that are not eligible for reimbursement under the funding mechanism in Senate Bill 101 that are provided to those juveniles who are at least 17 years old when the offense was committed.

In addition, it should be noted that not every 17-year-old who commits a crime will go into the juvenile justice system: those who commit serious felonies may still be waived to adult court and face adult criminal sanctions. Therefore, the approach taken in the bills should soften the impact on local governments and ensure a smooth transition by providing time for any needed legislative "tweaks" to be adopted.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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APPENDIX M

Facts About Youth Behind Bars, 2016
Michigan Council on Crime and Delinquency

MCCD
MICHIGAN COUNCIL ON CRIME AND DELINQUENCY
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Facts about Youth Behind Bars

In the mid-1990s, Michigan became part of a national trend to "get tough on youth crime." Although crime rates were steadily declining, the state passed a series of harsh laws that funneled thousands of youth under 18 into the adult criminal justice system.

Michigan is one of only states that automatically prosecute 17-year-olds as adults.

- Between 2003-2013, 20,291 youth were convicted as adults and placed on adult probation, sent to jail, or imprisoned for a crime they committed before turning 18. Of this population, 95% were 17 at the time of the offense.
- Nearly 60% of 17-year-olds were charged with non-violent offenses that did not include a weapon.
- 58% of those entering the system at age 17 had no prior juvenile record.

Michigan can prosecute, convict and sentence a youth of any age as an adult.

- Over 75 children under the age of 14 have been convicted as adults since 1996.
- For certain offenses, 14, 15 and 16-year-old children can be automatically prosecuted as an adult without any judicial oversight.
- Most youth never go to trial. Among 17-year olds, 86% accepted a plea agreement; among youth 16 and younger, 73% accepted a plea agreement.
- Once convicted, youth must serve 100% of their minimum sentence. There are 363 people serving a life sentence without parole for a crime committed before turning 18 – second highest in the nation.

Youth of color are disproportionately convicted as adults in Michigan.

- 53% of youth entering MDOC jurisdiction at age 17 were youth of color, even though youth of color only make up 23% of the population statewide.
- 59% of youth 16 or under were Black or African American, even though Black youth only make up 18% of the population statewide.

Girls in the adult system do not receive adequate treatment.

- Between 2003-2013, over 2,000 girls have been convicted as adults. 86% of them were 17 years old at the time of the offense.
- 58% of girls were charged with non-violent offenses and 70% had no prior juvenile record.
- Prior to incarceration, 45% of girls had known drug abuse; 26% had known alcohol abuse; 31% had received mental health treatment.
- 13% of girls had at least one dependent.

Youth under age 18 often spend time in jail.

- From 2003-2013 10,531 youth – over half of the entire youth population - received jail as part of their sentence.
- On average, a youth served 145 days in jail as part of a sentence and an average of 35 days awaiting a hearing.

Adult probation and prisons are ill-equipped to address the unique needs of youth.

- Youth in adult prison are more disruptive than either adults in prison or youth in juvenile facilities, which often leads to misconducts and segregation.
- Young people are at the greatest risk of violence and victimization in prison.
- 22% of 17-year olds and 30% of youth 16 and younger had received mental health treatment prior to entering prison.
- 60% of youth had known drug abuse and 25% had known alcohol abuse prior to entering prison.

Youth in prison are among the most vulnerable and marginalized population.

- Prior to entering prison, 78% had a friend who was killed; 48% had a family member who was killed.
- 81% had a parent with substance abuse issues.
- 44% spent time in foster care and were placed out of home an average of 11 times.
- 45% had a father in prison; 25% had a mother in prison; 19% had a sibling in prison.

Most 17-year-olds in adult corrections are behind in school.

- 82% of youth entering prison had no high school diploma or GED.
- Among 17-year-olds in prison, 32% entered with only a 10th grade education, 20% had a 9th grade education, and 10% had an 8th grade education or lower.
- Youth only receive about 8 hours a week of education in Michigan prison.

Michigan is spending millions of dollars to incarcerate youth.

- By the end of 2013, there were 5,617 people under MDOC jurisdiction that entered as 17-year-olds (probation, prison, or parole). Of that population, 55% were in prison.
- Nearly 25% of those currently in the system received sentences with a maximum term of 15 years or more, and 16% have sentences with a maximum term of 20 years or more. At a minimum, 17-year-olds serving a 20-year sentence cost the state $2.1 billion.
- An adult conviction creates lifelong barriers to housing, employment and education. A young person convicted as an adult can expect a lifetime earning loss of 40%, translating into loss of state tax revenue.

Source: MCCD, Youth Behind Bars: Examining the Impact of Prosecuting and Incarcerating Kids in Michigan's Criminal Justice System, May 2014.

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APPENDIX N

Black Disparities in Youth Incarceration (July 2021)
The Sentencing Project,

THE SENTENCING PROJECT

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Black Disparities in Youth Incarceration

Racial Disparities Persist but Fall from All-Time High

Black youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers, according to nationwide data collected in October 2019 and recently released. In 2015, Black youth's incarceration rate was 5.0 times as high as their white peers, an all-time peak. That ratio fell to 4.4, a 13% decline.[1]

Juvenile facilities, including 1,510 detention centers, residential treatment centers, group homes, and youth prisons[2] held 36,479 youths as of October 2019. (These data do not include the 653 people under 18 in prisons at year-end 2019[3] or the estimated 2,900 people under 18 in jails at midyear 2019.[4])

Forty-one percent of youths in placement are Black, even though Black Americans comprise only 15% of all youth across the United States.[5] Black youth are more likely to be in custody than white youth in every state but one: Hawaii. Between 2015 and 2019, juvenile placements fell by 24%. During these years, Black youth placements declined faster than white youth placements (54% vs. 36%), resulting in a smaller but still considerable disparity.

Nationally, the youth placement rate was 114 per 100,000. The Black youth placement rate was 315 per 100,000, compared to the white youth placement rate of 72 per 100,000.

Racial disparities grew by more than 10% in 11 states and decreased by at least 10% in 23 states and the District of Columbia.

- In New Jersey, Wisconsin, District of Columbia, and Connecticut, African American youth are at least 10 times more likely to be held in placement as are white youth.
- South Carolina, Tennessee, and Nebraska have seen their racial disparity grow by at least one-third.
- Indiana, New Jersey, Arkansas, Pennsylvania, and Nevada decreased their racial disparity by at least one-third.

Black/White Youth Placement Rates per 100,000; 2019

State	Black Rate	White Rate	B/W Disparity
Alabama	294	106	2.8
Arizona	240	62	3.9
Arkansas	307	96	3.2
California	433	48	9.0
Colorado	557	76	7.3
Connecticut	74	7	10.6
Delaware	390	44	8.9
District of Columbia	388	35	11.1
Florida	295	90	3.3
Georgia	233	40	5.8
Illinois	218	32	6.8
Indiana	298	138	2.2
Iowa	721	83	8.7
Kansas	405	81	5.0
Kentucky	393	89	4.4
Louisiana	294	49	6.0
Maryland	182	29	6.3
Massachusetts	133	19	7.0
Michigan	458	85	5.4
Minnesota	621	73	8.5
Mississippi	105	27	3.9
Missouri	288	80	3.6
Nebraska	641	69	9.3
Nevada	488	140	3.5
New Jersey	245	14	17.5
New York	168	30	5.6
North Carolina	250	37	6.8
Ohio	433	84	5.2
Oklahoma	281	53	5.3
Oregon	547	146	3.7
Pennsylvania	413	73	5.7
South Carolina	315	63	5.0
Tennessee	124	27	4.6
Texas	345	74	4.7
Virginia	273	57	4.8
Washington	310	60	5.2
Wisconsin	485	43	11.3
U.S. Total	**315**	**72**	**4.4**

The table above and the figure on page 2 are limited to the 36 states and the District of Columbia with at least 8,000 Black residents between 10- and 17-years old.

Numbers in the last column reveal the extent to which Black youth are more likely to be incarcerated than white youth. For example, in Alabama, Black youth are 2.8 times more likely to be held in a juvenile facility than their white peers.

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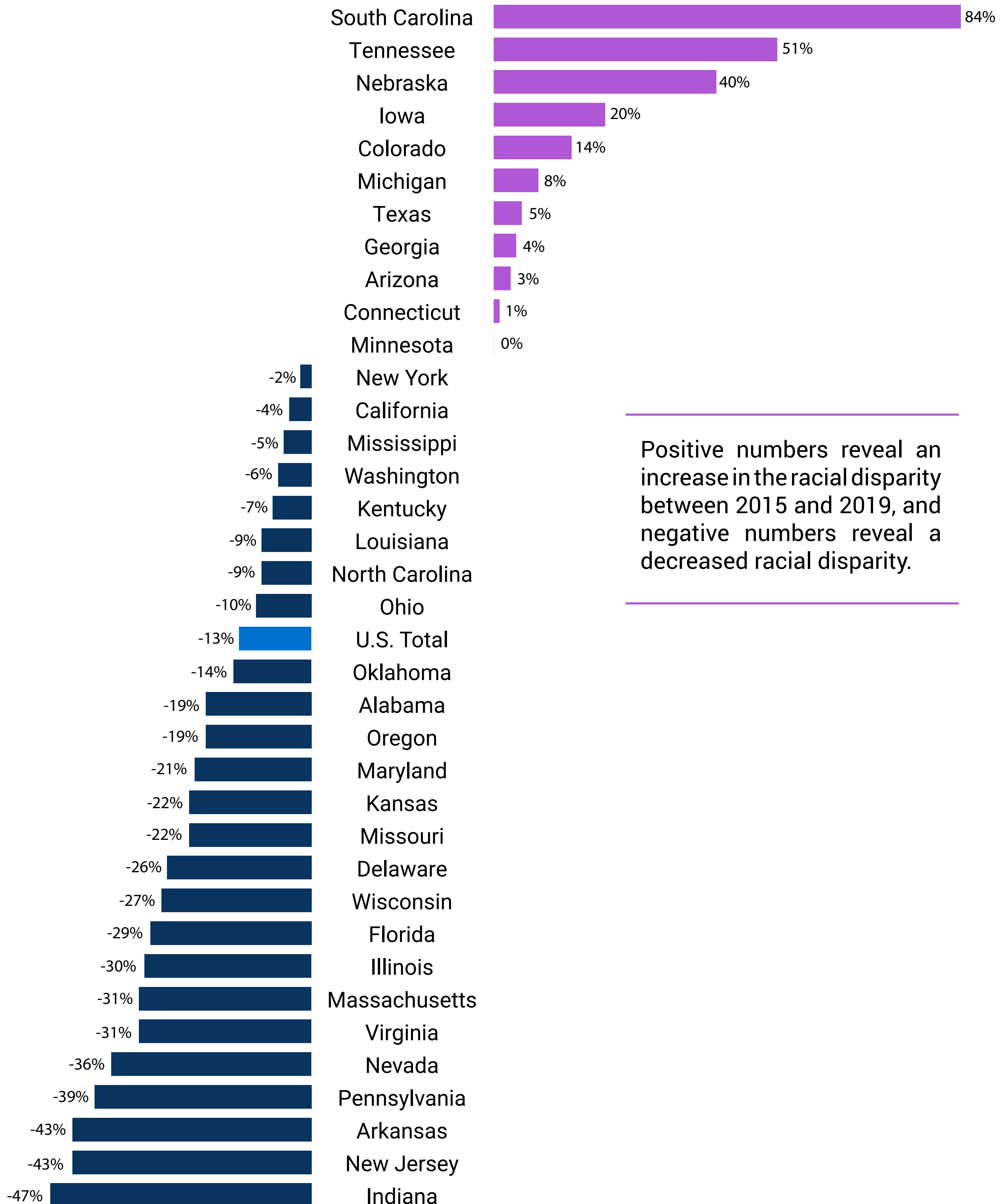
Change in Black/White Placement Disparity; 2015 vs. 2019[6]



1 Most data in this report are derived from Sickmund, M., Sladky, T.J., Puzzanchera, C. and Kang, W. (2021). *Easy Access to the Census of Juveniles in Residential Placement.* National Center for Juvenile Justice. https://www.ojjdp.gov/ojstatbb/ezacjrp/
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4 Zeng, Z. and Minton, T. (2021). *Jail Inmates in 2019*. Bureau of Justice Statistics. NCJ 255608. https://bjs.ojp.gov/content/pub/pdf/ji19.pdf
5 Puzzanchera, C., Sladky, A. and Kang, W. (2020). *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice. https://www.ojjdp.gov/ojstatbb/ezapop/
6 The District of Columbia's racial disparity was undefined in 2015 because there were no incarcerated white youth on the date of the one-day count.

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