2015

An Eighth Amendment Analysis of Statutes Allowing or Mandating Transfer of Juvenile Offenders to Adult Criminal Court in Light of the Supreme Court's Recent Jurisprudence Recognizing Developmental Neuroscience

Katherine I. Puzone
Barry University

AN EIGHTH AMENDMENT ANALYSIS OF STATUTES ALLOWING OR MANDATING TRANSFER OF JUVENILE OFFENDERS TO ADULT CRIMINAL COURT IN LIGHT OF THE SUPREME COURT'S RECENT JURISPRUDENCE RECOGNIZING DEVELOPMENTAL NEUROSCIENCE

Katherine I. Puzone[*]

TABLE OF CONTENTS

---

[*]Associate Professor of Law, Barry University Dwayne O. Andreas School of Law, J.D. cum laude New York University School of Law, M.Phil. University of Cambridge, B.A. Trinity College.

INTRODUCTION

Recent Supreme Court cases have recognized the science underlying the common-sense notion that children are not "little adults." Their brains function in a completely different manner than those of adults. In 2005, the Court abolished the juvenile death penalty and recognized the neuroscience underlying the claim that those under the age of eighteen should not be subject to the ultimate punishment due to the fundamental immaturity of their brains.[1] Later cases, discussed in depth below, followed similar reasoning in abolishing life without parole for non-homicides for juvenile offenders[2] and in holding that juvenile offenders cannot be subjected to a mandatory life sentence even for homicide.[3] In each of these cases, the Court applied an Eighth Amendment analysis.[4] In contrast, cases assessing the constitutionality of procedures employed in juvenile delinquency courts employ the "fundamental fairness" test dictated by the Due Process Clause of the Fourteenth Amendment.[5]

---

[1] Roper v. Simmons, 543 U.S. 551, 573–74, 578 (2004).

[2] Graham v. Florida, 540 U.S. 48, 68–69, 80 (2010).

[3] Miller v. Alabama, 132 S. Ct. 2455, 2482 (2012).

[4] *See Miller*, 132 S. Ct. at 2469 ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); *Graham*, 540 U.S. at 79 ("Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a non-homicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit."); *Roper*, 125 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

[5] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 533–34 (1971) ("We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."); *In re* Gault, 387

The first cases to evaluate the constitutionality of the procedures used to transfer juveniles to adult court utilized a due process framework.[6] This was consistent with the analysis of early cases that reviewed the procedures used in delinquency court.[7] This article argues that, in light of the Court's holdings in *Roper, Graham*, and *Miller*, direct file procedures must also be analyzed under the Eighth Amendment. As Justice Fortas noted in *Kent*, the "decision as to waiver of jurisdiction and transfer of the matter to the [adult criminal court] was potentially as important to petitioner as the difference between five years' confinement and a death sentence."[8] In most states, juvenile jurisdiction ends, at the latest, at the child's twenty-first birthday. In Florida, for example, the maximum sentence that can be imposed on a juvenile is commitment to a juvenile commitment program for the length of time applicable to an adult, or until the child's nineteenth birthday, whichever is shorter.[9] Therefore, a sixteen-

---

U.S. 1, 31–59 (1967) (applying due process analysis to determine what procedures were required to protect the rights of juveniles charged in delinquency court; due process was held to require adequate written notice of the charges, the right to counsel, the right to confront and cross-examine the State's witnesses, and the right to remain silent); Kent v. United States, 383 U.S. 541, 555, 564–65 (1966) (assessing the constitutionality of judicial transfer of juvenile to adult court by stating: "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."); *see also* Gallegos v. Colorado, 370 U.S. 49, 55 (1962) ("The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction was obtained in violation of due process."); Haley v. Ohio, 332 U.S. 596, 600–01(1948) (holding that Due Process Clause did not permit admission of a statement of a fifteen-year-old that was taken under circumstances that did not comport with fundamental fairness).

[6] *See supra*, note 5.

[7] *See Kent*, 383 U.S. at 555, 564–65.

[8] *Id.* at 546.

[9] *See* FLA. STAT. ANN. § 985.455(3) (West 2013).

year old facing a charge of armed burglary of a dwelling can be sentenced to a juvenile commitment facility until his nineteenth birthday if the case is filed in juvenile court. In stark contrast, if the juvenile is charged as an adult, he faces several decades in prison, perhaps as many as seventy years.[10] Given that the result of an adult charge could be the equivalent of life in prison—and in light of the developmental neuroscience recognized by the Supreme Court—procedures used to transfer youth to adult criminal courts must comport with the Eighth Amendment.

I. THE DEVELOPMENT AND PURPORTED PURPOSE OF JUVENILE COURTS

This article addresses cases that are transferred from juvenile delinquency court to adult criminal court. Delinquency proceedings are proceedings in juvenile court in which children are charged with "delinquent acts"—the juvenile equivalent of an adult crime. In most states, the law provides that delinquent acts are not crimes.[11] While every state has a juvenile court system today, the role of juvenile court has changed over time; "[a]t the dawn of the twentieth century, progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth."[12] After several

---

[10] In Florida, armed burglary of a dwelling is punishable by life in prison for an adult. *See* FLA. STAT. ANN. § 810.02 (West 2011). A case currently pending before the Florida Supreme Court illustrates the potential sentences faced by youth charged as adults. *See* Gridine v. State, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011). In *Gridine*, a fourteen-year-old was sentenced to seventy years without parole for an attempted armed robbery committed with a twelve-year-old. *Id.* at 910. Under Florida law, he will not be eligible for parole until he is seventy-seven. *Id.*; *see also* Erik Eckholm, *Juveniles Facing Lifelong Terms Despite Rulings*, N.Y. TIMES, Jan. 19, 2014, at A1.

[11] *See, e.g.*, FLA. STAT. ANN. § 985.35(6) (West 2007); GA. CODE ANN. § 15-11-606 (West 2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

[12] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691 (1991).

decades of reform, delinquency courts now closely resemble adult criminal courts.[13] Barry Feld has identified three types of reform affecting the juvenile court system: jurisdictional, jurisprudential, and procedural.[14] Recent years have seen an increase in society's desire to criminalize the conduct of children. While penalties have become harsher and juvenile sanctions have become more like criminal sanctions, juvenile courts are not required to provide children with the same protections afforded to adult defendants. According to Feld, "[a]lthough theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults."[15] Feld argues:

> The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.[16]

Historically, youth in delinquency court were not afforded all of the protections given to adults facing criminal charges.[17] This was because

---

[13] *Id.*

[14] *Id.* at 692.

[15] *Id.*

[16] *Id.* at 692–93.

[17] *See In re* Gault, 387 U.S. 1, 14 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison

juvenile court was seen as a way for the state to step in where children were engaging in socially unacceptable behavior, often due to lack of supervision at home.[18] Some have noted a distinct class element to early juvenile courts, arguing that such courts were a way for society to exercise control over "lower-class" youth.[19] A report submitted by the Cook County (Illinois) Bar Association to the Illinois state legislature in support of the creation of the first juvenile court stated that:

> The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime. . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.[20]

Over time, however, the courts, including the United States Supreme Court, began to recognize that the ideal of kindly juvenile judges who used their wide discretion to help at-risk children was far from the reality

---

sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable.").

[18] *History and Philosophy of the Juvenile Court*, *in* FLA. JUV. LAW AND PRACTICE 1–6 (11th ed. 2009) [hereinafter FLA. JUV. LAW AND PRACTICE].

[19] *Id.* ("Early juvenile law generally grew from citizen concern for children who, lacking parental control, discipline, and supervision, were coming before the criminal court for truancy, begging, homelessness, and petty criminal activity. There were distinct social phenomena that contributed to these problems, including a large population of children from broken families in the aftermath of the Civil War, latchkey children of parents who were unable to provide supervision during long work hours, lack of child care, and lack of free or compulsory education for children.").

[20] FLA. JUV. LAW AND PRACTICE, *supra* note 18, at 1–3.

faced every day by children in delinquency court.[21] In the seminal case of *In re Gault*, the United States Supreme Court stated:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts" . . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[22]

The facts of *Gault* demonstrate just how dangerous giving any judge unbridled discretion can be. One afternoon in 1964, a fifteen-year-old named Gerald Francis Gault and a friend purportedly made a prank phone call.[23] As eloquently described by Justice Fortas, the calls "were of the irritatingly offensive, adolescent, sex variety."[24] At the time of the "offense," Gerald was on probation because he had been caught in the company of another teenager who stole a wallet.[25] Gerald was taken into custody while both of his parents were at work.[26] No notice was left for

---

[21] In *Gault*, the Court traced the historical development of juvenile delinquency court and demonstrated that, as the consequences of a juvenile adjudication of delinquency became more severe, procedures similar to those used in adult criminal court were required by the Due Process Clause. 387 U.S. at 13–18.

[22] *Id.* at 17–18.

[23] *Id.* at 4.

[24] *Id.* at 4–5.

[25] *Id.*

[26] *Id.* at 5.

the parents, and no attempt was made to contact them to let them know that their son was in custody.[27] Upon learning of her son's whereabouts from a neighbor, Gerald's mother went to the detention home, where Gerald's probation officer told her of her son's alleged acts and informed her that there would be a hearing the next day.[28] The probation officer filed a petition in juvenile court that Gerald's parents did not see until a federal habeas proceeding was brought.[29] The petition did not allege any factual basis for the court proceeding.[30] At the "hearing" the next day, the complainant was not present, and no transcript or written memorandum of the proceedings was created.[31] Gerald was questioned by the judge but was not told that he had a right to remain silent.[32] A few days later, without explanation, Gerald was released.[33] Shortly thereafter, his parents were notified simply that there would be another hearing.[34] Once again, the complainant was not present, and Gerald testified without having been advised of his constitutional rights.[35] Gerald's mother specifically requested the presence of the complainant so that she could identify which of the two boys had actually made the lewd remarks.[36] At the hearing, a referral report was sent to the court by the probation officers, but was not sent to Gerald or his parents.[37] At the conclusion of the hearing, the judge

---

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 6.

[34] *Id.* at 7.

[35] *Id.*

[36] *Id.*

[37] *Id.*

committed Gerald to the State Industrial School as a juvenile delinquent until his twenty-first birthday, "unless sooner discharged by due process of law."[38] At no point were Gerald or his parents advised that he had a right to counsel.[39] In essence, Gerald was sentenced to six years in juvenile prison for a prank phone call without any notice of the charges, without having been able to cross-examine the complainant, without knowledge that he could remain silent, and without the advice of counsel.

In *Gault*, the Court reevaluated the juvenile justice system and held that many of the fundamental protections afforded to criminal defendants must be afforded to children facing charges in delinquency court. The Court noted the severe consequences of a juvenile adjudication of delinquency, and stated that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[40]

The Court held that due process requires that children be given notice of the charges against them,[41] that the Sixth and Fourteenth Amendments require that children be advised of their right to counsel, that they be provided with counsel if they cannot afford counsel,[42] that the Fifth, Sixth, and Fourteenth Amendments require that children be able to

---

[38] *Id.* at 7–8.

[39] *Id.* at 10.

[40] *Id.* at 27–28.

[41] *Id.* at 31–34 ("Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.").

[42] *Id.* at 34–42 ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'") (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

confront and cross-examine the witnesses against them, and that children may invoke the right against self-incrimination.[43] The Court specifically rejected the argument that this right should not apply to children because confession is therapeutic.[44] A few years later, the Court held that every element of the offense charged in a petition for delinquency must be proven to the trier of fact beyond a reasonable doubt.[45] However, a year later, the Court held that children are not entitled to a jury in delinquency

---

[43] *Id.* at 42–57 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."). While the Court declined to rule on the child's argument that the Constitution requires appellate review of juvenile delinquency proceedings and the right to a transcript of such proceedings, most states provide for transcription of delinquency proceedings and appellate review of these proceedings. *See, e.g.*, FLA. STAT. ANN. § 985.534 (West 2007) (providing a right to appeal from an adjudication of delinquency); FLA. R. JUV. P. 8.830 (providing for written transcripts of all proceedings in delinquency court).

[44] *Gault*, 387 U.S. at 51 ("It is also urged . . . that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders. In fact, evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment,' as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. . . . [I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.").

[45] *In re* Winship, 397 U.S. 358, 364–69 (1970) (noting that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" and that such a right is applicable to children "during the adjudicatory stage of a delinquency proceeding").

proceedings.[46] In most states, a juvenile judge presides over all pretrial proceedings and the adjudicatory hearing.[47]

The Court's rationale in holding that children are not entitled to a jury in delinquency proceedings was based upon the notion that juvenile proceedings are supposed to be rehabilitative rather than punitive. The standard of due process required in juvenile delinquency proceedings, as developed in *Gault* and *Winship*, is "fundamental fairness."[48] Despite acknowledging the many flaws in the juvenile system as it existed at the time—and acknowledging that the juvenile system could impose the functional equivalent of prison on children—the Court held that a jury is not required in a delinquency proceeding. The Court explained:

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.[49]

While the primary purpose of juvenile court may at one point have been rehabilitation,[50] that is no longer the case today. The legislative intent for

---

[46] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 549–50 (1971) (holding that a jury is not constitutionally required in juvenile delinquency proceedings).

[47] *See, e.g.*, FLA. R. JUV. P. 8.110(c) ("The adjudicatory hearing shall be conducted by the judge without a jury. At this hearing the court determines whether the allegations of the petition have been sustained.").

[48] *See McKeiver*, 403 U.S. at 543.

[49] *Id.* at 550.

[50] *See generally* Feld, *supra* note 12.

the juvenile justice system in most states[51] is to protect the public from acts of delinquency.[52] Preventing delinquency, strengthening the family, early intervention, and rehabilitation are often listed as secondary goals of the juvenile justice system.[53] It appears that Justice Fortas' warning in *Kent* over forty years ago is more applicable today than ever: "[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[54]

II. HISTORY OF TRANSFERRING YOUTH TO ADULT CRIMINAL COURT

In *Kent*, the Supreme Court addressed the constitutionality of the transfer statute then in effect in the District of Columbia.[55] The statute

---

[51] A few states, however, still prioritize the rehabilitation and care of the child. *See, e.g.*, LA. CHILD. CODE ANN. art. 801 (1992) (providing that each child facing delinquency proceedings receive the "care, guidance and control that will be conducive to his welfare"); NEB. REV. STAT. § 43-402 (West 1994) (providing for "individualized accountability and individualized treatment" in the delinquency system).

[52] *See, e.g.*, COLO. REV. STAT. ANN. § 19-2-102 (West 1997) ("[T]he intent of this article is to protect, restore and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community and the juvenile offenders for restorative purposes."); FLA. STAT. ANN. § 985.02(3) (West 1997) (stating that legislative intent of the juvenile justice system is "to first protect the public from acts of delinquency"); VT. STAT. ANN. tit. 3 § 3085c(c)(1)(A) (2013) (stating that a juvenile justice system should "[h]old juveniles accountable for their unlawful conduct"); WIS. STAT. ANN. § 938.01 (West 2009) ("It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively.").

[53] *See* FLA. STAT. ANN. § 985.02(3)(a)–(d) (West 2014).

[54] Kent v. United States, 383 U.S. 541, 556 (1966).

[55] *Id.* at 541.

allowed a judge in juvenile court to transfer a case for prosecution in the adult criminal system without holding a hearing and without giving any reasons for her decision.[56] The Court held that this transfer procedure did not comport with the fundamental fairness required by the Due Process Clause, noting:

> [A]s a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[57]

After *Kent*, many states reassessed their transfer statutes and procedures, purportedly in order to comply with the Court's ruling. The result, however, was that many of these new statutes in effect made it easier for the state to transfer juveniles to adult court and significantly limited—or, in some cases, eliminated completely—the role of the juvenile judge and the child's counsel in juvenile court. A study of state transfer laws revealed that, "[i]n the 1980s and 1990s, legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts."[58]

---

[56] *Id.*

[57] *Id.* at 557.

[58] PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1 (2011) [hereinafter ANALYSIS OF STATE TRANSFER LAWS], *available at* https://ncjrs.gov/pdffiles1/ojjdp/232434.pdf. The introduction to the study explains how difficult it is to acquire accurate statistics on the transfer of juveniles into the adult criminal system, noting that:

> [T]here are no national data sets that track youth who have been tried and sentenced in the criminal justice system. Moreover, state data are

Youths can be transferred to adult court in several ways. Judicial waiver laws "allow juvenile courts to waive jurisdiction on a case-by-case basis."[59] There are three types of judicial waiver: discretionary, presumptive, and mandatory.[60] Typically, these statutes set forth standards to guide the judge's discretion.[61] Some judicial waiver statutes, however, make waiver into the adult system presumptive in certain cases and put the burden on the defense to demonstrate why the case should remain in juvenile court.[62] Some states go so far as to *mandate* judicial transfer in certain cases.[63] Many states leave the decision to transfer a youth to the

---

> hard to find and even more difficult to assess accurately . . . Currently, only 13 states publicly report the total number of their transfers, and even fewer report offense profiles, demographic characteristics, or details regarding processing and sentencing. Although nearly 14,000 transfers can be derived from available 2007 sources, data from 29 states are missing from that total.

Id.

[59] *Id.* at 2.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 3 (noting that forty-five states have discretionary judicial waiver statutes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Fifteen states have presumptive judicial transfer statutes: Alaska, California, Colorado, District of Columbia, Illinois, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island and Utah. Fifteen states have mandatory judicial transfer statutes: Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, and West Virginia).

adult system solely in the hands of the prosecution.[64] The prosecutor is allowed to determine whether charges will be filed in juvenile or adult court.[65] Such statutes are commonly known as "direct file" statutes.[66] A typical direct file statute provides criteria for discretionary and mandatory direct file of an information in adult criminal court.[67] Fifteen states give the prosecutor complete discretion to charge a youth directly in adult criminal court, thereby bypassing a judicial hearing in juvenile court.[68] Finally, statutory exclusion laws give adult criminal courts exclusive jurisdiction over certain classes of cases involving juvenile offenders.[69]

Before analyzing the constitutionality of transfer statutes, it is important to remember that the United States Supreme Court has never acknowledged a constitutional right to be tried in juvenile court.[70] In upholding transfer statutes, courts have relied on the fact that the right to

---

[64] *Id.* at 2.

[65] *Id.*

[66] *Id.* at 12. For an example of a direct file statute, see FLA. STAT. ANN. § 985.557 (West 2011) (describing direct filing of information, as well as discretionary and mandatory criteria).

[67] *Id.* at 2 (noting that most transfer statutes provide broad guidelines and specific eligibility criteria that often include age and/or a specified level of offense).

[68] ANALYSIS OF STATE TRANSFER LAWS, *supra* note 58, at 3 (noting that the fifteen states with prosecutorial direct file statutes are Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia and Wyoming).

[69] *Id.* (noting the twenty-nine states that have statutory exclusion laws: Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington and Wisconsin).

[70] *See, e.g.*, Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977), *cert. denied,* 434 U.S. 1088 (1978) (stating that United States Supreme Court has never recognized a right for juveniles to be tried in juvenile court).

be tried in juvenile court is a right that is granted by the state legislature.[71] As such, the legislature may dictate the procedures and rights of juvenile defendants, as long as the legislature does so in a manner that comports with due process.[72] The Supreme Court has not yet set forth any criteria that must be met in order to satisfy the Constitution before a youth is transferred to adult criminal court.[73]

Courts construing mandatory waiver and direct file statutes have held them to be constitutional, despite the Supreme Court's holding in *Kent*. *Kent* held that if a transfer hearing is held, such a hearing must comport with due process. Courts have found that mandatory waiver and direct file statutes do not implicate the procedures mandated by *Kent* because they bypass a hearing in juvenile court entirely. For example, a Virginia appellate court upheld a mandatory transfer statute against a challenge by a youth on the grounds that, under *Kent*, he was constitutionally entitled to a transfer hearing in juvenile court.[74] The statute at issue provided for automatic transfer to adult court where the juvenile court found probable cause to believe that the youth was at least fourteen and had committed the offense of murder.[75]

The youth argued that, pursuant to *Kent*, "he had a constitutional right to a transfer hearing and to representation by counsel at that hearing before being stripped of his juvenile status and being tried as an adult."[76]

---

[71] *See, e.g.*, W.M.F. v. State, 723 P.2d 1298, 1300 (Alaska 1986) (noting that juvenile courts are a creature of statute and, as such, the legislature can prescribe procedures for those courts within constitutional boundaries).

[72] *Id.*

[73] *See* Breed v. Jones, 421 U.S. 519, 537 (1975) ("[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court."); *see also* Stokes v. Fair, 581 F.2d 287, 289 (1st Cir. 1978), *cert. denied,* 439 U.S. 1078 (1979).

[74] *See* Rodriguez v. Commonwealth, 578 S.E.2d 78, 82–83 (Va. Ct. App. 2003).

[75] VA. CODE ANN. § 16.1–269.1 (West 2012).

[76] *Rodriguez*, 578 S.E.2d at 80–81.

The Virginia court distinguished *Kent* on the ground that the youth in that case had a statutory right to be tried in juvenile court, whereas the Virginia statute mandated that the youth be charged as an adult under the circumstances.[77] The court found no constitutional right to a transfer hearing, and limited *Kent* to its construction of the particular statute at issue.[78] Essentially, the Virginia court found that, if a statute provides for a transfer hearing, such a hearing must comport with due process, but that the Constitution does not prevent a state from charging a juvenile directly in adult court without a transfer hearing.[79]

Given that direct file and mandatory transfer statutes have been in existence for decades, it is unlikely that a due process challenge to these statutes will succeed. However, the Court's evolving application of the Eighth Amendment to juvenile punishments—which has been informed by developmental neuroscience—might provide a new vehicle to challenge direct file and mandatory transfer statutes.

III. THE COURT'S EVOLVING RECOGNITION OF DEVELOPMENTAL NEUROSCIENCE AND ITS IMPACT ON EIGHTH AMENDMENT JURISPRUDENCE

As noted above, the United States Supreme Court has recently decided several landmark cases recognizing the fundamental principle that

---

[77] *Id.* at 81–83 ("[T]he Court's references to Kent's constitutional rights to due process and counsel arose in the context of the hearing and other procedures expressly provided for by the transfer statute at issue in that case. . . . Appellant has cited no controlling legal authority providing that a juvenile defendant has a constitutional right to a transfer hearing before being treated as an adult. The cases he cites provide, at most, that juvenile proceedings, including transfer proceedings, *when provided for by statute,* must measure up to the essentials of due process and fair treatment." (emphasis in original)) (internal quotation marks and citations omitted).

[78] *Id.* at 81–83.

[79] *Id.* at 81.

children are different from adults.[80] Each of these cases relied to a large extent on developing science demonstrating that children's brains function in a fundamentally different manner than those of adults. As the *Roper* Court noted, teenagers are generally less mature, more prone to reckless behavior, and much more susceptible to negative influences than adults; the possibility of rehabilitation is also greater for teenagers than for adults.[81] An *amicus* brief relied upon by the *Graham* court explains succinctly how children's brains are different. For example, even older adolescents "are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions."[82] Teenagers are much more likely to be influenced by negative peers and, because they are not adults, lack the autonomy to escape such influences even if they desire to do so.[83] Because a significant amount of juvenile criminal behavior is attributable to the transient characteristics of youth, research has shown that the vast majority of youthful offenders do not continue to engage in criminal behavior as adults.[84] Yet, as the science of juvenile brain development has

---

[80] *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2406 (2011) (holding that a child's age must be taken into account in determining whether a child was in custody when "it was known . . . or would have been objectively apparent to the reasonable officer" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966)); Graham v. Florida, 540 U.S. 48, 82 (2010) (abolishing life without parole for children convicted of crimes other than homicide); Roper v. Simmons, 543 U.S. 551, 578 (2004) (abolishing the juvenile death penalty).

[81] *Roper*, 543 U.S. at 569–70.

[82] Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners at 3–4, Graham v. Florida, 540 U.S. 48 (2010) (No. 08-7412), 2009 WL 2236778, at *4 (internal quotations omitted).

[83] *Id.*

[84] *Id.*

advanced considerably, there have not been any corresponding major changes in the way cases are transferred from delinquency court to adult criminal court.

The Court has long recognized that cognitive functioning is relevant to an Eighth Amendment analysis of a particular punishment.[85] In the context of the death penalty, the Court specifically recognized that youth is a mitigating factor that must be considered by the sentencing jury.[86] In 1982, prior to the recent progress in developmental neuroscience, the Supreme Court recognized the fundamental, commonsense fact that children are different than adults.[87] The Court stated that "the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."[88]

Further, in 2002, the Court expressly recognized the link between cognitive functioning and criminal culpability.[89] In holding that the Eighth Amendment bars the execution of the mentally retarded, the Court held that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, [mentally retarded offenders] do not act with the level of moral culpability that characterizes the most serious adult criminal

---

[85] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 607–08 (1978) (holding that the Eighth Amendment requires a capital sentencing jury to be allowed to consider "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers for a sentence less than death"); Gregg v. Georgia, 428 U.S. 153, 163–64 (1976) (holding that, in order to comply with the Eighth Amendment, jury must consider any mitigating circumstances). While *Lockett* and *Gregg* were capital cases, their recognition that the Eighth Amendment requires consideration of any relevant mitigating factors is applicable to the analysis that follows.

[86] *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

[87] *Id.* at 115–16.

[88] *Id.* at 116.

[89] Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment bars the execution of the mentally retarded).

conduct."[90] This holding provided the basis for the Court's decision in *Roper*, which banned the juvenile death penalty.[91] In *Roper*, the Court recognized that developmental neuroscience has demonstrated that the brains of teenagers are fundamentally different from those of adults in ways that directly affect culpability,[92] noting that "[t]he susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult."[93] Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[94] In *Graham*, the Court, relying on *Roper*, recognized that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[95]

In *Roper*, the Court relied on several scientific studies analyzing juvenile brain development.[96] Several professional associations wrote and submitted an *amicus* brief to the *Roper* court.[97] The *amicus* brief in *Roper*

---

[90] *Id.* at 306.

[91] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[92] *Id.* at 570 (noting that the personality traits of children are less formed than those of adults).

[93] *Id.* at 570.

[94] *Id.*

[95] Graham v. Florida, 540 U.S. 48, 73 (2010).

[96] *See Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

[97] Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and

detailed the ways in which the brains of youth differ in structure and functioning from those of adults. The authors explained that the regions of the brain associated with impulse control, regulation of emotions, risk assessment, and moral reasoning are among the last to develop, and often are not fully developed until the early to mid-twenties.[98] The authors also found that "[p]sychosocial maturity is incomplete until age 19."[99] In a finding of particular relevance to youth involved in the juvenile justice system, the authors cited studies showing that "the deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors—such as stress, emotions and peer pressure—enter the equation. These factors operate on an adolescent's mind differently and with special force."[100]

Further, scientists confirm that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[101] Studies have shown that adolescents rely more than adults on the amygdala, the area of the brain associated with the primitive impulses of anger,

---

National Mental Health Association as Amici Curiae in Support of Respondent at 4, Roper v. Simmons, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1633549, at *1 [hereinafter *Roper* Brief].

[98] *Id.* at *4 (noting that the tests that formed the basis of its conclusions were performed on healthy adolescents and that those in the criminal justice system often "suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, [such that] they can be expected to function at sub-standard levels").

[99] *Id.* at *7 ("Adolescents score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others and they have more difficulty restraining their aggressive impulses.") (internal quotation marks omitted).

[100] *Id.* at *7–8 ("Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. Adolescents are more susceptible to stress from daily events, which translates into further distortion of the already skewed cost-benefit analysis.").

[101] *Id.* at *10.

aggression, and fear.[102] In contrast, adults tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment.[103] The frontal and pre-frontal cortex, critical areas of the brain that control impulse, judgment, risk-taking, and weighing consequences, are among the last to develop and, often, are not fully developed until the mid-twenties.[104]

The picture below contains MRI images that demonstrate the structural changes that take place in the brain from ages five to twenty.[105] Researchers at the National Institutes of Health, the National Institute of Mental Health, and the University of California at Los Angeles conducted a decade-long study using magnetic resonance imaging to track the development of the brain.[106] The study concluded that "'higher-order' brain centers, such as the prefrontal cortex, don't fully develop until young adulthood as grey matter[107] wanes in a back-to-front wave as the brain matures and neural connections are pruned."[108] In the MRI scans below, red indicates more grey matter and blue indicates less grey matter.[109] As any adult can attest, teenagers lack the "brakes" that keep them from

---

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Paul Thompson, Ph.D., *MRI Images Taken From Time-Lapse Imaging Tracks Brain Maturation from ages 5 to 20, in The Adolescent Brain—Why Teenagers Think and Act Differently*, EDINFORMATICS, (Sept. 14, 2014), http://www.edinformatics.com/news/teenage__brains.htm.

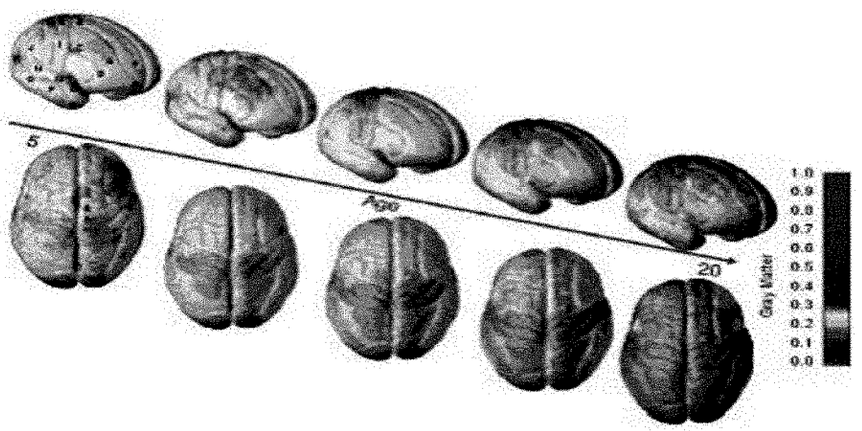
[106] *Id.*

[107] *Roper* Brief, *supra* note 97, at *18–20. One of the last parts of the brain to mature is the pre-frontal cortex. *Id.* at 16. This process is known as "pruning;" pruning of gray matter improves the functioning of the brain's reasoning centers by establishing some pathways while extinguishing others, thereby enhancing brain functioning. *Id.* at 18.

[108] Thompson, *supra* note 105.

[109] *Id.*

engaging in impulsive and reckless activities.[110] The "brakes" are located in the frontal lobe—the last part of the brain to develop.[111] Many other changes take place in the brain between birth and adulthood.[112]



As noted above, these conclusions were drawn from studies performed on the brains of normal adolescents. Many of the youth facing charges in delinquency court are at-risk youth who are either in foster care

---

[110] *Id.*

[111] *Id.*

[112] *See Roper* Brief, *supra* note 97, at *15–17 ("[The] limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala and [] the frontal lobes of the adolescent brain are less active . . . [A]s teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes . . . [T]he brain's frontal lobes are still structurally immature well into late adolescence. The prefrontal cortex (which [is] associated with impulse control, risk assessment and moral reasoning) is 'one of the last brain regions to mature' . . . [Additionally,] [m]yelination is the process by which the brain's axons are coated with a fatty white substance called myelin. The presence of myelin makes communication between different parts of the brain faster and more reliable. Myelination . . . continues through adolescence and into adulthood.").

or unstable, often violent homes;[113] if they attend school at all, they attend alternative schools.[114] It is also well documented that poor and minority

---

[113] *See* Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 3, 5 (2003) ("Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance."). Tulman powerfully summarizes the situation concerning children with education-related disabilities in the delinquency system, noting that:

> Poor educational performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that system who have education-related disabilities and who, more particularly, have not received the benefit of appropriate, and effective special education services. Indeed, the majority of children in the juvenile delinquency system are children with education-related disabilities. The delinquency system disproportionately attracts children with education-related disabilities both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent. Poor educational outcomes that are pervasive among children in the delinquency system constitute, in several respects, compelling evidence that school system and delinquency system personnel are failing to deliver appropriate educational services and failing to accommodate children with disabilities. The outcomes also, however, often reflect failure by school system and delinquency system personnel even to recognize education-related disabilities. These outcomes suggest, furthermore, that decision-makers guarding the gates to the delinquency system generally, and to incarceration facilities particularly, treat children with education-related disabilities differently than children who are not disabled. In vastly disproportionate numbers, children who are poor and who are members of racial and ethnic minority groups populate the delinquency system. The disproportionate numbers, moreover, reflect the harsh reality that society imposes unequal and discriminatory treatment upon poor children of color. Researchers and journalists have documented the disproportionate representation and disparate, discriminatory treatment of children based upon race and class. In contrast, disproportionate representation and disparate,

children are substantially over-represented in the delinquency population.[115]

IV. CHILDREN AND TEENAGERS CANNOT FORM INTENT IN THE SAME MANNER AS ADULTS, YET THEY ARE PROSECUTED UNDER THE SAME STATUTES USED TO PROSECUTE ADULTS

In criminal law, the law not only punishes the alleged act, but also the state of mind, or intent, of the defendant. For example, in Florida, a

---

> discriminatory treatment within the delinquency system of children with disabilities has not been sufficiently studied and documented. Estimates of the correlation between delinquency and disabilities vary widely.

Id. at 4–5.

[114] The term "alternative school" is used to describe schools where students are transferred for disciplinary reasons or because they have been suspended or expelled from mainstream schools. *See* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 904 (2011) ("In a typical disciplinary transfer case, the student has been involuntary [sic] transferred from a mainstream school to an alternative program without the procedural safeguards that accompany formal expulsions. Many alternative schools used for this purpose have limited classroom instruction, strict disciplinary procedures, and no extracurricular activities. Often, the only students attending an alternative school are those placed involuntarily for disciplinary or remedial reasons. Students attending disciplinary programs face a dramatically higher risk of violence than those attending mainstream schools. Moreover, because of curricular differences, students returning to a mainstream school from an alternative program may be unable to advance to the next grade or to graduate with their peers.").

[115] *See* HEIDI M. HSIA ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE iii (2004) ("Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population."); *see also* CARL E. POPE ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE DELINQUENCY AND PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 (2002).

premeditated murder committed in the course of certain enumerated felonies is a capital crime.[116] By contrast, a homicide that occurs during one of the enumerated felonies "without any design to effect death" is a second-degree felony with a maximum fifteen-year sentence.[117] There is no requirement in the law that courts evaluate a child's ability to form criminal intent before the child is transferred to adult court.

Many children facing charges in delinquency court are also in dependency proceedings, meaning that they have been abused, abandoned, or neglected by their parent(s).[118] Many other juvenile defendants have been victims of serious—often violent—physical, sexual, and emotional abuse.[119] This type of abuse has a direct impact on the functioning of the areas of the brain that control impulsive, risky, and unlawful behavior.[120]

Even before recent advances in neuroscience, psychologists recognized that adolescents do not form intent in the same manner as adults. As Dr. Marty Beyer, a leading expert in the area, explained: "[f]rom a psychological perspective, intention in children is a complex area, particularly considering their limited capacity to think ahead to the unforeseen long-term consequences of their immediate action."[121] Critically, Dr. Beyer concluded "that from the standpoint of cognitive development, young people have diminished capacity to intend harm to

---

[116] FLA. STAT. ANN. § 782.04(1)(a) (West 2014).

[117] FLA. STAT. ANN. § 775.082(6)(d) (West 2014).

[118] *See generally* Denise C. Herz et. al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305 (2010).

[119] *Id.*

[120] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS, UNDERSTANDING THE EFFECTS OF MALTREATMENT ON BRAIN DEVELOPMENT (2009), *available at* https://www.childwelfare.gov/pubs/issue_briefs/brain_development/effects.cfm.

[121] Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 18 (1999) ("Carrying a weapon and even using a weapon does not mean a child had adult intent to harm.").

others or anticipate harm as an unintended consequence of their actions."[122] Teenagers often demonstrate a disconnect between their actions and the resulting consequence.[123] Many teenagers see their behavior as the only option in a certain situation, but fail to recognize their responsibility for putting themselves in the situation in the first place.[124] This "adolescent disconnect goes to the heart of culpability and results from an immature thought process (not anticipating unintended consequences; reacting to threat) and incomplete moral development."[125]

Abuse, trauma, and neglect further impact a young person's ability to form intent, as these factors can significantly alter brain development.[126] This abuse includes emotional abuse.[127] After conducting extensive research, Dr. Martin Teicher concluded that "early maltreatment, even exclusively psychological abuse, has enduring negative effects on brain development."[128] In an observation particularly relevant to the appropriate punishment for young offenders, Dr. Teicher explained:

> Physical, sexual, and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or adulthood. The victim's anger, shame, and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as

---

[122] *Id.* at 18.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 18–19.

[126] *See* Martin Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM (The Dana F. on Brain Sci., New York N.Y.), 2000, at 1.

[127] *Id.*

[128] *Id.*

> aggression, impulsiveness, delinquency, hyperactivity, and substance abuse.[129]

Some of the disorders strongly associated with child abuse are those that may cause unlawful behavior, such as borderline personality disorder or dissociative identity disorder.[130] Similarly, victims of child abuse may suffer from post-traumatic stress disorder ("PTSD"), the symptoms of which include "irritability or outbursts of anger" and "an exaggerated startle response."[131] Dr. Teicher argues that "the trauma of abuse induces a cascade of effects, including changes in hormones and neurotransmitters that mediate development of vulnerable brain regions."[132] Dr. Teicher and other scientists have identified "a constellation of brain abnormalities associated with child abuse," including limbic irritability,[133] deficient development, differentiation of the left hemisphere,[134] deficient left-right hemisphere interaction,[135] and abnormal activity in the cerebellar vermis (the middle strip between the two hemispheres of the brain).[136] Of particular relevance here are the effects of abuse on the development of

---

[129] *Id.* at 3.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 6.

[133] *Id.* at 5–6 ("[Limbic irritability is] manifested by markedly increased prevalence of symptoms suggestive of temporal lobe epilepsy (TLE) and by an increased incidence of clinically significant EEG (brain wave) abnormalities.").

[134] *Id.* at 6 ("[This process is] manifested throughout the cerebral cortex and the hippocampus, which is involved in memory retrieval.").

[135] *Id.* ("[This process is] indicated by marked shifts in hemispheric activity during memory recall and by underdevelopment of the middle portions of the corpus callosum, the primary pathway connecting the two hemispheres.").

[136] *Id.* ("[This] appears to play an important role in emotional and attentional balance and regulates electrical activity within the limbic system.").

the hippocampus, which is involved in regulating memory and emotion.[137] Dr. Teicher's findings demonstrate that child abuse has a direct impact on the ability of a youthful offender to form intent:

> To be convicted of a crime in the United States, one supposedly must have the capacity to both know right from wrong and to control one's behavior. Those with a history of childhood abuse may know right from wrong, but their brains may be so irritable and the connections from the logical, rational hemispheres so weak that intense negative (right-hemisphere) emotions may incapacitate their use of logic and reason to control their aggressive impulses. Is it just to hold people criminally responsible for acts they lack the neurological capacity to control?[138]

While studies demonstrate that every child's brain develops differently, and that such development directly impacts the child's ability to form intent and, ultimately, the appropriate punishment for the child's offense, the decision about whether to transfer a case to adult court is often made by a prosecutor who knows only the facts of the crime. As shown below, the Eighth Amendment requires that all relevant factors—including cognitive functioning, brain development, child abuse and neglect, educational neglect, mental illness, and many others unique to each child's case—be considered by a neutral trier of fact before a child is prosecuted as an adult.

---

[137] *Id.* ("Cells in the hippocampus have an unusually large number of receptors that respond to the stress hormone cortisol. Since animal studies show that exposure to high levels of stress hormones like cortisol has toxic effects on the developing hippocampus, this brain region may be adversely affected by severe stress in childhood.").

[138] *Id.*

V. APPLICATION OF THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE TO MANDATORY TRANSFER AND DIRECT FILE STATUTES

Analyzing mandatory transfer and direct file statutes implicates both the due process issues addressed in the early cases governing procedure in juvenile court and Eighth Amendment[139] jurisprudence recognizing the impact of brain development on the proportionality of a particular punishment. Yet, only a handful of courts have addressed the Eighth Amendment issue,[140] and in each of these cases, an Eighth Amendment challenge based on *Roper* and *Graham* failed.[141] However, none of these cases conducted an in-depth Eight Amendment analysis. A number of Illinois cases upheld that state's mandatory transfer statute on the grounds that the statute did not itself impose a punishment; therefore, the Eighth Amendment was not implicated.[142] Similarly, an Arizona court

---

[139] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[140] *See* State v. Vasquez, No. 2 CA–CR 2010–0371, 2012 WL 112668, at *1 (Ariz. Ct. App. Jan. 13, 2012); People v. Pacheco, 991 N.E.2d 896, 906–08 (Ill. App. Ct. 2013) (holding that mandatory transfer does not impose a punishment and does not implicate the Eighth Amendment); People v. Jackson, 965 N.E.2d 623, 631–32 (Ill. App. Ct. 2012) (same); People v. Salas, 961 N.E.2d 831, 846–47 (Ill. App. Ct. 2012) (same).

[141] *See Vasquez*, 2012 WL 112668, at *1; *Pacheco*, 991 N.E.2d at 906–08; *Jackson*, 965 N.E.2d at 631–32; *Salas*, 961 N.E.2d at 846–47.

[142] *See Pacheco*, 991 N.E.2d at 907; *Jackson*, 965 N.E. 2d at 632 ("The automatic transfer provision does not dictate any form of punishment as that term is used throughout criminal statutes. Because the automatic transfer provision does not mandate or even suggest a punishment, any analysis as to whether or not it violated the Eighth Amendment's proscription against cruel and unusual punishment is futile. The automatic transfer provision does not impose any punishment. Therefore, it is not subject to the Eighth Amendment."); *Salas*, 961 N.E.2d at 845–46 ("[T]he automatic transfer statute at issue here does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant's case is to be tried, *i.e.,* it provides for the forum in which his guilt may be adjudicated. The punishment imposed on defendant here, specifically, his 50-year sentence of imprisonment, was made pursuant

held that while transfer exposed a juvenile to a greater punishment, the transfer itself was not a punishment, and, as a result, did not implicate the Eighth Amendment.[143]

Yet a statute does not have to impose a criminal sentence in order to be considered punitive for Eighth Amendment purposes.[144] In the seminal case of *Trop v. Dulles*, the Supreme Court recognized that whether a statute is penal or not cannot be determined simply by its label.[145] As Justice Warren wryly noted: "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"[146] In determining if a statute is penal, the "Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal."[147] A statute is non-penal if "it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."[148]

---

to the Unified Code of Corrections and not pursuant to the automatic transfer statute. As the automatic transfer statute does not impose any punishment, it is not subject to the Eighth Amendment.").

[143] *Vasquez*, 2012 WL 112668, at *3 ("Although being tried as an adult exposes the juvenile offender to the risk of more severe punishment than being adjudicated in the juvenile system, the transfer itself is not a form of punishment for purposes of the Eighth Amendment. Thus, the Eighth Amendment's protection against cruel and unusual punishment is simply not implicated by the transfer itself.").

[144] *See* Trop v. Dulles, 356 U.S. 86, 94–95 (1958).

[145] *Id.* at 94–95.

[146] *Id.* at 94.

[147] *Id.* at 96.

[148] *Id.* at 96–97 ("The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to

Mandatory transfer and direct file statutes impose an increased punishment for penal purposes: to punish the wrongdoer and to deter others. A youth transferred to adult court faces a potential sentence that is decades longer than what she would face in juvenile court, is housed in an adult jail (although, some states require that juveniles remain separated from adults), is considered an adult for purposes of any other pending charges, and, may remain detained prior to trial significantly longer than would be allowed in juvenile court.[149] The decision to transfer a youth to adult criminal court is made based primarily on the charge[150] and the youth's history in delinquency court.[151] In fact, in cases of mandatory

---

vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.").

[149] *See generally* ANALYSIS OF STATE TRANSFER LAWS, *supra* note 58.

[150] *See* FLA. STAT. ANN. § 985.556(4)(c) (West 2014) (decision to transfer child to adult court based upon seriousness of offense, aggressiveness, willfulness or violence of the offense, whether offense was against a person or property, probable cause, whether any co-defendants are adults or children, child's sophistication and maturity, child's previous history and record and prospects for rehabilitation); Kent v. United States, 383 U.S. 541 (1966).

[151] *See, e.g.*, 18 U.S.C.A. § 5032 (West 1996) ("Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer."); *see also* Manduley v. Superior Court, 27 Cal. 4th 537, 565–67 (Cal. 2002) (noting that direct file provisions typically give both juvenile and adult criminal courts the power to hear cases involving certain juveniles—

transfer, the transfer is dictated *solely* by the nature of the offense.[152] There is no mandate for the state or any court to consider mitigating factors.[153]

In *Trop*, the Court made it clear that any statute that imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer or to deter others—is penal.[154] Clearly, the purpose of transfer is at once to reprimand the wrongdoer and deter others. The Supreme Court itself noted that, "[i]t is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile."[155] As noted above, the transfer decision is made primarily based on the offense and the youth's delinquency history. It would be entirely disingenuous to argue that a transfer statute that exposes a youth to sentence of fifty, sixty, or seventy years in adult prison rather than several years in a juvenile program has a purpose other than punishment. While the language of the transfer statute itself may not impose a punishment, mandatory transfer and direct file statutes are indisputably penal in nature and are subject to Eighth Amendment scrutiny.

The purpose of the Eighth Amendment is not solely to prohibit torture and extreme forms of punishment. Rather, it embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and

---

particularly those of a certain age, those with certain offending histories, and/or those accused of certain offenses—and leave it up to prosecutors to make discretionary decisions regarding where to file them).

[152] *See* ANALYSIS OF STATE TRANSFER LAWS, *supra* note 58, at 4 (noting that fifteen states require transfer to adult criminal court in cases that meet "specified age/offense or prior record criteria").

[153] *Id.* (describing mandatory transfer criteria and omitting any reference to mitigation).

[154] Trop v. Dulles, 356 U.S. 86, 96 (1958).

[155] Kent v. United States, 383 U.S. 541, 556 (1966).

decency . . . against which [courts] must evaluate penal measures."[156] The *Graham* court specifically recognized that "[a]n 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."[157] In *Roper*, the Court explained that "[r]etribution 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."[158] While transfer is not the most severe penalty, a sentence of fifty years is essentially a life term and falls well within *Graham's* proscription of such sentences. As noted above, two "virtual life" cases are currently pending before the Florida Supreme Court and other similar challenges have been made across the country.[159]

While courts in Illinois and Arizona have held that a transfer statute itself does not impose a particular punishment, a close examination of the law demonstrates that that is not, in fact, the case. In Florida, for example, a seventeen-year-old charged with a second-degree felony[160] would face a maximum sentence of commitment to a juvenile program until his nineteenth birthday, while the same youth would face up to fifteen years in adult prison if transferred to adult court.[161] If the court

---

[156] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

[157] Graham v. Florida, 540 U.S. 48, 76 (2010).

[158] Roper v. Simmons, 543 U.S. 551, 571 (2004).

[159] *See* Gridine v. Florida, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011), *rev. granted by* Gridine v. Florida, 103 So. 3d 139, No. SC12–1223, 2012 WL 4839014, at *1 (Fla. Oct. 11, 2012); Henry v. Florida, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012), *rev. granted by* Henry v. Florida, 107 So. 3d 405, No. SC12–578, 2012 WL 5991345, at *1 (Fla. Nov. 6, 2012).

[160] *See* FLA. STAT. ANN. § 810.02(3) (West 2011) (noting that a common offense for juveniles is burglary of a dwelling, which is a second-degree felony in Florida).

[161] *See* FLA. STAT. ANN. § 775.082(3)(c) (West 2014) (noting that the exact sentence of a juvenile is determined by the Department of Corrections using a complicated score

adjudicated the youth as a "youthful offender," the maximum term in prison would be reduced to six years.[162] Therefore, by virtue of sentencing laws, a transfer to adult court, in and of itself, imposes a significantly longer sentence than a child faces if tried in juvenile court. As the court noted in *Trop*, the Eighth Amendment applies to any cruel and unusual sentence, and "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[163]

Applying the Court's Eighth Amendment jurisprudence to mandatory transfer and direct file statutes leads to the conclusion that such statutes are unconstitutional. The Court's recognition of the diminished culpability of juvenile offenders and the impact that other individualized factors, such as cognitive function and social history, have on culpability requires an individualized hearing before a juvenile judge before a case can be transferred to adult criminal court for prosecution. Proponents of direct file and mandatory transfer point to the fact that the Supreme Court looks at legislative trends when evaluating "evolving standards of decency"[164] for Eighth Amendment purposes and note that no state has implemented mandatory transfer hearings. However, *every* state has recognized through its statutes that age is relevant to the transfer decision. With a few exceptions, every state has a minimum age for transfer.[165] In addition, while the Court looks to state legislatures for indications as to "evolving standards of decency," the Court has made it clear that "the Constitution contemplates that the Court's own judgment be brought to

---

sheet. Depending on the youth's history, it is likely that the child will face a sentence of at least ten years if charged as an adult).

[162] *See* FLA. STAT. ANN. § 958.04(2)(d) (West 2008).

[163] Trop v. Dulles, 356 U.S. 86, 99 (1958).

[164] *Id.*; *see also* Graham v. Florida, 540 U.S. 48, 76 (2010) (same); Roper v. Simmons, 543 U.S. 551, 566–67 (2004) (evaluating legislative trends in standards of decency).

[165] *See* ANALYSIS OF STATE TRANSFER LAWS, *supra* note 58, at 4 (reporting that most, but not all, transfer statutes require a minimum age for transfer to adult court).

bear on the question of the acceptability of the death penalty."[166] The same reasoning applies to mandatory transfer and direct file statutes. It is not at all certain that the Court would conclude that current transfer statutes indicate a consensus among American citizens that a fourteen-year-old should face a fifty-year sentence. The issue involves complex questions of proportionality, developmental neuroscience, rehabilitation, and deterrence. These are issues with which most Americans are not familiar. Moreover, in evaluating the constitutionality of a particular punishment, the Court looks at the goals of the punishment at issue.[167] Typically, the goals of a criminal statute are retribution and deterrence.[168] Studies have shown that juveniles transferred to adult court have a higher recidivism rate than juveniles adjudicated in the juvenile delinquency system.[169]

Just as a penalty-phase jury must be allowed to consider any mitigating factor that could result in a sentence less than death, a juvenile judge presiding over a transfer hearing should consider all relevant factors, including the child's social history, mental health, cognitive functioning, and any other relevant factors. Florida allows direct file for certain offenses for children as young as fourteen.[170] As both common sense and

---

[166] *Roper*, 543 U.S. at 552.

[167] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (discussing the goals of the death penalty, retribution and deterrence, as applied to intellectually disabled offenders).

[168] *Id.*; *see also* Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that the traditional goals of punishment are retribution and deterrence).

[169] *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *in* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN 3 (2010), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

[170] *See* FLA. STAT. ANN. § 985.557(1) (West 2011) (providing that the State is able to directly file fourteen- and fifteen-year olds charged with a list of offenses including, *inter alia*: arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated assault, aggravated stalking, murder, manslaughter, and aggravated battery). In considering the list of offenses, it is important to note the difference in the severity of the offenses. Aggravated assault, for example, is assault with a deadly weapon absent the intent to kill. *See* FLA. STAT. ANN. § 784.021. "Deadly weapon" has been defined very

developmental neuroscience indicate, not all fourteen-year-olds are the same. The author of this article had a client who was direct filed at fourteen for his second offense (the first was petit theft). The charge was armed burglary of a dwelling. The facts indicated that the youth had gone along with his older brother and other adults after his older brother picked him up from school. While the offense is, of course, serious, there was no injury to the victim. Had a transfer hearing been held, defense counsel would have put forth evidence demonstrating the youth's lack of criminal history, his relative youth compared to the other defendants, the fact that his brother picked him up from school and drove him to the scene, and the fact that, while chronologically fourteen, school records indicated an intellectual disability that caused him to function several years behind his chronological age. Because Florida allows discretionary direct file, however, none of this evidence was presented. The youth was transferred to adult court and faces a very uncertain future.

CONCLUSION

In conclusion, this article has attempted to demonstrate that direct file and mandatory transfer statutes do not survive Eighth Amendment scrutiny. The cases that have upheld such statutes against an Eighth Amendment challenge have mistakenly relied on the form of the statute rather than its actual impact. Given the Court's recent jurisprudence, which recognizes that a child's mental capabilities are fundamentally different from those of an adult, the Eighth Amendment requires individual transfer hearings that comport with due process before a juvenile can be transferred to adult criminal court.

---

broadly by the Florida courts. *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIM. CASES § 82 ("[A] weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily harm."). The author has seen juveniles charged with aggravated assault where the "deadly weapon" was a chair, a bicycle, and a lamp. Common sense dictates that there is a substantial difference between throwing a chair and murder.