THE JUVENILE TRANSFER PROBLEM: WHERE THERE IS NO CONSIDERATION FOR THE JUVENILE THERE CAN BE NO JUSTICE

by

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I. Introduction

During the first century of criminal justice in the United States, children over the age of seven could be tried as adults in criminal court. A progressive shift at the turn of the 19th century gave birth to a separate juvenile justice system that allowed for children accused of crimes to be sequestered in juvenile courts of original jurisdiction. The juvenile justice system morphed into an institution that operated much like criminal courts but offered none of the Constitutional protections. In the present-day, juveniles offenders are situated somewhere in between: sometimes transferred to adult court and sometimes adjudicated in juvenile court with some, but not all, constitutional protections. Many of the changes have come by way of United States Supreme Court decisions, some changes have come by way of federal and state legislative initiatives, but all changes have been ushered in by a growing understanding of adolescence and the juvenile brain. Still, the benefits of the juvenile court imagined to be the opportunity for rehabilitation and reform so child offenders might escape the harshness and long-lasting implications of penal institutions, have not yet been realized because there are few meaningful attempts to foster those goals.

In comparison, for nearly the last century, juvenile courts in Germany have focused their juvenile court approach on rehabilitation and that focus has led to a system that gives troubled kids the hope for an adult life outside the criminal justice system. The individual approach that Germany has taken is supported by advances in brain science, which unequivocally concludes that the juvenile brain is underdeveloped—and that a fully developed and mature brain is not achieved until sometime in an individual's early twenties.

In this paper, I will look at the evolution of the juvenile court system in the United States, compare it with the system in place in Germany, and explore briefly the current understanding of the developing brain to argue: 1) that the juvenile court system should have exclusive jurisdiction

over all young accused offenders until the age of 21, 2) that the United States should reduce the number of juveniles who are eligible for incarceration, relying more on community intervention programs, 3) and any transfer prior to age 21 should be reserved for certain limited and serious offenses.

II. The history of the juvenile court system

As the United States grew in its adolescence, a post-civil war union saw tremendous societal change. "Rapid industrialization and modernization, immigration and urbanization, social change and intellectual ferment provided the impetus for the juvenile court." (Feld, 1999, p. 5). Before modernization in the United States, children were, for all intents and purposes, necessary extensions of adult society. In fact, until the Fair Labor Standards Act in 1938, a significant percentage of children worked in agricultural, retail, and industrial jobs. Not all children were employed, but those who were often had to forgo any meaningful formal education. Child labor was vital not only to the family economic model but for the greater economic structure in the United States.[1] Children were often seen as miniature adults and not human beings undergoing an intermediate phase of development. This is evidenced by the fact that despite the law expecting the same responsibilities of children as adults, the law never provided any of the same rights to children. It made sense that children who broke the law were treated as adults and served their sentences alongside adult offenders in prions. Before the first juvenile court established in 1899 in Cook County, Illinois, common-law classifications of infancy (those younger than seven years of age), and the defenses of incapacity and infancy were the only potential barriers to keeping a child offender from serving a prison sentence.

[1] "The 1870 census found that 1 out of every 8 children was employed. This rate increased to more than 1 in 5 children by 1900. Between 1890 and 1910, no less than 18 percent of all children ages 10–15 worked." History of child labor in the United States—part 1: little children working. Michael Schuman. Monthly Labor Review. U.S. Bureau of Labor Statistics. January 2017.

> The age at which a boy could begin to do a man's work at about seven years of age marked the necessary mastery of language and the stage at which he might also commit a man's crime. The common-law infancy doctrine conclusively presumed that children younger than seven years of age lacked criminal capacity, treated those fourteen years of age and older as fully responsible adults, and created a rebuttable presumption that those between seven and fourteen years of age lacked criminal capacity.

(Feld, p. 48)

During the 19th century, society began to shift its entire approach to child-rearing and, "'children began to be seen as different from adults; among other things they were considered more innocent; childhood itself was perceived . . . as a period of life not only worth recognizing and cherishing but extending.'" (Feld p. 23) It was during that progressive era spanning the end of the 19th century and the beginning of the 20th that social reformers began to advocate for a system sensitive to juvenile offenders. That system intended to remove the rigid and harsh rules of criminal procedure from the treatment of juvenile offenders. "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *In Re Gault,* 387 U.S. 1, 15–16 (1967). Despite the intention for the juvenile court formation that the court was to act like a gentle parent and to focus on safeguarding from family separation, there the court lacked infrastructure to run the court to achieve that vision.

A primary component of the juvenile court design was a creation of a probation-type arrangement where probation officers would look after troubled children, however, the flagship juvenile court in Cook County, Illinois began without any funding for the payment of any probation officers and had to rely on volunteers to carry out the vision. "Our juvenile court has become more like a criminal court": A century of reform at the Cook County (Chicago) Juvenile Court; L. Mara Dodge; Michigan Historical Review, Vol. 26, Issue 2, Fall 2000 pp 51-89, 55. The lack of funding

for the juvenile court system was almost a universal characteristic during the early decades of implementation. Right from the start "the court relied on institutionalization as its primary intervention and treatment strategy. During its first decade, judges committed more than one-third of delinquent boys and one-half of delinquent girls to state or private reformatory institutions." *Id.* Without meaningful resources to offer these children, there was little else any of the courts could do except to remove them from society once they proved to be incorrigible.

III. The juvenile court was designed to shield children from the criminal court, but the effect was to deny them their constitutional rights

Juvenile defendants facing charges in the young juvenile court system risked the forfeiture of their liberty just as they would if they were tried in criminal court, but they were denied any constitutional protections that adults were afforded in adult criminal court. During the 1960s, the Supreme Court began a trend of evaluating that blind spot. In the seminal case of *In Re Gault*, the Supreme Court mandated that the constitutional rights to notice of charges, the appointment of counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination were fundamental protections for juvenile and adult defendants alike. *In re Gault,* 387 U.S. 1 (1967). Gerald Francis Gault was apprehended by police on a misdemeanor charge and the Court laid out that while he was subject to confinement of a maximum of six years under the juvenile court sentencing scheme he would have been subject to a fine of not more than $50 and no more than two months imprisonment had he been tried in criminal court. *Id.* 30. The disparity was not only in the harshness of the punishment but in that Mr. Gault was also denied any constitutional protections because the juvenile court was specifically designed to operate without any facets of criminal procedure. The court reasoned "We do not mean to indicate that . . . [a juvenile delinquency hearing] 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." *Id.*, 30. In *Gault*, the Court established that even if juvenile court operated separate from criminal court, where a person stood accused of criminal-type activity, principles of due process still applied.

Just three years later, the Supreme Court again had occasion to expand the constitutional provisions for juvenile defendants. In *In re Winship*, the Court held that the standard of proof required by the juvenile court when hearing any delinquency matter must rise to the reasonable doubt level, just as is required by the criminal court. *In re Winship*, 397 U.S. 358 (1970). The Court stopped short of a blanket application of constitutional rights to juvenile defendants, however. When it came time to expand the *Duncan v. Lousiana* holding that the right to a jury trial was applicable to state courts by the Equal Protection clause under the Fourteenth Amendment, in *McKeiver v. Pennsylvania*, the Court declined to mandate that a juvenile defendant had the constitutional right to a trial by jury.[2] (403 U.S. 528) 1971. In *McKeiver*, the Court found that the overall failure of the juvenile court system was the impetus for *Gault* and *Winship* expanding Constitutional rights to the juvenile court, stating

> Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged. The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.

McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971) Still, the Court found that the ideal of the juvenile court was not yet deceased; but applying all facets of criminal procedure, such as the Sixth Amendment rights would make necessity for separate proceedings moot. *Id.* 551. In the same vein,

[2] In *Duncan v. Louisiana*, the Court held that the Equal Protection Clause of the Fourteenth Amendment extended the Sixth Amendment right to trial by jury to State court proceedings for the prosecution of serious crimes. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

while criminal proceedings are necessarily adversarial, the underlying goal of juvenile rehabilitation is not advanced by an adversarial system.

As the Supreme Court acknowledged in *McKeiver,* the juvenile court was not ameliorating the juvenile delinquency epidemic. Beginning in the 1970s, many states began reacting to public perceptions by passing laws to narrow the juvenile court discretion, including provision for waiver of juvenile offenders to criminal court for adjudication. "Faced with rising crime rates in the early 1980s and the perception that rehabilitation-based treatment was essentially unworkable, the juvenile justice system began treating delinquents less as misguided but redeemable individuals and more as a faceless army of pint-sized criminals." Lara A. Bazelon, Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Def. in Juvenile Court, 75 N.Y.U.L. Rev. 159, 175 (2000).

The view of the juvenile offender as a miniature adult criminal had come full circle and state legislatures worked to narrow the juvenile court jurisdiction with provision for waiver of jurisdiction based on type of offense and age at the time of the offense. "In this climate, vivid images of scary teenage criminals captured the public imagination, distorting perceptions about the threat of juvenile crime. Surveys showed that the public thought that most violent crime was committed by juveniles, while in fact, they were responsible for about thirteen percent. The public also thought that juvenile crime was on the rise after many years of steady decline." Elizabeth S. Scott, Miller v. Alabama & the (Past &) Future of Juvenile Crime Regulation, 31 Law & Ineq. 535, 540 (2013). Even despite all evidence to the contrary, the public-at-large began to be seized by the notion that juvenile offenders were dangerous supercriminals who lacked a moral compass or any hope for the future.

IV. Judicial waiver statutes grew out of misplaced fear

A prime example of the growing fear about juvenile crime was the highly publicized case of Willie Bosket, who, in 1978 at the 15 years of age, shot and killed two subway passengers while committing a series of robberies. Eric K. Klein, Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice, 35 Am. Crim. L. Rev. 371, 383 (1998). Willie Bosket received a sentence of five years in a juvenile institution, the maximum sentence under New York juvenile law at the time. *Id.* The news of Willie Bosket's crime and his juvenile court sentence made national news and sparked the governor of New York to call a special session of the New York Legislature to address the inability of the Court to hand down a more substantial sentence. *Id.*

> The "Willie Bosket Law"—changed existing New York waiver law so that children as young as thirteen would automatically be transferred to criminal court if charged with murder, and children as young as fourteen would automatically be transferred if charged with rape, robbery, assault, and violent categories of burglary. Many states followed New York's lead and made it easier to try juveniles as adults.

Id. 383–84. The zeitgeist for this movement was the notion of "adult crime, adult time." The transfer provisions, also known as waiver of jurisdiction provisions in many states included statutorily mandated transfers, similar to the New York law, while in oters, transfer provisions were left to the juvenile court's discretion. Even though the Willie Bosket case was especially brutal, it represented a single defendant whose actions were capable of altering the public perception of all juvenile offenders.[3]

[3] It is noteworthy that while juveniles transferred to adult criminal court are considered adults for the purpose of punishing criminal behavior, they have never been granted any adult privileges such as voting, entering into contracts without parental permission, ability to join the armed forces, etc.

V. The Supreme Court and the Eighth Amendment evolving standards of decency test

Waiver of jurisdiction statutes allowed for juveniles to be tried in adult court and sentenced to the extent that adults would be sentenced for similar crimes, including, in certain jurisdictions, a death sentence for first-degree murder. However, even as state legislatures enacted juvenile transfer provisions to permit punishing juveniles as adults, the Eighth Amendment prohibited legislatures from the wholesale treatment of juveniles as adults. In *Thompson v. Oklahoma*, the court held that Eighth Amendment protections against cruel and unusual punishment applied to the imposition of the death penalty for a defendant who was less than 16 years of age at the time of the offense. Part of the analysis looked at the capacity for the culpability of an offender less than 16 years of age:

> The Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

Thompson v. Oklahoma, 487 U.S. 815, 835 (1988). The Court articulated the notion that juvenile offenders are different for simple and obvious reasons, and although the *Thompson* opinion also discussed the discrepancies across jurisdictions as to the age an offender would advance to criminal court, the Court's stance still permitted offenders between sixteen and eighteen at the time of the offense to be eligible for capital punishment and life in prison without the possibility of parole, the strictest sentences available in criminal court.

In *Thompson*, the Court's analysis of the Eighth Amendment's ban on cruel and unusual punishment was modeled on the "evolving standards of decency" test, which the court considered "work product of state legislatures and sentencing juries," (*Id.* 822) "other nations that share our

Anglo-American heritage, and . . . the leading members of the Western European community, " (*Id,* 830) and the "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" (*Id,* 834) to determine that the death penalty as a sentence for juvenile offender below the age of sixteen. The evolving standards of decency test in *Thompson* was also informed by the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders (*Id.*. 834) which the court quoted:

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youth may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-term range than adults. Moreover, youth crime is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth

Id.

The Court, however, proved to be inconsistent with its analysis of the evolving standards of decency test in its application of Eighth Amendment protections. Just a year after its decision in *Thompson*, the Court declined to opine as to the appropriateness of juvenile death sentences generally in *Stanford v. Kentucky,* 492 U.S. 361 (1989) (abrogated by *Roper v. Simmons* 543 U.S. 551 (2005), later found that it was not cruel and unusual punishment to execute the mentally retarded[4], *Penry v. Lynaugh,* 492 U.S. 302 (1989) (abrogated by *Atkins v. Virginia,* 536 U.S. 304 (2002), and ultimately reversed and found that evolving standards of decency led to the conclusion that it did constitute cruel and unusual punishment to execute the mentally retarded, *Atkins v. Virginia,* 536 U.S. 304 (2002).

In *Stanford,* the Court proclaimed its "job is to *identify* the "evolving standards of decency"' to determine, not what they *should* be, but what they *are.* We have no power . . . to

[4] While not the phrasing used in modern-times, "mentally retarded" was the parlance of the court and society when *Penry* was decided.

substitute our belief in the scientific evidence for the society's apparent skepticism." *Id*, 378. The Court decided *Penry* in the same term, and in that opinion, the court found that "[i]n discerning those 'evolving standards' we have looked to objective evidence of how our society views a particular punishment today. . . . The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. 331.

Relying on *Penry*'s view of stage legislatures, the Court reported in *Atkins*, that eighteen states (including Tennessee at the forefront) enacted legislation to prohibit capital punishment for the mentally retarded. *Atkins*, 536 U.S. 315–316.[5] The Court also found that the

> cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id., 320. The Court went on in its analysis to find that the risk that the sentence

> 'will be imposed in spite of factors which may call for a less severe penalty' is enhanced not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses.

Id. Thus, the *Atkins* court relied not only on the legislative trend toward prohibition of capital punishment for the mentally retarded, but also on the scientific understanding of what being mentally retarded would mean in the context of the criminal justice system.

[5] Tennessee was a trailblazer when it enacted Tenn. Code Ann. § 39–13–203 in 1990, but it only prohibited capital punishment for the mentally retarded for offenses committed after the statute enactment date. In *Van Tran v. State*, the Tennessee Supreme Court held that, as a matter of first impression, the execution of a mentally retarded individual is violative of constitutional provisions against cruel and unusual punishment, that it was a new constitutional rule that must apply retroactively. 66 S.W. 3d (2001).

Despite the sea-change in the evolving standards of decency test, the Court did not agree to weigh in on the question of capital punishment for juvenile offenders for more than a decade. Ultimately, it found that for the same reason that it is against common decency to execute the mentally retarded, it amounts to cruel and unusual punishment to execute juvenile offenders or those who committed a capital crime as a juvenile. In *Roper v. Simmons*, Christopher Simmons was not adjudicated under the Missouri juvenile court system, since offenders aged out of the juvenile court system at age 17, and Mr. Simmons was 17 when he committed and confessed to first-degree murder. *Roper v. Simmons*, 543 U.S. 551, 557 (2005). At trial, Mr. Simmons was sentenced to death for his crime. *Id.* at 558. Applying the Court's rationale in *Atkins* that it violated Eighth Amendment protections against cruel and unusual punishment to execute the mentally retarded, the court contemplated the diminished culpability of the juvenile brain as analogous to mental retardation to find that it constitute a cruel and unusual punishment to execute a juvenile offender. In fact, regarding the mental state of juvenile offenders, the Court found that:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

Roper, 543 U.S. 569 (2005) (internal citations omitted). The opinion of the court that juvenile offenders are impulsive in their actions led to its conclusion that they are less culpable, and likely to have a reduced notion of self-responsibility, which would detract from any possibility of deterrence that potential punishment for his wrongdoing might carry.

> As for retribution, we remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." . . . The same conclusions follow from the lesser culpability

> of the juvenile offender. 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.

Roper v. Simmons, 543 U.S. 571. The court recognized that neither the two penological goals of capital punishment, deterrence and retribution[6], are "adequate justification for imposing the death penalty on juvenile offenders." The Court held in *Roper* that because of the status of the adolescent brain and evolving standards of decency test as applied in *Atkins,* it was violative of the Eighth and Fourteenth Amendments to execute offenders who were juveniles at the time of their crime.

In *Graham v. Florida,* the Court continued to apply the Eighth Amendment's evolving standards of decency test when it contemplated the possibility of reform for juvenile offenders. Terrance Graham was arrested on a series of non-homicide felony charges including armed burglary with assault or battery, which carried a possible maximum sentence of life in prison without the possibility of parole.[7] The trial court sentenced Mr. Graham to life despite the pre-sentence report of the Florida Department of Corrections recommending below the statutory minimum sentence and the prosecution seeking thirty-years for the armed burglary charge. *Graham v. Florida*, 560 U.S. 48 (2010). The Court held that it was categorically unfair to submit Mr. Graham to life in prison without the possibility for parole because "even if he spends the next half century attempting to atone for his crimes and learn from his mistakes . . . [t]he State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a

[6] In sharp contrast, recall that the primary goal of the juvenile court is the rehabilitation of the offender.

[7] Because "Florida . . . abolished its parole system, see Fla. Stat. § 921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency. *Graham v. Florida*, 560 U.S. 48, 57 (2010), *as modified* (July 6, 2010)

nonhomicide crime that he committed while he has a child in the eyes of the law." *Id.* at 79. In its analysis, the Court found that its previous holdings regarding the Eight Amendment's ban on cruel and unusual punishment focused on whether the punishment prescribed was proportionate to the circumstances surrounding the crime. The proportionality analysis looked at "all the circumstances of the case to determine whether the sentence is unconstitutionally excessive, (*Id*, 59), and at the categorical bans based upon the "nature of the offense, and . . . the characteristics of the offender" (*Id*, 60). In evaluating those proportionality factors, the Court considered not only state legislatures for an indicium of societal consensus but also the "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. 68. Further, the Court concluded that "juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults. *Graham*, 560 U.S. 68 citing *Roper*, 543 U.S. at 570). It was recognized by the Court that juvenile offenders possess the possibility for reform because they are positioned both with a still-developing brain and with an entire lifetime of experiences to shape who they will ultimately become.

The Court entertained just two years later whether that opportunity for reform applied only to juveniles who committed non-homicide offenses. In *Miller v. Alabama*, the Court heard the joined matter of two 14-year-olds who had each committed murder and who were both tried in criminal court and sentenced to a mandatory sentence of life in prison without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460 (2012). The Court began its analysis by acknowledging every case that preceded *Miller* was decided based on juvenile offenders lessened culpability and the requirement that sentences consider the individual characteristics of the juvenile before

imposing a sentence. *Id.* at 470. The Court specifically applied its rationale in *Roper* to find that "such mandatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 477. The Court concluded that mandatory life sentences without the possibility of parole violated the principles of the Eighth Amendment protections against cruel, and unusual punishment and it violated the principles of proportionality prevalent in criminal sentencing.

Following *Miller*, the state of juvenile offender sentencing in criminal court precludes capital punishment, life sentences without the possibility of parole for non-homicide crimes, and mandatory life sentences without the possibility for parole for homicide offenses. In those opinions, the Court consistently found that the juvenile offender has an underdeveloped brain, is categorically less culpable, and constitutionally must be considered with all of their characteristics and possibilities.

VI. Tennessee juvenile transfer provisions

Tennessee adopted transfer provisions early in the design of its juvenile court system. In *State ex rel. Norfleet v. Swafford*, 198 S.W. 2d 1007 (Tenn. 1947), the Supreme Court found that it was within the discretion of the juvenile court, to decide when a juvenile should be transferred to criminal court.

> Section 10925 is as follows: 10925. Delinquent child guilty of crime, and found to be incorrigible, etc., shall be remanded to proper court for trial.—Any child who shall have committed a misdemeanor or felony, and who shall have been found by the court to be a delinquent child within the meaning of this title and committed hereunder, and who shall thereafter be found by the court to be incorrigible and incapable of reformation or dangerous to the welfare of the community may, in the discretion of the court, be remanded to the proper county of the court in which such crime was committed, and be tried for such crime, and if found guilty thereof, be subject to judgment therefor in the same manner as if he had been seventeen years of age when such crime as committed.

Id. 1008. The court found that it was proper under the discretion of the juvenile court to waive jurisdiction. In the early days of the Tennessee juvenile court system, a juvenile court needed to make a finding of incorrigibility prior to transferring a juvenile offender to criminal court.[8] Once a juvenile was transferred to criminal court, they were statutorily deemed to have been the age of majority when the crime was committed. The effect of such a finding was that any incorrigible child offender, no matter the age, was deemed to be seventeen during sentencing proceedings.

Just as the trend nationally was to restrict the jurisdiction of the juvenile courts, Tennessee enacted legislation that expanded the provision for transfer to criminal court. Tennessee allows for a wide-ranging discretionary waiver provision. Tennessee Code Annotated § 37–1–134 lays out the provisions for those transfers. Section (a)(1)(A) states that waiver of jurisdiction of the juvenile court and transfer to the criminal court is may be appropriate where the offender was:

> (i) Less than fourteen (14) years of age at the time of the alleged conduct and charged with first degree murder or second degree murder or attempted first or second degree murder;
> (ii) Fourteen (14) years of age or more but less than seventeen (17) years of age at the time of the alleged conduct and charged with the offense of first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated kidnapping, commission of an act of terrorism, carjacking, or attempt to commit any such offenses;
> (iii) Sixteen (16) years of age or more at the time of the alleged conduct and charged with the offense of robbery or attempt to commit robbery; or
> (iv) Seventeen (17) years of age or more at the time of alleged conduct

Tenn. Code. Ann. § 37–1–134. Because of the wide range of this provision, a child as young as ten years of age may theoretically be transferred to criminal court for attempted second degree murder. The discretion for this transfer is left to the State, who may seek a waiver of jurisdiction

[8] A finding of incorrigibility was one that the child was unruly and incapable of being reformed.

within the guidelines. The petition for transfer signals a mandatory hearing where the judge must consider:

> (1) The extent and nature of the child's prior delinquency records;
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
> (4) Whether the offense was committed in an aggressive and premeditated manner;
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37–1–134. The court must also find reasonable cause as to the guilt of the juvenile for the crime he or she stands accused, that he or she is not committable to a mental institution and that the interests of the community require the child to be under legal restraint. *Id.* Once a juvenile is transferred to and convicted in criminal court, all future offenses are to be handled by the criminal court. *Id.* This code section allows for and creates procedures to permit juvenile offenders who have been convicted and sentenced in criminal court to remain housed at a juvenile facility until they reach the age of eighteen and can be transferred to adult penal facilities.

There have been no successful challenges to the statute since it was enacted. In *State v. Darden* the Tennessee Supreme Court held that charges that were not included in the transfer hearing and would not themselves make Mr. Darden eligible for transfer to criminal court, were properly transferred to criminal court. The statute, the court held, contemplated "that following the transfer hearing and the termination of the juvenile court's jurisdiction, a defendant may be charged in an adult court with other criminal offenses." *State v. Darden*, 12 S.W.3d 455, 458 (Tenn. 2000). Once the transfer has been successful, the court has waived jurisdiction, period.

In the line of United States Supreme Court cases that shaped the jurisdiction of the juvenile courts and the constitutional protections required during juvenile court adjudications, the Court looked to international procedure as an indicia of the evolving standards of decency. Where no other country permitted the death penalty for juvenile offenders, the Court was forced to confront the evolving standards of decency in order to determine that it was a moral imperative to abolish juvenile death sentences. The United States instituted the juvenile courts system in order to proactively protect children from incarceration, family separation, and a lifetime of grief, but the juvenile court ideal has never been fully realized. Examining an international counterpart program sheds light on the inherent problems of the American juvenile court system, namely the transfer provisions.

VII. In Germany, youth offenders are not subjected to adult criminal court

Germany is the largest European country and it is comparable to the United States in terms of economy and industry. Germany also sees considerably less crime overall than the United States. The United States Department of Justice undertook a study in the late 1990s to compare the rates of crime and concluded that the rates of serious crime rates were far higher in the United States than in Germany. Most Serious Crime Rates Far Higher in the United States than in Germany, US DOJ Report, 98-145, 1998 WL 526138. The report analyzed the difference in the structure of the criminal justice system between each country and found:

> As in the United States, the German states (Lander) are responsible for criminal justice administration. Germany, however, has a single national code of criminal procedures and a much more unified court system. The police and the prosecutors are state-level officials rather than local agency employees. . . . There is no death penalty in Germany, and sentences for all crimes--both major and minor--are considerably lower than in the United States. German juveniles are never tried as adults, even for the most serious crimes. And many 18- to 20-year olds are tried in the German juvenile courts.

Most Serious Crime Rates Far Higher in the United States than in Germany, US DOJ Report, 98-145, 1998 WL 526138. The Department of Justice did not issue any conclusions about whether the structural difference of the criminal justice systems in the United States and Germany account for the lower rate of serious crime in Germany or any other correlation, but the statistical conclusion is enough to warrant a closer look into the structure in Germany and how it might lead to a lower serious crime rate than in the United States, particularly in conjunction with the structure of the juvenile court.

Post-World-War-I-Germany adopted the Youth Courts Law (Jugendgerichtsgesetz) in 1923. In the original design, Germany adopted a minimum age for criminal prosecution at fourteen years of age. Germany ratified the United Nations' Convention on the Rights of the Child in 1992 and adopted it as the law in the same year.[9] The Convention on the Rights of the Child established a standard of protection for the health and well-being of children; it held the best interest of the child to be paramount. Convention on the Rights of the Child, November 20, 1989. U.N.T.S. Vol. 1577, p. 3. Using the Convention as a guidepost, a crucial viewpoint of criminal justice is that juveniles must receive treatment different than adults because juveniles cannot rise to the level of autonomous, fully culpable adults. In the ratification of the Convention, Germany adopted its principles into the design of the Youth Courts Law (Jugendgerichtsgesetz).[10]

The Youth Courts Law established that children between the ages of fourteen (14) and twenty-one (21) shall be in the jurisdiction of the youth court for violations of the criminal code.

[9] Library of Congress; Children's Rights: Germany; https://www.loc.gov/law/help/child-rights/germany.php; last accessed March 4, 2020.

[10] "The enactment of the Youth Courts Law (Jugendgerichtsgesetz) (JGG) in 1923 combined justice and welfare approaches, set the age of criminal responsibility at 14 years, allowed educational measures instead of punishment (particularly instead of imprisonment), and introduced the concept of prosecutorial discretion." Sibella Matthews, Vincent Schiraldi & Lael Chester (2018): Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System, Justice Evaluation. Journal, DOI: 10.1080/24751979.2018.1478443

Children under the age of fourteen (14) are not deemed to be culpable as a bright-line rule and children between the ages of fourteen (14) and eighteen (18) are ineligible to be transferred to adult criminal court. An important facet of the juvenile system is the purpose of any punishment, which is decidedly rehabilitative and not steeped in principles of retribution like in the United States. "Youth criminal law under the Youth Court Law targets education and rehabilitation of the young offender. Although a juvenile is held legally responsible for a crime (mens rea must be proven), the primary goals are education and rehabilitation. The emphasis is not on the offense or its seriousness but the offender and his or her needs." Youth Justice in Germany, 31 Crime & Just. 443, 453. Detention facilities in Germany are intended to mirror the outside world; juveniles housed in the facilities work minimum wage jobs designed to prepare them for the workforce; they can use their wages to buy their own clothes, which they are permitted to wear; and they have accommodations similar to college dormitories in the United States.[11]

The United States, by contrast, models its juvenile facilities after adult prisons and transfers many juvenile offenders to adult criminal court where they can be housed in juvenile facilities until they are old enough to be transferred to adult prisons; rather than offenders readying themselves for the outside world, offenders are educated in how to live an institutionalized life. It is no surprise that the recidivism rates in the United States demonstrate that the system is not achieving its early reformer goals of rehabilitating juvenile offenders. The United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention evaluated the recidivism rates among juvenile offenders in national look at juvenile delinquency prevention:

> In sum, to date, six large-scale studies have been conducted on the specific deterrent effects of transfer. These studies used large sample sizes (between 494 and 5,476

[11] The Vera Institute of Justice Blog; "Thank God I'm Not in an American Prison" As Young Germans Tell Their Own Incarceration Stories, Comparisons Arise. October 17, 2018. https://www.vera.org/blog/i-thank-god-im-not-in-an-american-prison-as-young-germans-tell-their-own-incarceration-stories-comparisons-arise Last accessed March 15, 2020.

> participants), different methodologies (natural experiment across two jurisdictions, matched groups within the same jurisdictions, or statistical controls), multiple measures of recidivism, and were conducted in five jurisdictions (Florida, New Jersey, New York, Minnesota, Pennsylvania) having different types of transfer laws (automatic, prosecutorial, or judicial). . . . All of the studies found higher recidivism rates among offenders who had been transferred to criminal court, compared with those who were retained in the juvenile system. This held true even for offenders who only received a sentence of probation from the criminal court.

Richard E. Redding. Juvenile Transfer Laws: An Effective Deterrent to Delinquency? *Juvenile Justice Bulletin*, OJJDP, June 2010, p. 5. German courts have authority over young offenders much longer than in the United States (sometimes until 21 years of age) and some offenders between the ages of 18 and 21 are subject to discretionary transfers to adult court, so determining the exact rate of recidivism among German youths is not a precise undertaking[12]. Even still, that the overall rate of crime for major and violent crimes is lower in Germany suggests strongly that some of the approaches Germany has taken to consider each offender and to protect, rehabilitate, and reform its juvenile offenders are successful in the long-term because it considers the offenders themselves.

VIII. What we know about the juvenile brain

What Germany has accomplished with its youth court law is to take to heart the wellbeing of children. At the heart of the Supreme Court cases that have shaped United States juvenile law, the notion that the juvenile or adolescent brain is different has been a prevailing theme. The United States Supreme Court has established that the juvenile or adolescent brain is different, and that difference leads to a conclusion of diminished culpability. *Miller*, 567 U.S. at 471 (citing *Graham*,

[12] The leading study on recidivism rates in Germany used a survey of individuals between the ages of 18 and 21—both those who were serving sentences under the juvenile law and those who had been transferred and were serving their sentences in adult criminal penal institutions. They were given a survey which asked what their own anticipated likelihood or intentional offense would be; the results found that those who were serving in juvenile facilities had higher rates of anticipated future offense. The study did not consider any actual rates of future offending. Horst Entorf, Expected recidivism among young offenders: Comparing specific deterrence under juvenile and adult criminal law. 38 Eur. J. Political Econ. 414 (2012).

560 U.S. at 68). What the court relied on was a growing body of scientific conclusions about the brain and how it develops.

It has long been understood that juveniles undergoing puberty experience tremendous hormone fluctuations, but the process of development and growth in the brain plays a bigger role in the behaviors of adolescents than just hormones. "The research indicates that the prefrontal cortex matures gradually, maturation extends over the course of adolescence and into early adulthood. The [prefrontal cortex] controls the brain's executive functions, advanced cognitive processes employed in planning, controlling impulses, and weighing the consequences of decisions before acting." Bonnie, R. J. and Scott, E. S. (2013) 'The Teenage Brain: Adolescent Brain Research and the Law', Current Directions in Psychological Science, 22(2), p. 159. doi: 10.1177/0963721412471678. Despite the gradual maturation of the prefrontal cortex, "changes in the limbic system around puberty result in increases in emotional arousal and in reward and sensation seeking (including sensitivity to social stimuli). *Id.* It is to the juvenile's detriment that hormone behavior during and after puberty will make them look like fully grown adults even while their brains undergo a significant metamorphosis.

Even for the healthiest juveniles, the dramatic changes occurring in the brain can lead to significant social and emotional stress[13]. For children and adolescents who enter this phase of development with a brain that isn't entirely healthy, these changes can cause significant problems. Advances in a host of sciences over the last few decades have led to a shift in the understanding of the impact of childhood experiences on lifelong outcomes. Significantly,

> exposure to stressful experiences has been shown to alter the size and . . . architecture of [areas of the brain] as well as lead to functional differences in learning, memory, and aspects of executive functioning. More specifically, chronic stress is associated with hypertrophy and overactivity in the amygdala and orbitofrontal cortex, whereas comparable levels of adversity can lead to loss of

[13] "Even the normal 16-year-old lacks the maturity of an adult" *Roper*, 543 U.S. at 569.

> neurons and neural connections in the hippocampus and the medial [prefrontal cortex].

Jack P. Schonkoff, M.D., Andrew S. Garner, M.D., Ph.D., et al. Technical Report: The Lifelong Effects of Early Childhood Adversity and Toxic Stress. American Academy of Pediatrics. Pediatrics Vol. 129, No. 1, January 2012 e232–e246. DOI: 10.1542/peds.2011-2663. Juveniles exposed to toxic stress situations such as child abuse, neglect, parental substance abuse, poverty, and homelessness undergo physical architectural changes in the brain which make their brains less able to process new information. "Toxic stress limits the ability of the hippocampus to promote contextual learning, making it more difficult to discriminate conditions for which there may be danger versus safety, as is common with post-traumatic stress disorder." *Id.*, e236. Juvenile offenders who engage in inordinately risky behavior that leads to delinquency may very well be attempting that behavior because the architecture of their brains has been restructured as a result of chronic stress.

The Supreme Court weighed the developmental brain science available at the time of each of the decisions in *Thompson*, *Roper*, *Graham*, and *Miller* when it concluded that juvenile brains, even absent an understanding of the effects of chronic stress, are impulsive, less likely to have an adequate notion of personal responsibility, and are therefore necessarily less culpable than the adult brain. Brain science developments continue to suggest that both brain maturation and external forces processed by the brain may make the juvenile brain even further from a fully-functioning adult brain than previously understood. The most important takeaway from this science is that the juvenile brain is still developing—so damage that is done can be repaired if factors of toxic stress are managed and services are put into place to help foster the inherent resiliency of the brain.

IX. Where do we go from here?

The purpose of the juvenile court system at its genesis was to become a gentle parent-- a guiding force to help the youth return from a dark and dangerous path—even the mere existence of the juvenile court system proves that society believes that the youth can be rehabilitated. What we have learned about the developing brain since the genesis of the juvenile court system in 1899 confirms our belief that this is correct. The system has fallen short, however, not only of its blueprint but also from its purpose since the beginning. It takes time, patience, and most of all resources to offer meaningful help to juvenile offenders. The United States Supreme court has repeatedly found that the adolescent brain is different than a fully formed adult brain, and that the adolescent brain cannot fully form the mens rea for some of the most serious crimes, but nevertheless, juveniles still face automatic and discretionary transfers to adult criminal courts.

Transferring juveniles to adult court is a disingenuous band-aid for a system that is overwhelmed by juvenile offenders. The systems in place—both inside and outside the juvenile court—fail to meet children at their needs. Every other aspect of the law recognizes that juveniles are not adults; no matter how responsible a juvenile proves to be, she cannot vote early, join the military or enter into a contract without parental permission, etc. It not only disingenuous but also arbitrary and capricious for the criminal justice system to tout the "adult crime, adult time" when it transfers a juvenile to adult criminal court based on the notion that the severity of the act somehow proves that the offender is a fully-functioning adult and no longer deserving of the rehabilitative ideal of the juvenile court.

By contrast, the system in Germany strives to consider each offender and their situations before deciding how they will be handled in the youth court system—and regardless—offenders are given meaningful opportunities to gain the skills they need to adjust to adult life. Germany does not transfer juvenile offenders to adult court until they are *at least* 18 years of age and can

keep them in the juvenile court system until they are 21 years of age upon the discretion of the court. The interventions at play in Germany aim to actually rehabilitate the offender.

In 1990, Tennessee was at the forefront of change to outlaw sentencing the mentally retarded to receive the death penalty[14]. Tennessee can, and ought to be at the forefront of change regarding the juvenile court system. Juvenile court jurisdiction should be extended to include offenders up to the age of 21 and all transfers to criminal court should be abolished except for limited and serious offenses through the age of 21. The system as it stands now regularly fails the children it strives to protect, and it does not to take into account the complexities of the adolescent developmental period.

[14] Tenn. Code. Ann. § 39–13–203