

SAVING THE FUTURE:
AN INTERSTATE COMPARISON OF JUVENILE JUSTICE

by
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There is an inherent belief that children are innocent, born with a pure heart, and as such we believe anything they do wrong is out of ignorance, not malice. Unfortunately, while that mentality is commonly held by people, it does not prevail in how the juvenile justice system handles youth offenders. The concept of rehabilitation encompasses the idea that children are innocent and malleable. This Article provides a brief history of the juvenile justice system before examining the juvenile justice system of three states. This Article compares the age of criminal responsibility, transfers to adult prison, sentencing, and mental health treatment of the juvenile justice system of those states and makes recommendations as to the best practices for those issues. A common saying is that children are the future. This Article focuses on how to make that future a better place for individuals and society by reforming the juvenile justice system.

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I. INTRODUCTION

There is an inherent belief that children are innocent, born with a pure heart, and as such we believe anything they do wrong is out of ignorance, not malice. Unfortunately, while that mentality is commonly held by people, it does not prevail in how the juvenile justice system handles youth offenders. The concept of rehabilitation encompasses the idea that children are innocent and malleable. Rehabilitation focuses on taking an offender and turning them into a better, more productive member of society by giving them the services they need to reach that goal. Through rehabilitative measures, juveniles are less likely to commit more crimes in the future and less likely to sustain harm in the process. A common saying is that children are the future. This Article will focus on how to make that future a better place for individuals and society by reforming the juvenile justice system.

One of the benefits of federalism is that the states can act as a testing grounds for different policies and practices. Looking to different states is a good way to see what works and what does not. This Article focuses on Massachusetts, Mississippi, and Oregon which are perceived as good, bad, and moderate respectively regarding juvenile justice. Part II explains why rehabilitation is beneficial and retribution is detrimental to both individuals in the system and society. Part III provides a brief history of the juvenile justice system for background. Part IV discusses and compares

policies on the age of criminal responsibility, mental health, transfers, and sentencing. Part V proposes how to implement nationwide policy changes in the United States, and a short statement about the future of the United States' juvenile justice system.

II. REHABILITATION VERSES RETRIBUTION

It is important to first understand why rehabilitative policies are preferable to retributive policies, especially within our juvenile justice system. If the view that children are innocent is held then the most important reason the system needs to become more rehabilitative is because of the mental, economic, and physical harm caused to youth by retributive policies.¹

Retributive policies such as juvenile detention, transfers to adult court and/or facilities, lack of mental health programs, and harsh sentencing practices cause significant harm. Rehabilitation, on the other hand, decreases the likelihood of these harms and has been shown to decrease recidivism and, in many cases, save taxpayer money.² Rehabilitative policies are also preferable to retributive policies because youth are significantly different from adults.³ Youths' brains are still developing and are therefore incapable of the same thought processes that are undertaken by a fully-developed mind.⁴ This not only makes youth more likely to make bad decisions, but also makes them more malleable for corrective intervention.⁵

A. Harm Prevention

Most youths that come into contact with the juvenile justice system already come from disadvantaged socioeconomic backgrounds. The deeper a youth goes into punitive corrections systems, the more physical, mental, and economic harm comes to them, which only serves to severely exacerbate their socioeconomic disadvantages. The juvenile justice system's purpose is to benefit society and help the youth become better citizens. However, in reality, the retributive policies that are in place instead create a large population of disadvantaged youth. Some of those policies are juvenile detention, lack of mental health, harsh sentencing structures, and transfers.

¹ JUV. CT. WORKING GRP. ON SENTENCING BEST PRACTICES, COMMONW. OF MASS. TRIAL CT., JUV. CT. DEPT., DISPOSITIONAL AND SENTENCING BEST PRACTICES FOR DELINQUENT AND JUVENILE OFFENDER MATTERS 3-4 (2016), <https://www.mass.gov/files/documents/2016/08/ub/jc-sbp-report.pdf> [hereinafter JUV. CT. WORKING GRP.].

² *Id.*

³ See *Graham v. Florida*, 560 U.S. 48, 68–69 (2010).

⁴ See *Issue Brief 3: Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ADOLESCENT DEV. AND JUV. JUST., http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Sept. 9, 2018).

⁵ GIUDI WEISS, *THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 21* (2013).

1. *Juvenile Detention*

Punitive policies largely fail to account for reentry and rely solely on deterrence. The large majority of youth that are placed into the juvenile justice system are out of that system by the time they turn 21.⁶ Adolescence is an important time for education, growth, and social learning. By removing youth from the population and placing them in detention, those important facets of development are hindered. Detained youth lose out on the opportunity to gain a meaningful education, and they spend a very impressionable time of their life surrounded by other offenders instead of in a normal setting.⁷ Detainment and the loss of healthy growth and proper education often cause long term detriment that makes the offender more likely to offend again.⁸ Beyond the social harms, youths in detention are also at risk of physical harm. The youth placed in juvenile detention facilities have an increased rate of suicide and a 29% chance of being the victim of violent acts.⁹

Systems that emphasize rehabilitation use detention as a last resort. Instead of being detained, rehabilitative policies place the offender in diversion programs that are aimed at making the offender a more functional member of society. Rehabilitative practices include programs such as community service, victim reparations, mental health or drug abuse treatments, mentoring, and community programs. Programs such as community service or victim reparations help undo some of the damage caused by the youth or provide other services to the community as payment. Not only does this act as a productive form of punishment, it can also help the offender understand how their actions have affected others.¹⁰ Mental health and drug abuse treatments can reduce future harm by helping offenders that likely would not have offended if they did not suffer from addiction or a mental disorder.¹¹ Community programs and mentoring help remove offenders from detrimental social environments and replace them with healthy ones. The aforementioned practices not only help reduce recidivism but also help the offender become more successful in their own lives, meaning these practices are beneficial to both the

⁶ JASON ZIEDENBERG, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., *YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS* 6 (2011).

⁷ See Kimberly Thielbar, *Education in Juvenile Detention Centers at Part III–IV* (2011) (unpublished manuscript) (on file with author).

⁸ *Id.* at Part V.

⁹ Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. 2 (Nov. 28, 2006), http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf; Nat'l Ctr. for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION 215 (Dec. 2014), <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

¹⁰ See JASON LANGBERG & PATRICIA ROBINSON, *YOUTH JUSTICE N. C., A GUIDE TO JUVENILE COURT FOR YOUTH AND PARENTS IN NORTH CAROLINA* 12 (2014).

¹¹ Sara McDermott, *Calibrating the Eighth Amendment: Graham, Miller, and the Right to Mental Healthcare in Juvenile Prison*, 63 UCLA L. REV. 712, 724 (2016).

offender and society.¹²

2. *Mental Health*

40% to 80% of youth in detention centers have mental health disorders.¹³ That means, at best, just under half of detained youth need mental health treatment, and at worst, as many as four in five detained youth may need mental health treatment. Left unaddressed these mental health disorders either remain the same or worsen which harms the individual and increases the likelihood that they will reoffend.¹⁴ Moreover, detention facilities are commonly unequipped to deal with the incredibly large volume of individuals in their facilities, and under retributive policies, there is even less access to mental health treatments.¹⁵ In contrast, rehabilitative policies encourage screening and treatment for mental health problems. As stated above, both the afflicted individual and the community benefit from this treatment because the juvenile offender receives the care they need and will be less likely to reoffend or become a burden on society.

While some states and facilities provide therapy, medication, and other services, other states do not provide these services at all.¹⁶ A nationwide study of 698 facilities found that 25% provided poor or no mental health treatment and 50% reported inadequate training for staff.¹⁷ Only half of the states require a mental health screening either during or shortly after the intake process.¹⁸ Of the states that do require a screening, some do not have a designated screening tool, which can cause confusion within that state.¹⁹

3. *Sentencing*

Sentencing plays a crucial part in the juvenile justice system. Rehabilitative sentencing practices that encourage healthy development, such as the diversion programs discussed previously, are less burdensome on the government and the offender. Instead of detaining youth, which is costly and labor-intensive, diversion programs can help break offenders out of their detrimental habits and

¹² Douglas W. Nelson, *Essay: A Road Map for Juvenile Justice Reform*, in ANNIE E. CASEY FOUNDATION 2008 KIDS COUNT DATA BOOK 4, 12 (2008).

¹³ Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT'L. J. ENVTL. RES. PUB. HEALTH 1, 3 (2016), <http://www.mdpi.com/1660-4601/13/2/228>.

¹⁴ McDermott, *supra* note 11, at 724.

¹⁵ *Id.* at 722–23.

¹⁶ *Id.* at 724.

¹⁷ KATHLEEN R. SKOWYRA & JOSEPH J. COCOZZA, NAT'L CTR FOR MENTAL HEALTH AND JUVENILE JUSTICE, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM 52 (2007).

¹⁸ Andrew Wachter, *Mental Health Screening in Juvenile Justice Services*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT. 1, 1 (Apr. 2015), http://www.nysap.us/JJGPS%20StateScan%20Mental%20Health%20Screening%20in%20Juvenile%20Justice%202015_4.pdf.

¹⁹ *Id.* at 3.

communities.²⁰ For the reasons discussed above, detention should be used only as a last resort for offenders that need intensive care and supervision that cannot be offered outside of detention, or when incapacitation is the only option for a heinous offender. However, for the average offender, staying out of detention is best for everyone.

Mandatory sentencing guidelines are detrimental to that end because how severely they limit judicial discretion. There are many factors that need to be considered when sentencing a juvenile, including age, maturity, family income, housing, education, offending by other family members, abuse in the household, drug use, and what is best for the child.²¹ Mandatory sentencing guidelines inhibit a judge's ability to sentence based on these factors and the individual in front of them. Instead, they are forced to sentence based on statutes that often fail to consider any or all these factors. Furthermore, statutes frequently require judges to either sentence youth to time in a correctional facility or transfer the juvenile to adult court. By doing so, judges are legally required to expose youth to the dangers inherent in detention instead of sentencing in a way that seems most appropriate for the case before them.

Juvenile sentencing practices vary widely between the states. Iowa no longer has mandatory sentencing for juveniles.²² Ohio has fairly strict sentencing guidelines that provide punishments for each category of crime and for different age groups.²³ Washington has similar guidelines to Ohio, except that it does not consider age.²⁴ Florida uses a point system to determine punishment that takes into consideration a series of aggravating and mitigating factors.²⁵ Michigan has extensive sentencing guidelines that consider a variety of factors depending on the crime.²⁶ One of Michigan's most disturbing sentencing requirements is a mandatory life sentence with the option of parole for juveniles caught in possession of 650 grams (roughly 1.5 pounds) of schedule 1 and 2 drugs.²⁷ North Carolina only has two minimum sentencing requirements, and those only apply to violent crimes or repeat

²⁰ JUV. CT. WORKING GRP., *supra* note 1, at 18–19.

²¹ See Rachel Frumin Eisenberg, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court After Miller v. Alabama*, 86 TEMP. L. REV. 215, 235 (2013).

²² State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014).

²³ Weisenburger Law Offices, *Juvenile Delinquency Penalties*, OHIOCRIMELAWYER, <https://www.ohiocrimelawyer.com/criminal-defense/juvenile-delinquency/157-juvenile-delinquency-penalties> (last visited Nov. 11, 2017).

²⁴ WASH. REV. CODE § 13.40.0357 (2018).

²⁵ FLA. STAT. § 985.14(1)–(3) (2018).

²⁶ MICH. JUDICIAL INST., STATE OF MICHIGAN SENTENCING GUIDELINES MANUAL, Steps I–III (2018).

²⁷ MICH. JUDICIAL INST., STATE OF MICHIGAN SENTENCING GUIDELINES MANUAL, MCL # Crime List (2018).

offenders.²⁸ Arizona does not have mandatory sentencing for juveniles, and restricts detention to children over 14 who commit felonies.²⁹

4. *Transfers*

Juvenile transfer laws are undoubtedly the most detrimental retributive practice. Juvenile transfers go against the common understanding that children are different from adults and therefore less culpable—an understanding that scientific research overwhelmingly supports.³⁰ A youth offender in the adult system loses most of the procedural safeguards that take their age into consideration. Youth in adult court face the same sentencing guidelines as adults, which means a higher chance of incarceration and longer sentences.³¹ Depending on the jurisdiction, youths who are transferred can be placed in adult correction facilities, which dramatically increases the chances of physical and mental harm.³²

The most serious harm to youth in adult correction facilities is that they are eight times more likely to commit suicide than youth held in juvenile facilities.³³ This reason alone should be enough to convince anyone that holding youth in adult correction facilities is a horrendous idea. The increased chances of being assaulted, sexually or otherwise, as a juvenile in adult facilities may explain why the suicide rates are higher for juveniles in adult, rather than juvenile, facilities.³⁴ Youth in adult correction facilities are five times more likely to be sexually assaulted than youth in juvenile correction facilities and almost twice as likely to be victims of violence than youth in juvenile correction facilities.³⁵ Many states and the federal government now have laws that protect youth from being placed in adult correction facilities, but until it is illegal to place youth in adult facilities, our system is partially responsible for every suicide, rape, and act of violence.

Youth do not just sustain extra physical harm from being placed in the adult system; youth transferred to criminal court are twice as likely to be rearrested, even when using statistical models that control for the type of offense and youth who are less likely to benefit from the rehabilitation offered by the juvenile system.³⁶ This drastic increase in the recidivism rate is commonly attributed to two things: fewer

²⁸ N.C. GEN. STAT. § 7B-1602 (2017).

²⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-501(B); see also *Juvenile Division*, MARICOPA COUNTY ATTORNEY'S OFFICE, <https://www.maricopacountyattorney.org/165/Juvenile-Division> (last visited Oct. 10, 2018).

³⁰ *Graham v. Florida*, 560 U.S. 48, 68 (2010).

³¹ Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BILL. 1, 1 (2010).

³² *Id.* at 7.

³³ See Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults after Graham and Miller*, 61 EMORY L. J. 1445, 1454 (2012).

³⁴ *Id.* at 1454–1458; Redding, *supra* note 31, at 7.

³⁵ Redding, *supra* note 31, at 7.

³⁶ See *id.* at 4.

rehabilitative programs and less social learning.³⁷ Adult facilities have even fewer rehabilitative programs than the limited ones offered by juvenile facilities, such as education, mental health, and drug treatment programs.³⁸ Because of the lack of opportunity to participate in rehabilitative programs, and the lost opportunity to develop job skills, youth are more likely to return to old habits or turn to crime to make money after they are released. Sixty-one percent of juveniles held in adult prison claim that they have either not changed their behavior or now behave worse than they did before.³⁹ Most reported that while incarcerated, they had to do what was possible to adapt to prison culture.⁴⁰ This involved learning more criminal behaviors and “accepting violence as a part of daily life.”⁴¹ Learning how to survive in prison creates behaviors that are often violent. Due to the malleability of young minds, youth frequently carry those behaviors with them for the rest of their lives.

Retributive policies, such as transfers, have the sole focus of punishment and deterrence, which makes transfers even more confounding because transfer laws have been shown to utterly fail as a deterrent.⁴² Even after youths reach the age of majority and are considered legal adults, and thus punishable as adults, rates of offending do not decrease.⁴³ Youth who are transferred have higher rates of recidivism, which means not only that transfers fail as an individual deterrent but also increase the risk of future harm.⁴⁴ Even when juveniles know about transfer laws they do not think that they will be transferred, which shows that transfer laws do not work as a general deterrent.⁴⁵ All of these factors indicate there is no deterrent effect of transfers and instead that there is an increased harm to society as seen by the rate of reoffending and the creation of lifelong offenders.⁴⁶

Each state sets its own transfer laws: twenty-two states have no specified minimum age for transfers. Three states set the minimum age at ten, three states set it at twelve, six set it at thirteen, sixteen set it at fourteen, and one state has set it at fifteen.⁴⁷ The minimum age reflects when states can transfer youth, not when they

³⁷ *Id.* at 7.

³⁸ See Radek G. Radek, *Juvenile vs. Adult Corrections: How Do They Stack Up?*, in CHANGING LIVES, CHANGING MINDS: A CHANGING LIVES THROUGH LITERATURE BLOG (Apr. 18, 2009), <https://cltlblog.wordpress.com/2009/04/18/juvenile-vs-adult-corrections-how-do-they-stack-up/>.

³⁹ Redding, *supra* note 31, at 5.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8.

⁴² *Id.*

⁴³ *Id.* at 2.

⁴⁴ *Id.*

⁴⁵ See Richard E. Redding & Elizabeth J. Fuller, *What Do Juvenile Offenders Know About Being Tried as Adults? Implications for Deterrence*, JUV. & FAM. CT. J. 35, 40 (2004).

⁴⁶ See Redding, *supra* note 31, at 8.

⁴⁷ CARMEN E. DAUGHERTY, CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA’S YOUTHFUL INMATE STANDARD 10 (2015).

must. The chart below shows how different states have approached statutory exclusions that require juvenile courts to transfer cases to adult court.⁴⁸

Many states exclude certain serious offenses from juvenile court jurisdiction								
State	Any criminal offense	Certain felonies	Capital crimes	Murder	Certain person offenses	Certain property offenses	Certain drug offenses	Certain weapon offenses
Alabama		16	16				16	
Alaska					16	16		
Arizona		15		15	15			
California				14	14			
Delaware		15						
Florida				16	NS	16	16	
Georgia				13	13			
Idaho				14	14	14	14	
Illinois		15		13	15			15
Indiana		16		16	16		16	16
Iowa		16					16	16
Louisiana				15	15			
Maryland			14	16	16			16
Massachusetts				14				
Minnesota				16				
Mississippi		13	13					
Montana				17	17	17	17	17
Nevada	16*	NS		NS	16			
New Mexico				15				
New York				13	13	14		14
Oklahoma				13				
Oregon				15	15			
Pennsylvania				NS	15			
South Carolina		16						
South Dakota		16						
Utah		16		16				
Vermont				14	14	14		
Washington				16	16	16		
Wisconsin				10	10			

* In Nevada, the exclusion applies to any juvenile with a previous felony adjudication, regardless of the current offense charged, if the current offense involves the use or threatened use of a firearm.

Notes: An entry in the column below an offense category means that there is at least one offense in that category that is excluded from juvenile court jurisdiction. The number indicates the youngest possible age at which a juvenile accused of an offense in that category is subject to exclusion. "NS" means no age restriction is specified for an offense in that category. Table information is as of the end of the 2009 legislative session.

B. Culpability of an Adolescent Brain

Retributive policies fail to acknowledge that children and adults are different. As scientific research on brain development has progressed, the idea that children are less culpable than adults has become solidified as scientific fact. Research shows that the frontal lobe does not finish developing until the mid to late 20's.⁴⁹ The frontal lobe is responsible for decision making, meaning that adolescents are less able to consider future consequences than adults, making them more likely to act recklessly and impulsively.⁵⁰ This also leads youth to seek excitement and be influenced by peer pressure.⁵¹ As Figure 1 below illustrates, although we become intellectually mature at close to 18, giving the impression of an adult brain, our

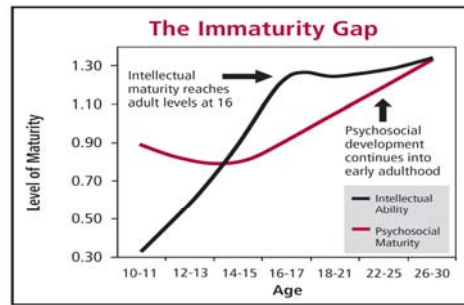
⁴⁸ Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS & VICTIMS 6 (2011).

⁴⁹ NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE CHANGES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 9 (2011).

⁵⁰ See *Issue Brief 3*, *supra* note 4, at 2, 3.

⁵¹ *Id.* at 3.

psychological maturity does not peak until later.⁵²



(Figure 1)

This lack of psychological maturity makes youth less capable of making responsible choices, especially those that involve long-term or complex thought.⁵³ What is particularly disturbing is that this research is not fully considered within our juvenile justice system, although the government acknowledges it with other laws, like those setting minimum-age requirements to drive,⁵⁴ vote,⁵⁵ get married,⁵⁶ sit on a jury,⁵⁷ use tobacco or marijuana,⁵⁸ and drink alcohol.⁵⁹ The age at which one can drive, vote, get married, or sit on a jury (typically 18) is only implicated in the case of transfers because those laws still treat youth over 18 the same as all other adults. However, alcohol and marijuana consumption laws are placed at 21 based on this exact same science that shows youth are not fully developed by the legal age of adulthood. The argument that a youth's brain is not developed enough for a beer but is developed enough to stand trial and be culpable for complex decision-making is absurd.

Both long-term and complex thinking are paramount to understanding the harm and potential consequences of a crime. For a developing mind, there is a lack of understanding about the harm being caused, the likelihood of getting caught, and

⁵² *Id.* at 2.

⁵³ ARYA, *supra* note 49, at 9; *Issue Brief 3*, *supra* note 4, at 2.

⁵⁴ For example, in Oregon the legal age to drive is 16. *Applying for a New License (Teen Drivers) in Oregon*, DMV.ORG, <https://www.dmv.org/or-oregon/teen-drivers.php> (last visited Nov. 15, 2017).

⁵⁵ Oregon's voting age is 18. *Voter Registration in Oregon*, DMV.ORG, <https://www.dmv.org/or-oregon/voter-registration.php> (last visited Nov. 11, 2017).

⁵⁶ Oregon's age requirement to marry is 17 with parental consent, otherwise 18. *Marriage Licenses*, WASHINGTON COUNTY ORE., <http://www.co.washington.or.us/AssessmentTaxation/MarriageLicenses/requirements.cfm> (last visited Nov. 15, 2017).

⁵⁷ OR. REV. STAT. § 10.030(2)(c) (2017).

⁵⁸ The minimum age in Oregon to smoke tobacco or marijuana is 21. *See Act effective Aug. 9, 2017, ch. 701, § 4(1)*, 2017 Or. Laws 1 (2017); OR. REV. STAT. § 475B.316(1)(a)–(b) (2017).

⁵⁹ Oregon's minimum drinking age is 21. OR. REV. STAT. § 471.430(1) (2017).

the potential consequences. While an adult is at least as capable as he or she will ever be of considering those concepts, and as capable of being able to act accordingly, youth simply are not. Youth pay much more attention to potential benefits than the likelihood of the costs.⁶⁰ Youth are unlikely to think there is any chance they will be caught and have extreme difficulty in contemplating the consequences if they are caught.⁶¹

Furthermore, youth are particularly sensitive to peer pressure, which can feel like having a gun to their head when deciding whether or not to do something.⁶² Because youth are so vulnerable to peer pressure, and because that vulnerability dissipates as the brain fully develops, youth should be judged as less culpable than adults. Often, peer pressure does not even need to be verbalized. A youth might commit a crime, even when there is no direct pressure to do so, simply because they think their peers will perceive them as cool for doing it.⁶³ Juveniles that end up in contact with the juvenile justice system frequently come from bad areas where that pressure is even more keenly felt. For youth in those areas, not giving into social expectations can be very costly to one's social possibilities and even be potentially dangerous.⁶⁴

Poor decision-making affects more than just the level of culpability of youth, it also affects them once contact with the system has been made. It is important that youth are treated significantly different than adults because they are more likely to confess, take plea deals, waive their rights, and not know their rights.⁶⁵ Below, Figure 2 and Figure 3 show the results of a study determining youths' likelihood of confessing or taking a plea deal.⁶⁶

⁶⁰ See Mary Beckman, *Crime, Culpability, and The Adolescent Brain*, 305 SCIENCE 596, 596-99 (2004).

⁶¹ See Redding & Fuller, *supra* note 45, at 39.

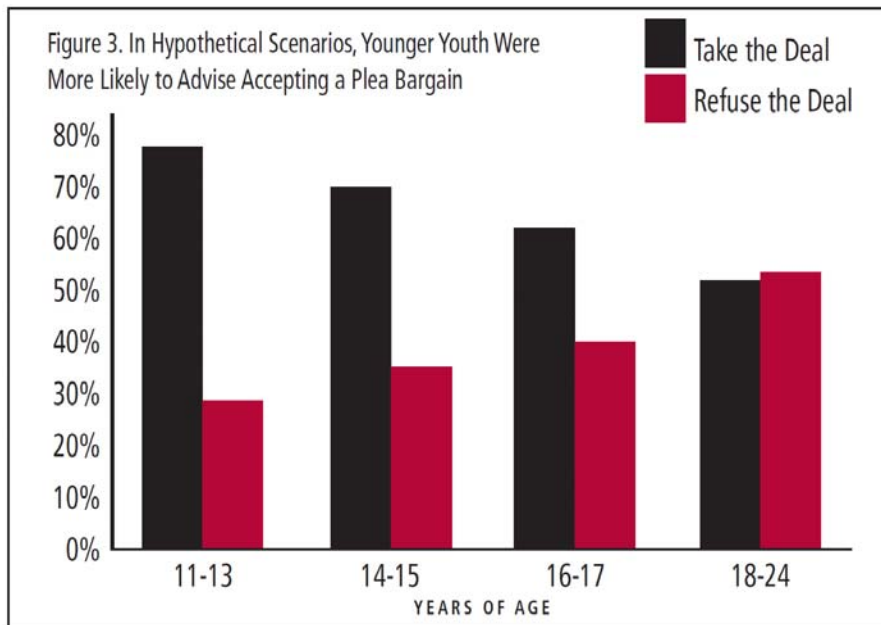
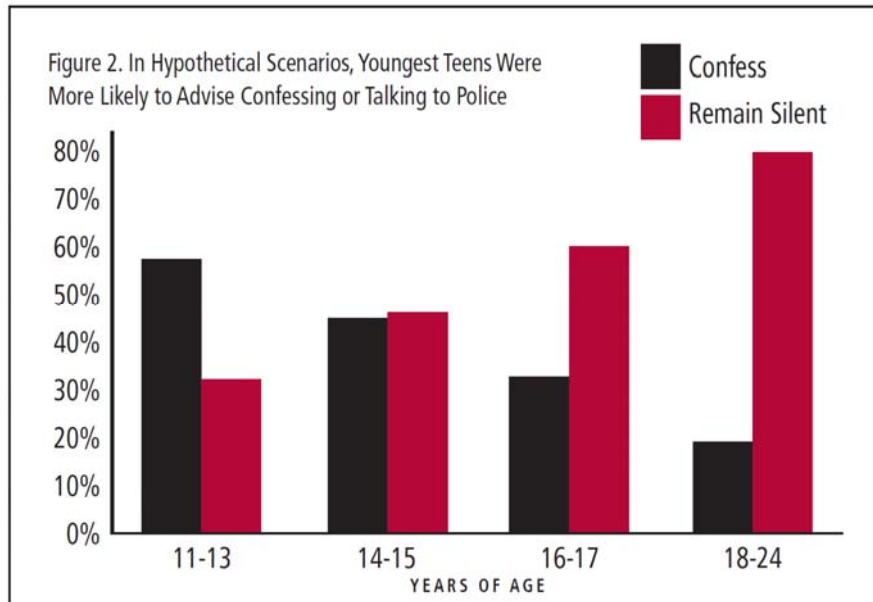
⁶² See *Issue Brief 3*, *supra* note 4, at 3 (discussing the coercive nature of group pressure).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ WEISS, *supra* note 5, at 23.

⁶⁶ *Issue Brief 1: Adolescent Legal Competence in Court*, MACARTHUR FOUND. RES. NETWORK ADOLESCENT DEV. & JUV. JUST. 2, http://www.adjj.org/downloads/9805issue_brief_1.pdf.



Due to a lack of developmental maturity, youth, especially under 15, are

usually not competent enough to stand trial.⁶⁷ The lack of competency to stand trial is due to the previously mentioned inability to consider long-term consequences, impulsiveness, and peer pressure, but another big factor is youth deciding whether to comply with authority figures.⁶⁸ Most children are taught at a young age to trust and comply with authority figures. That trust and compliance leave youth vulnerable to police who might pressure them to talk without an attorney present or confess guilt because youth are more likely than adults to give the authority figure what they want or what the youth perceives that they want. This can cost youth their freedom and safety if it results in their future being spent in the punitive system.

There is no federal minimum age of criminal responsibility applicable in state courts. While the federal government has set the age of criminal responsibility at eleven for federal cases, the states have placed the number from none to ten.⁶⁹ Nine states have placed it at ten, two at nine, three at seven, one at six, and the remaining thirty-five states have no minimum age.⁷⁰ This puts the United States on par with Cuba, Malaysia, and Sudan.⁷¹

III. A BRIEF HISTORY OF THE JUVENILE JUSTICE SYSTEM

For the past 200 years, there has been acknowledgement that youth are different than adults and should be treated differently. The first institutionalization of this principle was in 1825 with the creation of the New York House of Refuge.⁷² At the time, there were laws that forbid vagrancy, which meant many orphans or neglected children wound up in the criminal justice system.⁷³ The reformers at the time believed that there was danger in placing youth with adults and that it could corrupt them from being neglected children to being actual criminals.⁷⁴ The House of Refuge was created as a place to send youth instead of prison. While the House of Refuge was a good idea, it was still far from being a good option. It was run similarly to a criminal corrections facility, but with the addition of religious oppression.⁷⁵ As such, while it was still good to separate the youth from the adults, the means used within the facility were still not rehabilitative. Additionally, Houses

⁶⁷ See *id.* at 1.

⁶⁸ *Id.* at 2.

⁶⁹ *The Minimum Age of Criminal Responsibility Continues to Divide Opinion*, ECONOMIST (Mar. 15, 2017), <https://www.economist.com/blogs/graphicdetail/2017/03/daily-chart-7>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1969).

⁷³ *Id.* at 1201.

⁷⁴ *Id.* at 1189.

⁷⁵ *Id.* at 1195.

of Refuge only took in those youths deemed amenable to reform.⁷⁶ Finally, because the House of Refuge existed, many children that would have otherwise been acquitted, because the court did not deem imprisonment appropriate, were instead punitively incarcerated under the guise of rehabilitation.⁷⁷

The next big step in juvenile justice was in 1899 when Illinois created the first juvenile court in the United States.⁷⁸ The objective was not to place children on trial but instead to take the child into the care of the state and help them.⁷⁹ Within 26 years all but two states had juvenile courts that all acted with the same additional parental type care mentality.⁸⁰ While this was a well-intentioned way to treat children differently, it led to advocacy issues; instead of being an adversarial system with a prosecutor and defense attorney, it was typically just a commissioner making the decision about what would happen to the child.⁸¹

In 1967, the Supreme Court addressed the advocacy issue in *In Re Gault*.⁸² *In Re Gault* gave juveniles constitutional protections of right to counsel, to confront witnesses, and against self-incrimination.⁸³ The decision put a stop to the informality that led to many children being placed in reformatories and detention centers without the process of determining guilt.⁸⁴ However, instead of striking a good balance, an adversarial juvenile system was created that mirrored adult court.

Unlike the other reforms to the juvenile justice system, the ones that occurred in the 1980s and 90s were punitive instead of rehabilitative. Due to media fear mongering and faulty criminology predictions from a few professors in the field, lawmakers began to take “tough on crime” stances.⁸⁵ While the majority of researchers still believed that rehabilitation was appropriate, that retributive policies would not reduce the spike in crime, and that the generation of the “super predator” would never come to exist, the fear won out.⁸⁶ Laws were passed that expanded juvenile transfers, reduced the age requirement for transfers and adult court, and created harsher sentencing guidelines.⁸⁷ Unsurprisingly, these policies did not decrease crime; instead, “recidivism became the norm.”⁸⁸

⁷⁶ *Id.* at 1190.

⁷⁷ *Id.* at 1194.

⁷⁸ *Id.* at 1191.

⁷⁹ *Id.* at 1221.

⁸⁰ Thielbar, *supra* note 7, at Part II.

⁸¹ Fox, *supra* note 72, at 1215.

⁸² See 387 U.S. 1, 16 (1967).

⁸³ WEISS, *supra* note 5, at 11.

⁸⁴ Fox, *supra* note 72, at 1214.

⁸⁵ See Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J.C.R. & ECON. DEV. 765, 778 (2015).

⁸⁶ See *id.* at 773.

⁸⁷ *Id.* at 780.

⁸⁸ WEISS, *supra* note 5, at 3.

Over time, the fear of a generation of “super predators” faded and policy makers began to see the detriment of the “tough on crime” practices. Two of the most well know professors that furthered the super-predator myth, Professor James Alan Fox and Professor Dilulio, recanted their statements acknowledging their mistake and the damage that had been done.⁸⁹ Unfortunately it was too late, and by that point, many people’s lives had already been irreversibly damaged, ruined, or ended because of the retributive policies implemented.⁹⁰

Most states are now moving away from the harsh “tough on crime” ideology and back to the recognition of fundamental difference between youth and adults. Between 2009 and 2011, nineteen states reduced reliance on incarcerating juveniles, saving not only harm to the youth and society, but also money.⁹¹ The Supreme Court finally placed that science into case law with its opinions in *Roper v. Simmons*, *Graham v. Florida* and *Miller v. Alabama*, stating that the death penalty and, in almost all cases, life without parole are unconstitutional punishments for offenders who committed the crime while juveniles, due to scientific differences between juveniles and adults.⁹² As Chief Justice Roberts predicted in his *Miller* dissent, the ruling could lead to all mandatory sentencing and transfers for juveniles being ruled unconstitutional.⁹³ Although Roberts seems to believe that would be bad, the removal of punitive policies from the country would be beneficial for all the affected parties.

IV. TRANSFERS

A. Massachusetts

The only type of transfer that Massachusetts has is a single statutory exclusion.⁹⁴ That exclusion is only for first and second-degree murder committed by youth ages 14 and older.⁹⁵ While youth who are charged with these two crimes are transferred to the adult system, there are laws to protect them, and those awaiting trial are not held in adult facilities. Youth who are convicted are placed in youthful offender units that are separate from the adult prisoners.⁹⁶ Further protection is granted by the Massachusetts Department of Correction’s (DOC) policies, which require that

⁸⁹ Southerland, *supra* note 85, at 777–78.

⁹⁰ *Id.* at 778.

⁹¹ See generally Annie Balck, *Advances in Juvenile Justice Reform: 2009-2011*, NAT’L JUV. JUST. NETWORK (July 2012), http://www.njjn.org/uploads/digital-library/NJJN-Advances-in-Juvenile-Justice-Reform_2009-2011.pdf.

⁹² See *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

⁹³ See *Miller*, 567 U.S. at 500–01.

⁹⁴ Griffin et al., *supra* note 48, at 6.

⁹⁵ MASS. GEN. LAWS, ch. 119, § 72B (2017).

⁹⁶ MASS. GEN. LAWS, ch. 119, § 58 (2017).

youth cannot have sight, sound, or physical contact with any adult inmates through use of a shared common space.⁹⁷

Massachusetts has laws in place to protect youthful inmates from not only physical harm, but also, mental harm. The DOC cannot limit transferred youths' access to education, substance abuse treatment, anger management and vocational training based on their crimes or sentence length.⁹⁸ While this is a good policy, it still does not guarantee access to any of those programs or treatments—it simply says that youth cannot be passed over for them because they were transferred.

B. *Mississippi*

Mississippi has judicial waivers, prosecutorial waivers, statutory exclusion, and “once an adult always an adult” transfer practices.⁹⁹ Transfers in Mississippi are limited to youth 13 and older.¹⁰⁰ For both judicial and prosecutorial waivers, either the court or the prosecutor has the discretion to file for a transfer, after which there is a hearing to determine if a transfer would be appropriate.¹⁰¹ At the hearing, the court must consider twelve different factors including: the seriousness and type of offense; whether transfer is required to protect the community; the child's maturity and educational background; the child's home and emotional condition; and whether or not the court believes the juvenile justice system can rehabilitate them.¹⁰² Mississippi's statutory exclusions are for all felonies committed by 17-year-olds and any armed felonies committed by offenders over 13.¹⁰³ Youth are also statutorily excluded for any crime if they have previously been tried and convicted as an adult.¹⁰⁴ Mississippi does have reverse waiver laws, which allow the criminal court to send the case to the youth court.¹⁰⁵ However, this power is limited. The criminal court is not allowed to send the case to youth court if the youth is there due to the “once an adult always an adult” law or if the youth was previously convicted for a crime that the criminal court had original jurisdiction over.¹⁰⁶

Similarly to Massachusetts, convicted youth in Mississippi are housed in

⁹⁷ SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION POLICY, 103 DOC § 519.05(F) (MASS. DEP'T OF CORRECTION 2016).

⁹⁸ MASS. GEN. LAWS, ch. 119, § 72B (2017).

⁹⁹ MISS. CODE ANN. § 43-21-157 (8) (2017) (“Once an adult always an adult is principle employed by the Mississippi courts under this statute; once a circuit court has jurisdiction over the youth, the jurisdiction of the youth court is terminated for any future offenses.”).

¹⁰⁰ MISS. CODE ANN. § 43-21-157(1) (2017).

¹⁰¹ MISS. CODE ANN. § 43-21-157(5) (2017).

¹⁰² *Id.*

¹⁰³ MISS. CODE ANN. § 43-21-151(1) (2017).

¹⁰⁴ MISS. CODE ANN. § 43-21-157(8)–(9) (2017).

¹⁰⁵ MISS. CODE ANN. § 43-21-159(4) (2017).

¹⁰⁶ *Id.*

youthful offender units.¹⁰⁷ Mississippi goes further by requiring that all juvenile detention centers and youthful offender units provide proper rehabilitative, educational, and mental health services.¹⁰⁸ Youth awaiting trial are not as fortunate. While youth being tried in the juvenile court are protected from being placed in jails or other detention facilities with adults, transferred youth are not offered that protection.¹⁰⁹

C. Oregon

Oregon allows transfers through judicial discretion, statutory exclusion, and “once an adult always an adult” laws.¹¹⁰ Oregon’s “once an adult always an adult” laws are limited to offenders 16 and older.¹¹¹ It is up to the judge trying the original case to enter an order requiring future cases to also be waived.¹¹² For any transfer, the youth must be at least 15.¹¹³ Judicial discretion allows the judge to waive youth 15 or older for murder, class A or B felonies, escape in the second degree, assault in the third degree, coercion, arson in the second degree, robbery in the third degree, and class C felonies in which the youth used or threatened to use a firearm.¹¹⁴ The statute also requires that the youth be mature enough to appreciate the nature of their conduct and for the judge to determine, by a preponderance of the evidence, that retaining the youth would not serve the best interest of the youth and society.¹¹⁵ Measure 11 mandates statutory exclusion. Measure 11 requires a youth charged with any of 21 crimes to be prosecuted in adult court.¹¹⁶ While most youth charged under Measure 11 are convicted of crimes outside of Measure 11, they are still subject to adult sentencing guidelines and have the conviction on their adult record.¹¹⁷

Youth convicted of adult crimes are kept out of adult corrections facilities. The DOC gives custody of the youth to the Oregon Youth Authority (“OYA”) which runs the youth detainment facilities.¹¹⁸ Youth can stay in these facilities until they are 25 if their sentence ends before their 26th birthday, but if it does not, they are

¹⁰⁷ MISS. CODE ANN. § 47-5-1401(1)–(2) (2017).

¹⁰⁸ SARAH ALICE BROWN, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2001–2011, 11 (2012) (ebook).

¹⁰⁹ MISS. CODE ANN. § 43-21-315(2) (2017).

¹¹⁰ Griffin et al., *supra* note 48, at 3.

¹¹¹ *Id.* at 7.

¹¹² OR. REV. STAT. § 419C.364 (2017).

¹¹³ OR. REV. STAT. § 419C.349(1) (2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ JASON ZIEDENBERG ET AL., CAMPAIGN FOR YOUTH JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON’S YOUTH 3 (2011) (ebook).

¹¹⁷ *Id.*

¹¹⁸ OR. REV. STAT. § 137.124(5)(a) (2017).

transferred when they turn 25.¹¹⁹ They can also be kept in the youth facilities if the DOC and OYA believe the youth should stay there because of their age, maturity, mental condition or risk of physical harm.¹²⁰ Transferred youth can be placed in jails with adult offenders if they are 16 or older and if the official responsible for managing the jail agrees to detain the youth.¹²¹

D. Comparison and Recommendation

For transfers, the Massachusetts system is the best of the three states, because it only allows transfers for the two most serious crimes and only for youth over a certain age, which is preferable to the approach taken by Oregon and Mississippi. Oregon, however, has the best practice for detaining transferred youth. By holding transferred youth in youth facilities until they become adults (at 25), many of the physical and social harms to youth are avoided.

The best approach would be to get rid of transfers altogether. As discussed above, transfers are detrimental to youth in many ways and have a negative impact on both individuals and society. Furthermore, transfers disregard the fact that young offenders are different and less culpable than their adult counterparts. By no longer allowing transfers, youth would be significantly more likely to be treated appropriately and not suffer as much harm. Children need to be treated like children.

V. AGE OF CRIMINAL RESPONSIBILITY

A. Massachusetts

While the age of automatic criminal responsibility is set at 18 in Massachusetts, the above-mentioned transfer law realistically sets it at 14 for first and second-degree murder. As for other crimes, youth 14 and older are tried either as delinquent children or youthful offenders depending on the seriousness of the offense. Youth between 7 and 13 are only tried as delinquent children regardless of the severity of the offense. Youth under 7 are not considered capable of committed a legal offense.¹²² While both youthful offenders and delinquent children are considered delinquency offenders, they still are tried and convicted for committing the crime, and sentenced accordingly, but their records are more easily expunged, and their sentences are less severe. In acknowledgement of the scientific research on brain development, a bill has been introduced in Massachusetts to raise the age of criminal

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ OR. REV. STAT. § 419C.130(1)(b)(A)–(B).

¹²² MASS. GEN. LAWS ANN. ch. 119, § 52 (2017).

responsibility from 18 to 21.¹²³ The current transfer statute would still stand.¹²⁴ If passed, Massachusetts would be the first state to raise the criminal age of responsibility above 18.¹²⁵

B. *Mississippi*

Mississippi also has set the automatic age of criminal responsibility at 18.¹²⁶ Since transfer laws realistically set the age of criminal responsibility, that age is effectively 13 in Mississippi.¹²⁷ Mississippi also has an exception for anyone that is actively enrolled in the military or married.¹²⁸ Mississippi's official minimum age of criminal responsibility is 10, meaning that the youth cannot be charged criminally but this does not necessarily mean the youth is safe from being charged as a delinquent.¹²⁹

C. *Oregon*

Just like Massachusetts and Mississippi, Oregon's standard age of criminal responsibility is 18.¹³⁰ As discussed above, youth can be transferred once they are 15 to be held criminally responsible.¹³¹ Oregon has no minimum age at which a youth can be tried as a delinquent. However, youth younger than 12 cannot be sentenced to detainment in corrections facilities.¹³²

D. *Comparison and Recommendation*

While all three states have set the age of juvenile-court jurisdiction at 18 and younger in their transfer laws and juvenile jurisdiction laws, Massachusetts has the best transfer policies, and a clear minimum age of delinquent responsibility of seven makes it better than the policies in Mississippi and Oregon. Massachusetts also has separate categories for youths 14 and older versus 7 to 14, which is another good policy because it shows acknowledgement of different stages of development. Mississippi's transfer laws and lack of a minimum age of delinquency make it the

¹²³ Shira Schoenberg, *Massachusetts Lawmakers to Consider Raising Juvenile Court Age from 18 to 21*, MASS LIVE (Feb. 6, 2017), http://www.masslive.com/politics/index.ssf/2017/02/massachusetts_lawmakers_to_con.html.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ MISS. CODE ANN. § 43-21-105(d) (2018).

¹²⁷ MISS. CODE ANN. § 43-21-151(3) (2017).

¹²⁸ MISS. CODE ANN. § 43-21-105(d) (2018).

¹²⁹ *Minimum Age of Criminal Responsibility Continues to Divide Opinion*, THE ECONOMIST (Mar. 15, 2017), <https://www.economist.com/blogs/graphicdetail/2017/03/daily-chart-7>.

¹³⁰ OR. REV. STAT. § 419C.005 (2017).

¹³¹ OR. REV. STAT. § 419C.349(2) (2017).

¹³² OR. REV. STAT. § 419C.478 (2017).

least preferable. Oregon's are not significantly better but the minimum age for transfers is higher and having a minimum age for when a youth can be detained makes it a step above Mississippi.

The best policy would be to raise the age of criminal responsibility to 21, as Massachusetts is considering doing, and get rid of transfers. Having the age of criminal responsibility set at 21 reflects the research that shows that the human brain becomes fully developed around 21; therefore, that is the age at which a person can be held fully culpable. For youth younger than 21, there should be at least two tiers of culpability. Oregon's approach is a good example. Oregon sets a minimum age at which harsher punishments, such as detainment, are possible; the next age range is for older youth, up to 21, who are treated as more culpable than younger offenders. Even more tiers should be added, however, because a youth's punishment needs to be appropriate for both the crime they committed and for their level of development and maturity.

VI. MENTAL ILLNESS

A. *Massachusetts*

Massachusetts requires a mental health screening upon the original detention of a youth.¹³³ A standard evaluation tool, the MAYSI-2, which is the most commonly used evaluation tool across the country, is used statewide.¹³⁴ While Massachusetts requires screening, it does not require that actions be taken based on the results. Once the screening is done, either the attorney or social service worker must raise the issue for it to be considered.¹³⁵ Once this is done, the judge has the discretion to send the youth to a clinic or the department of mental health for further evaluation.¹³⁶ This can only be done with the consent of the youth's parent or guardian.¹³⁷ If the judge does send the youth to a clinic and the guardian consents, then the youth receives a full evaluation that looks into the parents, school, social services, and any mental health providers.¹³⁸ The evaluating agency then provides the court with its report and recommendations.¹³⁹ It is then up to the judge whether to follow the recommendations or not.¹⁴⁰ If the judge does so, then the youth gains access to treatment services.

¹³³ Wachter, *supra* note 18, at 2.

¹³⁴ *Id.* at 3.

¹³⁵ SKOWYRA & COCOZZA, *supra* note 17, at 69.

¹³⁶ MASS. GEN. LAWS ANN. ch. 119, § 68A (2017).

¹³⁷ *Id.*

¹³⁸ SKOWYRA & COCOZZA, *supra* note 17, at 69.

¹³⁹ ch. 119, § 68A.

¹⁴⁰ SKOWYRA & COCOZZA, *supra* note 17, at 69.

B. *Mississippi*

In Mississippi one of the factors to be considered in sentencing is the mental health history of the youth.¹⁴¹ However, many people do not have a documented mental health history because they have never sought out evaluation or treatment. For youth to be evaluated, an interested party must submit an affidavit to the court.¹⁴² The court must then determine if there is enough evidence to establish probable cause such that the youth needs mental health services.¹⁴³ If the court finds there is probable cause, then the youth receives a mental health screening. Mississippi also uses the MAYSI-2.¹⁴⁴ After the screening, if the court finds probable cause that the youth need mental health services, then it must commit the youth to the least restrictive treatment facility.¹⁴⁵ If there is no reasonable alternative to detention, then the youth gets committed to a licensed medical facility.¹⁴⁶

Mississippi requires a mental health screening, the MAYSI-2, after admission to a juvenile detention center.¹⁴⁷ This is good because it ensures that all detained youth will be screened and hopefully treated, but it only covers those detained and, since it happens after sentencing, it does not have any effect on the youth's sentence.

C. *Oregon*

Oregon judges have the discretion to sentence youth to mental health treatment and examination.¹⁴⁸ Youth must raise mental health as a defense in order to guarantee the court will consider it before sentencing in Oregon.¹⁴⁹ The youth must provide the court with a psychiatric report or psychological evaluation.¹⁵⁰ At that point, the State can have the youth evaluated again by their own psychiatrist.¹⁵¹ If the court finds that the youth has a mental health defense, then it can sentence them to a secure mental hospital or facility, place them on conditional release, or place them in treatment outside of a facility.¹⁵²

There is no requirement to screen youth upon detention in Oregon.¹⁵³ Each

¹⁴¹ UNIF. RULES OF YOUTH COURT PRACTICE § 26(6)(vi), MISS. BAR, <https://www.msbar.org/media/2362/appendix-youth-court-rules.pdf> (last visited Oct. 27, 2018).

¹⁴² MISS. CODE ANN. § 41-21-65(2) (2018).

¹⁴³ UNIF. RULES OF YOUTH COURT PRACTICE § 32(a)(1)(ii), MISS. BAR, <https://www.msbar.org/media/2362/appendix-youth-court-rules.pdf> (last visited Oct. 27, 2018).

¹⁴⁴ Wachter, *supra* note 18, at 2.

¹⁴⁵ MISS. CODE ANN. § 43-21-67(4) (2018).

¹⁴⁶ *Id.*

¹⁴⁷ MISS. CODE ANN. § 43-21-321(1) (2018).

¹⁴⁸ OR. REV. STAT. § 419C.507 (2017).

¹⁴⁹ OR. REV. STAT. § 419C.524 (2017).

¹⁵⁰ *Id.*

¹⁵¹ OR. REV. STAT. § 419C.527 (2017).

¹⁵² OR. REV. STAT. § 419C.529 (2017).

¹⁵³ Wachter, *supra* note 18, at 1; OR. ST. CT. JUV. JUST. MENTAL HEALTH TASK FORCE,

county handles screening and treatment differently.¹⁵⁴ As of August 2015, only 37% of juvenile departments were conducting mental health screenings.¹⁵⁵ Furthermore, because there is no specified screening tool and the facilities are controlled at the county level there is no effective data sharing between facilities or treatment providers.¹⁵⁶ While the overwhelming number of detention facilities and judges in Oregon want more mental health options, funding is a major obstacle.¹⁵⁷ Because youth are not eligible for federal Medicaid while incarcerated, they cannot receive help from the Oregon Health Plan, placing the financial burden directly on the state and county governments.¹⁵⁸

D. Comparison and Recommendation

Again, Massachusetts has the best practice. Out of the three states, Massachusetts is the only state that requires a mental health evaluation prior to sentencing. While Mississippi also requires a screening using a standard tool, the evaluation does not happen until after sentencing which does not allow the judge to sentence with all the necessary information. Oregon comes in dead last because no screening is required at all and there is not a standard tool used even when evaluations are performed. If the youth brings up the argument before sentencing and convinces the court of legitimacy of the mental health concern, then all three states provide similar treatments options with the preferable option being court required outpatient therapy.

The best practice would be for all states to require a mental health screening upon arrest. This would be the most encompassing strategy. If this is done, many youth who are arrested will not even make it to the next stages of the system and will simply be released. It would be best to evaluate them first so that if there are problems, they can be addressed before the youth commits another offense or just so that they can be assessed with it as part of the analysis. If the youth does proceed to a criminal or delinquency trial, the mental health evaluation should be automatically entered into the record and the judge should be required to consider it during sentencing. After that, treatment needs to be a priority because treating these offenders is the best way to help both them and society.

VII. SENTENCING

A. Massachusetts

Once a youth is shown to be guilty beyond a reasonable doubt there are two

REPORT AND RECOMMENDATIONS 1 (2016).

¹⁵⁴ OR. ST. CT. JUV. JUST., *supra* note 153, at 1.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 1–2.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 7.

immediate options in Massachusetts. First, with the consent of the youth and at least one of their guardians, the judge can continue the case as if there was no finding and place the youth on probation.¹⁵⁹ Depending on the timing of the youth's case, the probation can last until they are 20.¹⁶⁰ Second is placing the case on file, which leaves the judge with a few options. The judge can place the youth on probation, commit them to the department of youth services, sentence as provided by law, or assign a combination sentence.¹⁶¹ Probation and commitment to the department of youth services can both be suspended and cannot go past the offenders 21st birthday.¹⁶² Sentencing the youth as provided by law means that the youth faces the same sentence as an adult would face for the same crime, this type of sentence cannot be reduced or suspended.¹⁶³ In combination sentencing, a judge can sentence the offender to the department of youth services until they turn 21 and a house of correction or state prison for the remainder of their sentence.¹⁶⁴

Before sentencing, a sentencing-recommendation hearing is held.¹⁶⁵ A pre-sentencing investigation report must be provided to all the parties at least seven days before the hearing.¹⁶⁶ When sentencing a youth, the judge is required to consider at least eight factors: the nature and circumstances of the offense, the victim impact statement, a report by a probation officer about the history of the offender, the offenders court record, past treatment effectiveness, the services available in the juvenile justice system, the age and maturity of the offender, and the likelihood of avoiding future offending.¹⁶⁷ If the offender has certain past offenses then the judge must place them in the custody of the state for at least one year.¹⁶⁸ All statutes in the juvenile code are to be interpreted liberally so that "the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."¹⁶⁹ That mirrors the sentiment expressed by the Massachusetts Supreme Court:

From these pronouncements, the principal aim and underlying philosophy of our juvenile justice system become clear This is not a punitive scheme strictly akin to the adult criminal justice system. Rather, it is primarily

¹⁵⁹ MASS. GEN. LAWS, ch. 119, § 58 (2017).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ JUV. CT. WORKING GRP., *supra* note 1, at 11.

¹⁶⁷ *Id.*

¹⁶⁸ MASS. GEN. LAWS, ch. 119, § 58 (2017).

¹⁶⁹ MASS. GEN. LAWS ANN. ch. 119, § 53 (2017).

rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward “the correction and redemption to society of delinquent children.”¹⁷⁰

B. Mississippi

When determining the sentence of a youth in Mississippi, a judge must consider the following factors: nature of the offense, number of previous offenses, the child’s need for care, medical and mental health history, school records, and the recommendation from the school.¹⁷¹ Mississippi gives the judge a fair number of options in sentencing. A judge can sentence the youth to be detained, release them, place them in the custody of the parents with conditions and limitations, place them on probation, order treatment for the child and their guardians, order restitution, levy a fine, suspend the child driver’s license, or take custody away from the parents.¹⁷²

C. Oregon

Oregon judges are instructed to consider the gravity of the crime, the manner in which the youth committed it, the youth’s past juvenile court record, protection to the victim and the community, whether the youth has attempted to reform themselves, their school record, employment record, the recommendations parties involved, and the mental, emotional, and physical health of the youth.¹⁷³ The judge is left with the discretion to sentence the youth to probation or detention, levy fines or restitution, or require addiction or mental treatment, and/or education training for the guardians.¹⁷⁴ If the youth is sentenced to detainment, they are held by the Oregon Youth Authority and can be held there until they turn 25.¹⁷⁵ The sentences cannot exceed certain lengths depending on the crime committed; that limit can be anywhere between 30 days and life with parole.¹⁷⁶ The exception to the youth sentencing structure is if the youth is transferred, in which case they are subject to the adult sentencing schemes if not transferred back for sentencing.

D. Comparison and Recommendation

While all three states require the judge to consider similar factors, Massachusetts stands out because it is the only one that requires a pre-sentencing

¹⁷⁰ Commonwealth v. Magnus, 961 N.E.2d 581, 584 (Mass. 2012) (internal quotations omitted).

¹⁷¹ MISS. CODE ANN. § 43-21-603(3) (2018).

¹⁷² MISS. CODE ANN. § 43-21-605(1) (2018).

¹⁷³ OR. REV. STAT. § 419C.411 (2017).

¹⁷⁴ OR. REV. STAT. § 419C.446, 450, 453, 459, 573, 575 (2017).

¹⁷⁵ OR. REV. STAT. § 419C.495(2) (2017).

¹⁷⁶ OR. REV. STAT. § 419C.501(1) (2017).

investigation. However, Massachusetts is worse than Mississippi and Oregon for non-transferred sentencing. While Massachusetts's law claims that sentencing should be done with the care of the child in mind, its sentencing laws are more rigid than Mississippi or Oregon. Examples of this are the sentence according to law sentencing that applies the same sentencing schemes to youth as adults and the requirement that a second-time offender be placed in detainment for a year. Oregon stands out in two ways. First, there are strict detention-sentence maximums for youth, most of which are appropriately low. Second, to the extent that youth-sentencing statutes list all the options available for sentencing, they provide a reminder to judges that they are available and a give a strong basis for more lenient sentencing.

The best option for pre-sentencing is to require an investigation of the youth before sentencing that evaluates the youth's maturity, intelligence, mental health, school record, home life, drug or alcohol abuse, parental abuse, parental neglect, social environment, and potentially helpful options that the juvenile justice system can offer. This report should be automatically included in the record. By doing so, the judge would be better equipped to appropriately sentence the individual.

Sentencing a youth to detention should be a last resort, and there should be no mandatory minimum sentences for youth. Diversion programs have been shown to lower recidivism and save significant amounts of money, making diversion the best option for most youth. Also, due to continuing mental development, youth are more malleable to change, which makes them more likely to benefit from rehabilitative programs. Mandatory minimums for youth are entirely inappropriate. Because of the impressionable nature of youth, they are more affected by their environment. Mandatory minimums prohibit the judge from considering all the factors listed above that are necessary to sentence a youth properly. Each youth is different; some may commit crime just because of the thrill, while others commit crime due to strong social pressures. Those differences need to be considered.

VIII. REAL LIFE EXAMPLES

A. *Massachusetts*

When Jefferson Alvares was 16 he was expelled and arrested for fighting. He was eventually sentenced and placed in the custody of the Department of Youth Services ("DYS").¹⁷⁷ In a punitive state this could have been the beginning of the end for him. However, Massachusetts' juvenile justice system is more rehabilitative than retributive. DYS helped teach Alvares how to be respectful and how to deal with his emotions so that he could have healthy, normal responses in his interactions

¹⁷⁷ Sam Cote, *Senate Criminal Reform Bill Addresses Juvenile Justice, Changing Age of Adulthood*, TELEGRAM (Nov. 4, 2017), <http://www.telegram.com/news/20171104/senate-criminal-reform-bill-addresses-juvenile-justice-changing-age-of-adulthood>.

with others.¹⁷⁸ He now is a youth leader at UTEC, which is an organization that helps at-risk youth escape violence and poverty.¹⁷⁹ He is also studying to get his GED and plans to become a paramedic.¹⁸⁰ He is the advocate for a bill that will allow youth to have their records expunged quicker. He says it is important for youth to be able to get their records expunged because even sealed records can withhold opportunities that would be available otherwise.¹⁸¹

B. *Mississippi*

Alonté Davis Anderson was arrested for his third time when he was 17.¹⁸² The first two times were from having the police called due to loud arguments with his mom.¹⁸³ The first of those placed him in a juvenile corrections facility for a week; the second put him back in the same facility for two weeks.¹⁸⁴ Had it not been for his neighbor, the third time could have been much longer. A house had just been broken into a few minutes before the police picked up and arrested Anderson who was biking home from school.¹⁸⁵ While he was proven innocent by his neighbor's testimony, that the robbers had been significantly shorter than Anderson, he still spent 3 days back at the juvenile corrections facility waiting for the hearing.¹⁸⁶ Anderson is convinced that, had his neighbor not been there, he would have been convicted for the crime he did not commit.¹⁸⁷ Anderson said that all three interactions with the police and juvenile justice system were like junior high preparing you for high school.¹⁸⁸ The police, judges, and corrections facility all assumed that the youth were guilty and doomed to a life of crime, so they treated the youth as if preparing them to spend life in and out of jail.¹⁸⁹ He said that they all do the bare minimum required by the state.¹⁹⁰ While for many, as discussed above, this type of environment becomes a self-fulfilling prophecy, that was not the case with Anderson. Because the juvenile justice system in Mississippi is so bad, his frustration has led him to have political aspirations, and he wants to fix the broken

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Arielle Dreher & Maya Miller, *Junior Jail: Surviving Mississippi's Juvenile Justice System*, JACKSON FREE PRESS (June 8, 2016), <http://www.jacksonfreepress.com/news/2016/jun/08/junior-jail-surviving-mississippi-juvenile-justice/>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

system that dooms youth to failure.¹⁹¹

C. Oregon

While Measure 11 causes Oregon to put many youth into corrections facilities, for the most part, the facilities focus on rehabilitation. For example, MacLaren Juvenile Detention Facility tries to make education feel normal. The facility has a separate building that looks like a regular school.¹⁹² The school has the normal classes held at normal times.¹⁹³ The youth in the facility follow a normal schedule, wake up, go to school, have a lunch break, go back to school, and then have some free time.¹⁹⁴ The school offers more than just the normal academia found in most schools. The facility teaches vocations just as mechanics, woodworking, and firefighting.¹⁹⁵ The upper division students in the firefighting program work in the field as part of a firefighting team.¹⁹⁶ The facility also has a partnership with the local community college so that youth held in the facility can take college classes.¹⁹⁷ This focus on reentry provides many opportunities for youth that would likely not exist for them under a retributive policy scheme.

IX. CONCLUSION

A. Ways to Implement

There are a few ways in which the United States can implement national changes that will move the law away from retribution and towards rehabilitation. The first, and most simple, is for all the States to simply do it on their own. States have the full authority to decide to become purely rehabilitative in the way they deal with offenders. For example, the Oregon legislature would need to start by either amending or repealing and replacing the sections of Measure 11 which pertain to juveniles. The legislature could pass laws that eliminate juvenile transfers to adult court, raise the age of criminal responsibility to 21 (like Massachusetts is considering), and eliminate mandatory sentencing schemes. Furthermore, the legislature could pass laws to implement mental health screenings for all youth that are arrested and require screening to be entered into the record before sentencing. Another option is for State supreme courts to interpret *Miller* liberally to mean that

¹⁹¹ *Id.*

¹⁹² John Holland, *From Detention to Graduation: Examining Role of Education in U.S. Juvenile Justice System*, JUV. JUST. INFO. EXCHANGE (Oct. 18, 2017), <http://youthtoday.org/2017/10/from-detention-to-graduation-examining-role-of-education-in-u-s-juvenile-justice-system/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

all juvenile mandatory sentencing is unconstitutional like Iowa did.¹⁹⁸ Courts could potentially use *Miller* even further to hold other punitive policies unconstitutional and infer extra rights for youth.

The second is through the federal spending power. While this would not require all states to abide by the rules, it would incentivize them to do so. The Prison Rape Elimination Act is a good example of the federal government using its spending power to push reform. If the federal government chose to give out significant sums of money to states that followed federal guidelines, many states would follow them because everyone likes money. Finally, and currently the most likely option for nationwide change, is for the Supreme Court to fulfill Chief Justice Roberts' premonition that all mandatory sentencing for youth will be abolished and to continue striking down other retributive policies against youth while placing more scientific acknowledgements into case law based on the Eighth and Fourteenth Amendments.

B. End Note

While the United States has far to go and may never fully cast off retribution in favor of rehabilitation, the general trend for the past century, except for backwards tumble in the 1990's, has been towards rehabilitation. Scholars are much more unified now in pushing for rehabilitation than they were back then. The Supreme Court has decided multiple cases acknowledging the scientific differences between adults and youth. These are clear signs that the United States is moving in the right direction and will hopefully continue to do so. The quicker the law focuses on the rehabilitation of youth the better – for humanitarian purposes, for society, for our children, and for our future.

¹⁹⁸ State v. Lyle, 854 N.W.2d 378, 401–02 (Iowa 2014).