

Fall 2014

Stop Presumptive Transfers: How Forcing Juveniles to Prove They Should Remain in the Juvenile Justice System is Inconsistent with Roper v. Simmons & Graham v. Florida, 48 J. Marshall L. Rev. 365 (2014)

Rachel Fugett

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STOP PRESUMPTIVE TRANSFERS: HOW
FORCING JUVENILES TO PROVE THEY
SHOULD REMAIN IN THE JUVENILE
JUSTICE SYSTEM IS INCONSISTENT
WITH *ROPER V. SIMMONS & GRAHAM V.
FLORIDA*

RACHEL M. FUGETT*

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I. INTRODUCTION

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”¹

* J.D., May 2015, The John Marshall Law School; B.A. Lewis University, 2011. I would like to thank and dedicate this article to the most important and influential people in my life, my friends and family. Thank you Paula, Randy, Matthew, and Megan Fugett for your endless love, support, and encouragement. A special thank you to all of my close friends in law school who supported me throughout the entire process including, but not limited to, Michael Czopkiewicz, M. Catelyn Anderson, Ryan Hennen, Morgan Mackovjak, Zain Ali, Haley Flans, Elizabeth Casey, Meghan Troc, Alexis Pool, Heather Hensley, and Mary Ellen Richardson. Sincerest gratitude to Michael Czopkiewicz and Professor Mary Nagel for introducing me to this topic. Finally, thank you to my two highly esteemed editors, Alex Whitt and Joseph Swee for all of your hard work and dedication to my article.

1. United States. v. Cunningham, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010).

In the late 1980s and early 1990s, every state responded to what appeared to be a dramatic increase in violent juvenile offenses by enacting laws that transfer juveniles into the adult criminal justice system (“juvenile transfer laws”).² Juvenile transfer laws allow for, and in some instances require, juveniles to be prosecuted in the criminal justice system, even if they satisfy the juvenile justice system’s jurisdictional age requirement.³ States use three mechanisms to transfer juveniles into the adult criminal justice system: judicial waivers, prosecutorial waivers, and statutory exclusions.⁴ Because of these mechanisms, the number of adolescents under the age of eighteen that were incarcerated in adult prisons increased 208% between 1990 and 2004.⁵ Unfortunately, there are few accurate statistics detailing the total number of juveniles transferred into the adult criminal justice system each year.⁶ But general studies estimate that as many as 250,000 adolescents are prosecuted, sentenced, or incarcerated as adults each year.⁷ In fact, about ten percent of

2. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 7 (2011), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf; *see also* ROBERT HAHN ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, DEPT OF HEALTH AND HUMAN SERVICES, EFFECTS ON VIOLENCE OF LAWS & POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM 2 (2007), *available at* <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf> (asserting that from 1992–1999, forty-nine states enacted new juvenile transfer mechanisms that make it easier for juveniles to be transferred to the adult criminal justice system).

3. ARYA, *supra* note 2, at 5.

4. *See id.* (describing each of these transfer methods); *see also* PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (explaining that additional transfer laws include mandatory waivers, reverse waivers, and criminal blending sentencing); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, JUVENILE TRANSFER TO CRIMINAL COURT, *available at* http://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited Sept. 19, 2014) (explaining that other “mechanisms” to compel juvenile transfers to the adult criminal justice system exist, such as presumptive waivers and “once an adult always an adult” or automatic transfer legislation).

5. CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME AND DELINQUENCY, YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2006), *available at* <http://www.wcl.american.edu/endsilence/documents/youthunder18intheCJsystem.pdf>.

6. GRIFFIN ET AL., *supra* note 4, at 1.

7. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 3 (2012), *available at* <http://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf>; HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), *available at* <http://www.ojjdp.gov/>

adolescent offenders are incarcerated in adult prisons or jails.⁸

Since the early 1990s, Illinois has enacted more transfer provisions and laws than any state except for California.⁹ In 1992, Illinois implemented juvenile transfer laws.¹⁰ This host of laws included discretionary judicial waivers,¹¹ mandatory judicial waivers,¹² presumptive judicial waivers,¹³ automatic transfers,¹⁴ and blended sentencing.¹⁵ Illinois never enacted prosecutorial discretion waivers and, in 2009, repealed reverse waivers.¹⁶ Even though California and Illinois have enacted the most juvenile transfer laws, Florida transfers the largest number of juveniles per capita into the adult criminal justice system each year.¹⁷ Between 2003 and 2008, California transferred only about twenty juvenile cases into the adult criminal justice system each year.¹⁸ Although it is unclear how many juvenile cases Illinois transfers in an average year, the state transferred over 120 juveniles into the adult criminal justice system in 2008 alone.¹⁹

Concurrent with the states' expansive juvenile transfer legislation, the Supreme Court expanded its Eighth Amendment jurisprudence. Specifically, the Court held that the Eighth

ojstatbb/nr2006/downloads/NR2006.pdf; JASON ZIEDENBERG, NAT'L INST. OF CORR., U.S. DEPT OF JUSTICE, YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 2 (2011), available at <http://static.nicic.gov/Library/025555.pdf>.

8. GRIFFIN ET AL., *supra* note 4, at 3.

9. *See id.* (explaining that Florida transfers eight times the number of juveniles that California does).

10. *Illinois Jurisdictional Boundaries*, JUVENILE JUSTICE GEOGRAPHY, POLICE, PRACTICE & STATISTICS, <http://jjgps.org/jurisdictional-boundaries/illinois#age-boundaries> (last visited Oct. 11, 2014) [hereinafter *Illinois Jurisdictional Boundaries*].

11. LINDSAY BOSTWICK, ILL. JUVENILE JUSTICE COMM'N, ILL. CRIMINAL JUSTICE INFORMATION AUTH., POLICIES AND PROCEDURES OF THE ILLINOIS JUVENILE JUSTICE SYSTEM 12 (2010), available at http://www.icjia.state.il.us/public/pdf/ResearchReports/IL_Juvenile_Justice_System_Walkthrough_0810.pdf; *see also* GRIFFIN ET AL., *supra* note 4, at 3 (depicting Illinois's juvenile transfer laws as including discretionary, presumptive, and mandatory waivers; statutory exclusions; "once an adult always an adult laws;" and blended sentencing).

12. BOSTWICK, *supra* note 11, at 12.

13. *Id.* at 13.

14. *Id.* at 7.

15. *Id.* at 13.

16. *Illinois Jurisdictional Boundaries*, *supra* note 10.

17. *See* GRIFFIN, *supra* note 4, at 3 (explaining that Florida transfers eight times the number of juveniles that California does).

18. *Id.* at 18.

19. *Id.*; *see* ERICA HUGHES & LINDSAY BOSTWICK, ILL. JUVENILE JUSTICE COMM'N, ILL. CRIMINAL JUSTICE INFORMATION AUTH., JUVENILE JUSTICE SYSTEM AND RISK FACTOR DATA (2008), available at http://www.icjia.state.il.us/public/pdf/ResearchReports/JJSRF_Data_2008_Annual_Rpt_March_2011.pdf (stating that, in 2008, 120 juveniles in Illinois, not including juveniles in Cook County, were transferred into the adult criminal justice system).

Amendment categorically bars juveniles from being executed or sentenced to life in prison without parole for non-violent crimes.²⁰ As part of the Court's analysis, these landmark cases stressed the fundamental and psychological differences between adolescents and adults. The Court reasoned that juveniles are less culpable for wrongdoing and have a greater capacity for change.²¹ Based on these distinctions, the Court found that juveniles should be punished and sentenced differently than adults.

Overly expansive juvenile transfer laws are inconsistent with the Court's reasoning because their primary objective is to transfer juveniles into the adult criminal justice system solely for the purpose of punishing and sentencing them like adults. In so doing, expansive juvenile transfer laws, more often than not, largely ignore a juvenile's diminished culpability and greater capacity for change.

Part II of this Comment provides an overview of the juvenile justice system, focusing primarily on its history and purpose. It explores juvenile transfer legislation and discusses the various types of juvenile transfer mechanisms. This section also examines the Eighth Amendment in conjunction with the Supreme Court's response to over expansive juvenile transfer legislation. Part III of this Comment analyzes the ways in which presumptive waivers are inconsistent with the Supreme Court's jurisprudence. It also examines the Illinois statute, 705 ILL. COMP. STAT 405/5-805. Part IV of this Comment proposes that the Illinois legislature should amend that statute to eliminate the presumptive waiver.

II. BACKGROUND INFORMATION

A. An Overview of the Juvenile Justice System and Juvenile Transfers Laws

The juvenile justice system was created in 1899²² as a distinct justice system for juveniles.²³ The system's primary purpose was

20. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005); *Graham v. Florida*, 560 U.S. 48, 75 (2010); Joanna L. Visser & Jeffrey J. Shook, *The Supreme Court's Emerging Jurisprudence on the Punishment of Juveniles: Legal and Policy Implications*, 49 CT. REV. 24, 24 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Visser.pdf>.

21. Visser & Shook, *supra* note 20, at 27–28.

22. JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT' OF JUSTICE, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* ix (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

23. Before the inception of the juvenile justice system, and throughout practically all of the 19th century, the American criminal justice system prosecuted and sentenced children as adults. RICHARD LAWRENCE & CRAIG HEMMENS, *JUVENILE JUSTICE* 20–21 (2008), available at http://www.sagepub.com/upm-data/19434_Section_I.pdf. Children did not receive any

to focus on the rehabilitation of adolescents by balancing their treatment with the “welfare”²⁴ and “the best interest of the child.”²⁵ In the late 1980s and early 1990s, however, the public and state legislatures turned their back on this purpose.

During this time period, violent juvenile crime appeared to be drastically increasing.²⁶ Although this was a nation-wide misconception, the public decided that the juvenile justice system was not harsh enough on juvenile offenders.²⁷ Legislative policymakers and legal professionals, who have always struggled to determine whether a juvenile should be transferred to the adult criminal justice system, reacted swiftly and severely.²⁸ Ignoring the need for a more measured approach, state legislators decided to “get tough” on juvenile crime by revising existing or enacting new transfer legislation.²⁹ As state legislators reacted to the public’s reaction to the “crime wave,” they made it easier to transfer juveniles into the adult criminal justice system.³⁰ These

accommodations; they did not have separate provisions, statutes, or incarceration facilities. *Id.* In 1899, the very first juvenile court was founded in Chicago, Illinois. *Id.* at 20.

24. AUSTIN ET AL., *supra* note 22, at ix.

25. LAWRENCE & HEMMENS, *supra* note 23, at 20, 24 (asserting that the juvenile justice system’s goal was to alter juvenile offenders into constructive citizens by stressing “treatment” instead of punitive measures); *see also* TIMOTHY J. BRANDAU, CAMPAIGN FOR YOUTH JUSTICE, TRANSFER OF JUVENILE OFFENDERS TO ADULT COURT IN DELAWARE 1, *available at* www.campaignforyouthjustice.org/documents/DE_YouthTransfer.pdf (last visited Sept. 19, 2014) (describing how “[t]he original goals of the juvenile court were to investigate, diagnose, and prescribe treatment for offenders, not to adjudicate guilt or fix blame”).

26. SHAY BILCHIK, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, JUVENILE JUSTICE: A CENTURY OF CHANGE 4 (1999) *available at* <https://www.ncjrs.gov/pdffiles1/ojdp/178995.pdf>.

27. *Id.*

28. EDWARD P. MULVEY & CAROL A. SCHUBERT, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT 2–3 (2012), *available at* <http://www.ojdp.gov/pubs/232932.pdf> (affirming that “policymakers and professionals” have strong beliefs about whether juvenile offenders should be prosecuted and sentenced in a different manner than adult offenders).

29. Jeffrey A. Butts & Daniel P. Mears, *Reviving Juvenile Justice in a Get-Tough Era*, 33 YOUTH & SOC’Y, 169, 169 (2001), *available at* <http://www.sagepub.com/martin/Butts.pdf>.

30. From 1980 to 1994, the number of apprehensions for serious, violent offenses committed by juveniles increased by 64%. MULVEY & SCHUBERT, *supra* note 28, at 2. This increase drew relentless media coverage and drove “intense legislative activity” that resulted in modern state transfer laws. GRIFFIN ET AL., *supra* note 4, at 9. The legislative process included correcting and rewriting statutes to expand broaden eligibility for juvenile transfers into the adult criminal justice system. *Id.* In a short four-year span at the end of the 1980s (1986 to 1990), ten states enacted automatic transfer laws—a 50% increase—and eight implemented prosecutorial waiver systems—more than a

new juvenile transfer laws encompassed an array of changes, such as lifting age restrictions, increasing the number and classes of crimes that make juveniles eligible for transfer, adding statutory exclusions, and granting prosecutorial waivers.³¹

B. Modern Juvenile Transfer Laws

Most states have a variety of juvenile transfer laws or mechanisms in place.³² Although there are different types and combinations of juvenile transfer laws, they all fall into three basic categories: judicial waivers, prosecutorial waivers, and statutory exclusion laws.³³ The most traditional or common forms of juvenile transfer laws are judicial waivers.³⁴ Judicial waivers give the juvenile court judge discretion to waive juvenile court jurisdiction and transfer juveniles into the adult criminal justice system.³⁵ Prosecutorial waivers, on the other hand, place the discretion in the hands of prosecutors by allowing them to file cases in either the juvenile or adult criminal court.³⁶ Unlike judicial and prosecutorial waivers, statutory exclusions grant very little discretion.³⁷ Instead, they simply look at “who fell into the statutorily defined net of eligibility.”³⁸ Statutory exclusions largely

100% increase. *Id.* In recent years, though, the juvenile justice system has been the target of “increasing scrutiny.” LAWRENCE & HEMMENS, *supra* note 23, at 20.

31. MULVEY & SCHUBERT, *supra* note 28, at 2.

32. GRIFFIN ET AL., *supra* note 4, at 3.

33. *Id.* at 2.

34. *Id.* at 3. Throughout most of its history, the juvenile court system primarily gave discretion to the juvenile court judge when deciding to transfer a juvenile. MULVEY & SCHUBERT, *supra* note 28, at 2. Under modern transfer law, discretionary judicial waivers require the application of expansive standards and the balancing of specific factors. GRIFFIN ET AL., *supra* note 4, at 2. Often, courts will consider “the nature of the alleged crime and the individual youth’s age, maturity, history, and rehabilitative prospects.” *Id.* Most important, the prosecutors bear the burden of proving that the waiver is appropriate. *Id.* Presumptive waiver laws are different; they classify certain offenses as once for which transfer from the juvenile court to criminal court is “presumed appropriate.” *Id.* at 4. In such cases, the juvenile bears the burden of presenting evidence establishing that he or she would be an appropriate fit in the juvenile justice system. *Id.*

35. CHILDREN’S ACTION ALLIANCE, PROSECUTING JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM 6 (2003), available at http://www.njjn.org/uploads/digital-library/resource_119.pdf.

36. *Id.* An exercise of prosecutorial discretion “appears” to require a lower threshold than statutory exclusion. *Id.*

37. See HAHN, *supra* note 2. Statutory exclusions limit juvenile justice system jurisdiction with respect to certain crimes. *Id.* When a statutory exclusion applies, the prosecutor has discretion to decide what charges to file. *Id.* This decision “might determine whether the juvenile is transferred.” *Id.*

38. MULVEY & SCHUBERT, *supra* note 28, at 3.

bar specific juvenile offenders from accessing the juvenile court because of the *type* of crime that the juvenile committed.³⁹

Every state has at least one of these three general types of transfer laws.⁴⁰ However, most employ additional transfer mechanisms that do not fall within the three general categories of juvenile transfer laws, including “once adult, always adult” (or automatic transfer laws),⁴¹ reverse waiver laws,⁴² and blended sentencing laws.⁴³

C. Illinois Juvenile Transfer Laws

Illinois juvenile transfer statutes allow for automatic transfers⁴⁴ and blended criminal sentencing in the extended juvenile jurisdiction statute.⁴⁵ Automatic transfers automatically transfer a juvenile into the adult criminal justice system when statutory requirements are satisfied.⁴⁶ Extended juvenile jurisdiction statutes blend a juvenile’s sentence such that he or she receives both juvenile and adult sentences.⁴⁷ Like every other

39. *Id.*

40. GRIFFIN ET AL., *supra* note 4, at 3.

41. Automatic transfer laws provide that juveniles who have been previously prosecuted and convicted as adults must be automatically transferred to adult court for any subsequent offenses. *Id.* at 7.

42. Reverse waivers allow juveniles who have pending cases filed in criminal court to petition for removal to juvenile court. *Id.* Typically, reverse waivers are only available to juveniles who are still under the age of majority and whose case is “deemed inappropriate for the criminal court system.” HAHN, *supra* note 2, at 3.

43. Blended sentencing “allows a juvenile to be sentenced to both juvenile and adult sanctions by one court.” *Id.* Most commonly, a blended sentencing regime provides that the juvenile “is tried in juvenile court and given a juvenile disposition—but in combination with a suspended criminal sentence.” GRIFFIN ET AL., *supra* note 4, at 7. The effects of such sentencing regimes “are not well understood.” *Id.*

44. 705 ILL. COMP. STAT. 405/5-130 (2013). After initial passage in 1983, automatic transfer only applied to “murder, rape, sexual assault, or armed robbery[.]” KOLLMANN, *supra* note 49, at 12–13. Over the ensuing years, the legislature added additional offenses. *Id.* at 13. Illinois automatic transfer law became “the most racially biased drug transfer law in the Nation[.]” ARYA, *supra* note 2, at 35. Finally, in 2005, the legislature reduced the list of automatic transfer offenses for the first time, *id.*, by eliminating certain drug crimes. KOLLMANN, *supra* note 49, at 13. By 2007, “automatic transfers in Cook County” dropped “by more than two-thirds.” ARYA, *supra* note 2, at 35. The list of automatic transfer offenses still includes criminal sexual assault, aggravated battery with a gun, armed robbery with a gun, and carjacking with a gun. KOLLMANN, *supra* note 49, at 73.

45. 705 ILL. COMP. STAT. 405/5-710(1)(b) (2013).

46. RICHARD E. REDDING, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 2 (2010) available at <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

47. BOSTWICK, *supra* note 11, at 13.

state, Illinois enacted these statutory provisions in order to “get tough” on juvenile crime.⁴⁸

Illinois’s juvenile transfer laws are unlike most other states, though, because they are broader and more expansive.⁴⁹ Under 705 ILL. COMP. STAT. 405/5-805, juveniles can be transferred to the adult criminal justice system by a discretionary judicial waiver (“discretionary waivers”), presumptive judicial waiver (“presumptive waiver”), or mandatory judicial waiver (“mandatory waiver”).⁵⁰

Discretionary waiver proceedings begin in the juvenile justice system.⁵¹ The juvenile court judge examines the individual case and the statutory factors. Then, the judge may exercise his or her discretion to determine whether the juvenile should be transferred to the adult criminal justice system.⁵² Mandatory waivers also begin in the juvenile justice system.⁵³ However, mandatory waivers only permit the juvenile court judge to confirm that the

48. Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 455 (1985).

49. See STEPHANIE KOLLMANN, ILL. JUVENILE JUSTICE COMM’N, RAISING THE AGE OF JUVENILE COURT JURISDICTION 10 (2012), available at <http://ijjc.illinois.gov/sites/www.ijjc-illinois.gov/files/assets/IJJC%20-%20Raising%20the%20Age%20Report.pdf> (clarifying that Illinois juvenile transfer laws are applied “only after the default application of the juvenile court rules”).

50. 705 ILL. COMP. STAT. 405/5-805(1)-(3) (2013); GRIFFIN ET AL., *supra* note 4, at 3.

A discretionary transfer can only occur where the adolescent is thirteen years old or older and has committed a crime under Illinois law. 405/5-805(3)(a). Further, the juvenile judge must hold an appropriate hearing. *Id.* The hearing allows the consideration of a number of factors, including: “the severity of the offense, degree of participation or premeditation, whether a weapon was involved, probation history, school engagement, mental and physical health history, history of abuse or neglect, services available in the juvenile system, and likelihood of rehabilitation.” KOLLMANN, *supra* note 49, at 40–41. After this hearing, the judge must find that “there is probable cause to believe that the allegations in the motion are true and that it is not in the best interest of the public” to proceed in juvenile court. 405/5-805(3)(a).

A presumptive transfer can only occur where the adolescent is fifteen years old or older and has committed certain crimes. 405/5-805(2)(a). Presumptive transfer allows for judicial discretion, but “place the burden on the youth to establish that he/she should not be transferred.” KOLLMANN, *supra* note 49, at 13.

A mandatory transfer can only occur where the adolescent is fifteen years old or older and has committed certain crimes. 405/5-805(1)(a). One of two crimes suffices. First, the crime may be a forcible felony in furtherance of “criminal activity by an organized gang.” *Id.* Second, the crime may be any forcible felony if the juvenile previously committed a felony. *Id.* Thus, “[m]andatory transfer hearings require specific probable cause findings regarding offense characteristics, offense history, and/or gang activity.” KOLLMANN, *supra* note 49, at 40.

51. GRIFFIN ET AL., *supra* note 4, at 2.

52. *Id.*

53. *Id.*

statutory requirements are satisfied. If said requirements are met, the judge has no discretion; he or she must transfer the juvenile to the adult criminal justice system.⁵⁴ Thus, mandatory waivers operate in the same fashion as statutory exclusions.⁵⁵ As with both other waivers, presumptive waivers—the third type of judicial waiver—start in the juvenile justice system. Like discretionary waivers, presumptive waivers give the judge discretion in transferring a juvenile. However, unlike any other waiver, presumptive waivers require that juveniles rebut the presumption that they should be transferred.⁵⁶

This means juveniles have to prove that they should not be transferred because they are amenable to treatment in the juvenile justice system.⁵⁷ Essentially, presumptive waivers place the burden of proof on the juvenile.⁵⁸ On the other hand, neither discretionary nor mandatory waivers place the burden of proof on the juvenile.⁵⁹ Presumptive waivers are wholly unique in this regard.⁶⁰ Admittedly, both mandatory and presumptive waivers require the state to prove that probable cause exists that the relevant statutory requirements are satisfied. Once the state satisfies this step, however, presumptive waivers create a presumption that the juvenile is not amenable to treatment in the juvenile justice system.⁶¹ A similar rebuttable presumption is not triggered when the state seeks a mandatory waiver.

Transferring juveniles to the adult criminal justice system produces many negative effects on the adolescent's physical wellbeing, psyche, and identity formation.⁶² Locking adolescents up with adults guarantees that adolescents will not be rehabilitated because they will not receive guidance from responsible, supportive adults or have access to programs and services that will help shape them into productive adults.⁶³

54. *Id.*

55. *Id.*

56. KOLLMANN, *supra* note 49, at 13.

57. *Transfer Provisions*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, <http://www.ojjdp.gov/pubs/tryingjuvasadult/transfer.html> (last visited Nov. 3, 2014).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Identity formation, a crucial aspect of a juvenile's psyche, is greatly harmed by incarceration in adult correctional facilities because "prisons and jails are primarily designed to break down identities, not foster new, resilient ones that are adaptive to the world outside the facility walls." MULVEY & SCHUBERT, *supra* note 28, at 5. Also, adult facilities are largely devoid of positive, healthy adults or well-behaved, balanced peers with whom juveniles can interact. *Id.* Further, the facilities' heavy-handed control does not permit juveniles to learn how to make self-governing decisions. *Id.*

63. ARYA, *supra* note 2, at 9. "[A]dolescents are operating with a learner's

Some components of Illinois law demonstrate that the state is at least somewhat aware of the detrimental effects that the adult justice system has on juveniles. Four years ago, Illinois raised the age of juvenile court jurisdiction.⁶⁴ Before this change was implemented, seventeen-year-olds were automatically tried as adults for all misdemeanor offenses.⁶⁵ Now, though, seventeen-year-olds who commit misdemeanor offenses fall within the jurisdiction of the juvenile justice system.⁶⁶ Of course, seventeen-year-olds who are charged with felonies still fall under the purview of the adult criminal justice system.⁶⁷ But even then, adolescents under the age of seventeen must be detained separately from adults.⁶⁸ And although Illinois allows adolescents over the age of ten to be detained in a county jail,⁶⁹ the detention is limited to just six hours for minors between the age of ten and twelve.⁷⁰ Collectively, these policy decisions demonstrate a clear understanding that juvenile offenders should not be treated like adult criminals.

D. Eighth Amendment Jurisprudence

The Eighth Amendment prohibits the infliction of “cruel and unusual punishment[.]”⁷¹ The primary purpose of the Cruel and Unusual Punishment Clause of the Eighth Amendment is to prevent the state from inflicting “barbaric” punishments, such as torture, upon criminal offenders.⁷² In addition to such prohibitions, the Eighth Amendment also requires that a criminal offender’s punishment be proportionate to the crime.⁷³ Thus, the Cruel and Unusual Punishment Clause effectively guarantees that criminal offenders will not be “subjected to excessive sanctions.”⁷⁴ Further, the Cruel and Unusual Punishment Clause demands that the state treat criminal offenders, regardless of the seriousness of their crime, with the same human decency and respect afforded to the rest of society.⁷⁵

permit’ for developing maturity; they are generally under the watchful eye of caring individuals and are afforded more tolerance from society for making bad choices.” MULVEY & SCHUBERT, *supra* note 28, at 5.

64. KOLLMANN, *supra* note 49, at 14.

65. *Id.*

66. *Id.*

67. *Id.*

68. 705 ILL. COMP. STAT. 405/5-410(2)(c)(v) (2013).

69. 405/5-410(2)(a).

70. *Id.*

71. U.S. CONST. amend. XIII.

72. 21A AM. JUR. 2D *Criminal Law* § 878, Westlaw (database updated Aug. 2014) [hereinafter AM. JUR.].

73. *Miller v. Alabama*, 132 S. Ct. 2455, 2458.

74. *Roper*, 543 U.S. at 560.

75. AM. JUR., *supra* note 72, § 878.

In determining whether a particular type of punishment is “categorically prohibited” by the Eighth Amendment, the Supreme Court applies an objective two-part test.⁷⁶ First, the Court takes a national assessment and explores the “objective indicia of society’s standards” to determine whether a “national consensus” exists against the employment of the punishment in question.⁷⁷ Then, the Court examines the text of the Eighth Amendment, interpreting its meaning, function, and purpose, to determine whether the punishment in question violates the spirit and mandates of the Eighth Amendment.⁷⁸ In conducting this analysis, the Court examines both the history of the Eighth Amendment and its own precedent.⁷⁹

When the Court confronts a case about whether a juvenile offender’s punishment was constitutionally excessive, the Court explores additional mitigating factors like the juvenile offender’s age, background, and cognitive or emotional capabilities.⁸⁰ In fact, in *Graham v. Florida*, the Court provided that a consideration of age was not only proper but also constitutionally required, stating that “criminal procedure laws that fail to take [a] defendants’ youthfulness into account at all would be flawed.”⁸¹ The Court explores these additional factors in juvenile cases because the Court cannot determine whether a juvenile offender’s punishment was constitutionally excessive unless it determines whether the punishment was proportional to the crime.⁸² Any reasonable consideration of proportionality requires an evaluation of such basic mitigating factors as age, background, and cognitive development.⁸³

E. Supreme Court Jurisprudence on the Punishment of Juveniles

In 2005, the Supreme Court recognized that developmental research indisputably shows adolescents are cognitively and fundamentally different than adults. Therefore, they are less culpable and should be treated differently in the eyes of the law.⁸⁴ In that case—*Roper v. Simmons*—seventeen-year-old Christopher Simmons allegedly murdered Shirley Crook after they got in an automobile accident.⁸⁵ Simmons was tried as an adult and found

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Miller*, 132 S. Ct. at 2467.

81. AM. JUR., *supra* note 72, § 878.

82. *Id.*

83. *Id.*

84. KOLLMANN, *supra* note 49, at 20.

85. *Roper*, 543 U.S. at 556. Simmons assured two of his friends that they

guilty of murder.⁸⁶ The State of Missouri sought the death penalty.⁸⁷ The Supreme Court held, however, that the Eighth and Fourteenth Amendments prohibited the death sentence for individuals under the age of eighteen.⁸⁸

In its analysis, the Court examined the states' collective stance on juvenile death penalties; thirty states prohibited it.⁸⁹ The Court asserted that the death penalty is an excessive sanction reserved for offenders who commit serious crimes and whose "extreme culpability" warranted execution.⁹⁰ The Court found that juveniles are categorically less culpable than adults, and, therefore, could never attain such a level of culpability.⁹¹ As part of its reasoning, the Court noted that three "general differences" between adults and juveniles under the age of eighteen demonstrate that juvenile offenders "cannot with reliability be classified among the worst offenders."⁹² The three general differences the Court noted are as follows: (1) juveniles do not have the necessary maturity and responsibility to make good decisions; (2) juveniles do not have the necessary resolve to avoid negative pressure and influences; and (3) juveniles do not have the fully formed identities and characters to function as adults.⁹³

Several years after *Roper*, the Supreme Court faced a related issue in *Graham v. Florida*. Jamar Graham was arrested and convicted of armed burglary with assault and attempted armed robbery.⁹⁴ Graham was charged as an adult and ultimately

could get away with murder because they were minors. *Id.* The three juveniles entered Shirley Crook's home, bound her, and brought her to a railroad trestle where they drowned her in the river. *Id.* After the murder, Simmons was caught bragging about the murder and eventually confessed. *Id.* at 557.

86. *Id.*

87. *Id.*

88. *Id.* at 578.

89. *Id.* at 552; see also, Charles Scott, *Roper v. Simmons: Can Juvenile Offenders be Executed?*, 33 J. AM. ACAD. PSYCHIATRY LAW 547, 549 (2005), available at <http://www.jaapl.org/content/33/4/547.full> (explaining that after the United States Supreme Court ruling in *Stanford v. Kentucky*, there was a significant enough change among the states to forbid the execution of juveniles). The Court in *Atkins v. Virginia* also argued a similar point. See Scott, *supra* note 89, at 549.

90. *Roper*, 543 U.S. at 553 (emphasizing the Eighth Amendment's application to only a "narrow category of the most serious crimes") (emphasis added).

91. *Id.* at 572-73. The court analogized its findings on the mentally retarded to juveniles, stating "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." *Id.* at 553. See also Scott, *supra* note 89, at 552 (arguing that the differing juvenile characteristics that the court enumerated in *Roper* could be applied to a number of categories of individuals).

92. *Id.* at 569.

93. *Id.*

94. *Graham*, 560 U.S. at 53.

accepted a plea agreement.⁹⁵ A few months later, Graham was arrested for participating in a “home invasion robbery.”⁹⁶ Because Graham violated the conditions of his probation,⁹⁷ the trial court sentenced him to life in prison without the opportunity for parole.⁹⁸ In reviewing this decision, the Court held that the Eighth Amendment prohibits juveniles from being sentenced to life imprisonment without parole for non-homicide offenses.⁹⁹ The Court reasoned that, although thirty-eight states allow sentences of life in prison without the possibility of parole for juveniles who have committed non-homicide crimes, there were only about 109 juveniles actually serving such sentences.¹⁰⁰ Accordingly, the Court concluded that the states’ “sentencing practice[s]” made a sentence of life without parole just as rare as other sentencing practices that the Court found cruel and unusual.¹⁰¹ The Court ultimately held that a life sentence without the possibility of parole is too severe of a punishment for juvenile offenders.¹⁰²

95. *Id.* at 53–54.

96. *Id.* at 54.

97. *See id.* (describing Graham’s probation violation as engaging in criminal activity, associating with individuals engaging in criminal activity, and having a firearm in his possession).

98. *Id.* at 57. The trial judge expressed his disappointment at the sentence, stating:

[a]nd I don’t understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you . . . if I can’t do anything to help you, if I can’t do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today[.]

Id. at 56–57.

99. *Id.* at 74. In *Graham*, the court melded “two separate constitutional holdings together to create a third.” Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 91 (2010). Specifically, the Court built on both the constitutional principle that capital punishment is not permissible for individuals who have committed non-homicide crimes and *Ropers*’ finding that juveniles have reduced culpability because of their adolescent development. *Id.* By combing these, the Court concluded that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.” *Graham*, 560 U.S. at 70.

After *Graham*, some states started reevaluating their transfer provisions and policies. Visser & Shook, *supra* note 20, at 25.

100. *Graham*, 560 U.S. at 62–63.

101. *Id.* at 62–66. The Court also recognized that a state may leave laws on the books that allow juvenile offenders of non-homicide crimes to be charged with life sentences without the possibility of parole even if the legislature does not find the practice appropriate. *Id.* at 66–67.

102. *Id.* at 82.

III. ANALYSIS

Presumptive waivers of juvenile offenders into the adult criminal justice system are inconsistent with the Supreme Court's explicit determination that adolescent offenders are less culpable than adult offenders due to their limited cognitive development.¹⁰³ This analysis explores the ways in which state presumptive waivers conflict with the Court's jurisprudence on juvenile culpability. Also, it addresses the reasons why presumptive waivers are problematic and how incarceration in adult prisons undercuts the juvenile justice system's goals.

A. Rehabilitation and Culpability

Rehabilitation and culpability are integral components of our criminal justice system. Rehabilitation is not only the primary goal of juvenile justice systems; it is also a driving force in the majority of adult criminal justice systems.¹⁰⁴ Rehabilitation and treatment methods are particularly important in our criminal justice system because they have a tendency to lower recidivism rates.¹⁰⁵ Consistent with these principles, prisons have implemented a variety of "treatment" methods that are geared towards rehabilitating criminal offenders.¹⁰⁶ The criminal justice system also accounts for the "varying levels of blameworthiness" that each offender possesses.¹⁰⁷ Pursuant to the Eighth Amendment, a

103. In *Roper*, the Court recognized that juveniles cannot be classified among the worst offenders. *Roper*, 543 U.S. at 569. The Court described how juveniles' irresponsible behavior, immaturity, and susceptibility to negative influences makes them less morally accountable than adults. *Id.* at 570. The Court even determined that the probability that an adolescent offender engages in any sort of "cost-benefit analysis" during the commission of his or her offense is "so remote" that it is "virtually nonexistent." *Id.* at 572.

104. See *Rehabilitation—Correctional Programs in the United States*, AM. LAW AND LEGAL INFO., <http://law.jrank.org/pages/1935/Rehabilitation-Correctional-programs-in-United-States.html> (last visited Nov. 2, 2014) (providing that although rehabilitative measures have diminished over the past several decades, rehabilitation is still alive and well in our criminal justice system).

105. *Id.*

106. See, e.g., *Corrections & Reentry*, NAT'L INST. OF JUSTICE, <https://www.crimesolutions.gov/TopicDetails.aspx?ID=31> (last visited Nov. 3, 2014) (listing such programs).

107. Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 J. OF HEALTH CARE L. & POL'Y 375, 389 (2011), available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1192&context=jhclp&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3Dimportance%2Bof%2Bculpability%2Bin%2Bcriminal%2Bjustice%2Bsystem%26first%3D9%26FORM%3DPERE#search=%22importance%20culpability%20criminal%20justice%20system%22>.

criminal offender's punishment should be proportional to both the crime and his or her culpability.¹⁰⁸ The criminal acts of an offender with diminished levels of culpability provides less insight into his or her risk of recidivism and fails to justify as significant a retributive punishment. Thus, such offenders are generally prime candidates for rehabilitative treatment.

B. Supreme Court Jurisprudence: Juveniles Are Less Culpable and More Amenable to Rehabilitation

The differences between juveniles and adults are too "marked and well understood" to allow the punishment of juveniles to mirror that of adults.¹⁰⁹ The Supreme Court's expansion of Eighth Amendment jurisprudence has categorically found adolescents to be less culpable than adults for the same reasons that juveniles are more amenable to rehabilitation.¹¹⁰ In *Roper*, the Court provided three reasons why juvenile offenders are less culpable than adult offenders: juveniles (1) are immature, (2) may be highly subject to influence, and (3) have unformed identities.¹¹¹

As discussed above, the Court in *Roper* and *Graham* held that the under-developed cognitive abilities of juveniles contribute to their immaturity, susceptibility of negative influences, and evolving identities. The *Roper* Court found that these under-developed cognitive abilities are transient¹¹² and that most teens grow out of them.¹¹³ The transient nature of adolescent

108. *Miller*, 132 S. Ct. at 2458.

109. *Roper*, 543 U.S. at 572–73. States implicitly recognize the differences between adults and juveniles by restricting juveniles' ability to "marry, serve on juries, vote, drink alcohol, and contract." Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1162–63 (2005). *But see* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 221 (1995) (noting that paternalistic procedures of law may be less appropriate when applied to adolescents rather than younger minors).

110. *Roper*, 543 U.S. at 569–70. The Court frankly stated, "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." *Id.* at 571.

111. *See id.* at 569 (examining the underdeveloped sense of responsibility and immaturity found in youth that leads to poorly thought-out decisions and actions; the vulnerability of juveniles to succumb to negative external influences and pressures; juveniles' lack of control and lack of experience; and the transitory nature of juveniles' personality traits caused by the absence of identity or character).

112. *See Graham*, 560 U.S. at 66–70 (finding that there was a greater possibility for juveniles to be reformed than there was for adults); *see also Roper*, 543 U.S. at 570 (finding that teen's immaturity, recklessness, and irresponsibility dissipates as they grow and develop an identity).

113. *Graham*, 560 U.S. at 66–70; *see also Roper*, 543 U.S. at 570 (arguing that most teens who are immature, reckless, and irresponsible grow out of this phase, because these characteristics that mark adolescence are fleeting; once

characteristics means that juveniles have the capacity to change their behavior.¹¹⁴ In fact, the Court in *Graham* explained that juveniles are more capable of change than adults because of their under-developed cognitive functions and temporarily immature nature.¹¹⁵ An individual's maturity can lead to reflection on one's past actions, creating "remorse, renewal, and rehabilitation."¹¹⁶ Thus, juveniles' actions are less likely to indicate an "irretrievably depraved character" that is generally associated with adult criminal offenders.¹¹⁷ Because juveniles are more capable of changing their behavior, it logically follows that juveniles have a greater capacity to reform their character deficiencies through rehabilitation.¹¹⁸ On the other hand, the Court opined that a juvenile who has not been given an opportunity to rehabilitate himself has no meaningful incentive to become a productive, responsible citizen.¹¹⁹

The reasoning used in *Roper* and *Graham* was also adopted in *Miller v. Alabama*.¹²⁰ The Court in *Miller* held that any person or entity that awards a sentence to a juvenile offender of life without any possibility of parole *must* examine all the relevant circumstances that are related to the juvenile's youthfulness and his or her offense.¹²¹ These factors include the juvenile's age, background, and cognitive ability at the time of the offense.¹²² *Miller* clearly requires that all courts consider these factors and circumstances before implementing such a sentence.¹²³

Both *Roper* and *Graham* relied more heavily on insight and intuition than on scientific evidence when discussing the cognitive difference of juveniles.¹²⁴ But numerous studies substantiate the premise that juveniles are more susceptible than adults to changing their behavior.¹²⁵ There is a consensus among

an adolescent's identity is shaped and settled, these adolescent characteristics dissipate).

114. *Roper*, 543 U.S. at 572.

115. *Graham*, 560 U.S. at 68–69.

116. *Id.* at 79.

117. *Id.* at 76.

118. *Id.*

119. *Id.*

120. 132 S. Ct. 2455 (2012).

121. *Id.* at 2469.

122. *Id.*

123. *Id.*

124. Barry Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 277 (2013) (arguing that the Court's use of phrases like "as any parent knows" indicates that it relied more on intuition than on action scientific studies).

125. See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 19 (2008) (explaining that studies in developmental psychology suggest juvenile offenders are differentiated from adult offenders by an inability to make sound decisions, a susceptibility to external pressures, and an undeveloped

developmental psychologists that between the ages of twelve and fifteen there is significant cognitive, emotional, and physical development.¹²⁶ According to the American Academy of Child and Adolescent Psychiatry, the brain does not stop maturing until an individual is approximately twenty-years-old.¹²⁷ Because of this disparity in cognitive development, adolescents are developmentally different from adults. These differences must be taken into consideration during all stages of a juvenile's criminal proceedings, especially those regarding transfer.¹²⁸

Of course, these cognitive characteristics do not imply that juvenile offenders should not be punished for their actions.¹²⁹ On the contrary, juveniles must be punished; but all criminal punishment must be tailored to a criminal's culpability and should be geared toward rehabilitation.¹³⁰ Criminal law is based on the premise that individuals generally form intent whenever they engage in some sort of action.¹³¹ The law also assumes that individuals use rules of law when forming this intent.¹³² However, adolescents often do not operate and act based on reason. Instead, they react based on instinct; thus, they are not always cognizant of how they should conform their behavior to the mandates of the law. When courts are sentencing and punishing adolescent offenders, they should be cognizant of the ineffectiveness and inapplicability of principles that apply to sentencing and punishing adults.

character, all of which mitigate their culpability).

126. Scott, *supra* note 109, at 230–35.

127. Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity> (last updated May 29, 2012); see also Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. OF CHILD AND PSYCHIATRY 296, 300 (2006) (explaining that the two regions of the brain—the parietal cortex and the prefrontal cortex—consistently undergo development during adolescence).

128. ROBERT E. SHEPARD, JR., CRIM. JUSTICE SEC., AM. BAR ASSOC., YOUTH IN THE CRIMINAL JUSTICE SYSTEM: AN ABA TASK FORCE REPORT 1–2 (2002), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jjppolicies_YCJSReport.au *thcheckdam.pdf*; see also Jacqueline Caster, *The Insanity of Sentencing Minors to Adult Prison: The Maryland Study*, HUFF. POST, http://www.huffingtonpost.com/jacqueline-caster/the-insanity-of-sentencin_b_758922.html (last updated May 25, 2011) (arguing that treating juveniles like adults is inconsistent with the scientific evidence that a juvenile's brain has not fully developed the parts of the brain that govern decision making and analysis of consequences).

129. Caster, *supra* note 128.

130. See *id.* (arguing that juveniles should not be exempt from punishment, but they should be given more lenient sentences based on their diminished culpability).

131. Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 19 (2001).

132. *Id.*

*C. Adult Prisons Are Not Geared toward
Rehabilitation or Protecting the Community from
Juvenile Offenders*

Adult correctional facilities are not geared toward rehabilitation.¹³³ Sending a juvenile to an adult prison is like sending them to their very own graduate school for criminals.¹³⁴ In such settings, juveniles almost certainly will not be appropriately rehabilitated because they will not acquire necessary skills that foster a positive cognitive development into adulthood.¹³⁵

The regimented schedules and restrictions that are implemented in adult prisons reduce adolescents' opportunities to develop important skills and imperative relationships. The effects are wide-ranging; they are unable to engage in romantic relationships, create healthy friendships, identify career goals, or develop occupational skills.¹³⁶ Additionally, incarceration in an adult facility, at an early age, severely interferes with the development of an adolescent's self and identity¹³⁷ because adult correctional facilities are designed to "break down" identities, not foster fragile, new ones.¹³⁸ The incarceration of juvenile offenders in adult correctional facilities have produced numerous negative effects on juveniles aside from developmental disruptions,¹³⁹ including victimization,¹⁴⁰ death,¹⁴¹ increased rate of

133. HARTNEY, *supra* note 5, at 1.

134. *See* Caster, *supra* note 128 (quoting an inmate arrested as a juvenile who stated, "Why adult prison? It's not to help you better yourself, but to transform you in the most messed up ways because you hear and see more crime."). Placing juvenile offenders in prison with "hardened adult criminals" does not reduce or deter crime. *Id.*

135. *See* *Swansey v. Elrod*, 386 F. Supp. 1138, 1141–42 (N.D. Ill. 1975) (delineating the psychological differences between children aged thirteen to sixteen and young adults aged seventeen to twenty). In *Swansey*, the plaintiffs' expert found that adult prisons did not recognize these psychological differences. *Id.* at 1141. Therefore, incarceration of adolescents in the adult criminal justice system had substantial detrimental and emotional effects on them. *Id.* at 1141–42.

136. MULVEY & SCHUBERT, *supra* note 28, at 6.

137. *See id.* (navigating the adolescent developmental period adequately requires interaction with supportive adults, positive relationships with peers, along with ample opportunities to make self-governing decisions).

138. *Id.*

139. HARTNEY, *supra* note 5, at 1.

140. *Id.* Juveniles in adult facilities may be subjected "to physical, sexual, and or psychological victimization." MULVEY & SCHUBERT, *supra* note 28, at 4. "Incarcerating children in the adult system puts them at higher risk of abuse, injury, and death while they are in the system[.]" ARYA, *supra* note 2, at 7. "[J]uveniles in adult facilities are five times more likely to be sexually assaulted and two times more likely to be beaten by staff than youth held in juvenile facilities." MULVEY & SCHUBERT, *supra* note 28, at 4.

141. ARYA, *supra* note 2, at 7.

recidivism,¹⁴² criminal stigma that affects their future educational and occupational opportunities,¹⁴³ and the potential of harsher punishment.¹⁴⁴

Transferring juveniles into adult correctional facilities is a big deal. Most juveniles are negatively affected for the rest of their lives, which is why it is paramount that juveniles are individually examined to determine whether they are as culpable as an adult and will not be amenable to treatment.¹⁴⁵ The juvenile justice system was specifically designed to function differently from adult correctional facilities in order to cater to the developmental and rehabilitative needs of juveniles.¹⁴⁶

D. Presumptive Waivers are Inconsistent with Supreme Court Rulings

Fifteen states use presumptive waivers to transfer juveniles into the adult court system.¹⁴⁷ Illinois enacted transfer provisions, like presumptive waivers, to protect society and hold juveniles accountable for their actions.¹⁴⁸ In Illinois, the presumptive waiver creates a rebuttable presumption that any juvenile who commits a specific statutory offense¹⁴⁹ is “not a fit and proper subject” for

142. Most studies have failed to show that transfer laws have a deterrent effect on crime. GRIFFIN ET AL., *supra* note 4, at 26. To the contrary, research has found that transferred youth are more likely to recidivate and reoffend more quickly than non-transferred youth. MULVEY & SCHUBERT, *supra* note 28, at 7; HARTNEY, *supra* note 5, at 1. Thus, it seems adolescents’ experiences and conditions in adult facilities “make[] it more likely that they will reoffend once they get out.” ARYA, *supra* note 2, at 7.

143. HARTNEY, *supra* note 5, at 1.

144. *Id.*

145. See MULVEY & SCHUBERT, *supra* note 28 (explaining the effects of juveniles who are sent to the criminal justice system. Depending on the juvenile—his or her personality and anti-social behavior—juveniles who are transferred to the adult court system usually continue to engage in criminal activity).

146. BOSTWICK, *supra* note 11, at 1.

147. GRIFFIN ET AL., *supra* note 4, at 4. Alaska, California, Colorado, the District of Columbia, Illinois, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, and Utah all use presumptive waivers. *Id.* at 3.

148. During the late 1980s and 1990s, the public believed that the juvenile justice system was far too lenient on juvenile offenders. LAWRENCE & HEMMENS, *supra* note 23, at 33. Faced with a dearth of public trust in the juvenile justice system, state legislatures tried to implement statutory provisions that would keep serious juvenile offenders off the streets. MULVEY & SCHUBERT, *supra* note 28, at 2. This was, essentially, a “law and order” approach. LAWRENCE & HEMMENS, *supra* note 23, at 33. The Illinois Juvenile Justice Reform Provision of the Illinois Juvenile Court Act adopted balanced and restorative justice principles. BOSTWICK, *supra* note 11, at 1–2. In keeping with the public mood of the 1980s and 1990s, two of the three goals behind the act were accountability and public safety. *Id.*

149. The triggering offenses are: any Class X felony aside from armed

treatment in the juvenile justice system.¹⁵⁰ Under these circumstances, the burden of proof shifts to the juvenile, requiring that he or she rebut this presumption *by clear and convincing evidence* and show amenability to the care and treatment of the juvenile justice system.¹⁵¹ By shifting the burden of proof, presumptive waivers presume that juveniles who commit certain offenses are neither more capable of rehabilitation nor less culpable than adults who commit the same offenses.

These statutory presumptions, which treat and punish adolescents like adults, are completely inconsistent with the Court's decisions in both *Roper* and *Graham*.¹⁵² The Court explicitly found that juveniles are categorically less culpable than adults.¹⁵³ But judicial presumptive waivers presume—*without examining the individual first*—that certain juveniles should be treated as adults. Unless the state is systematically under-punishing adult offenders or juveniles are as culpable as adults, this practice would violate the requirement of proportionality. The former possibility is facially unreasonable. The latter is directly contrary to the Court's findings, and state statutes cannot presume the opposite of what the Court has dictated¹⁵⁴—that

violence, aggravated discharge of a firearm, armed violence with a fire arm when the predicate offense is a Class 1 of 2 felony, armed violence with a firearm when the predicate offense is a violation of the Illinois Controlled Substances Act, a violation of the Cannabis Control Act, an act in violation of Section 401 of the Illinois Controlled Substance Act while in school, and an act in violation of Section 401 of the Illinois Controlled Substances Act while on school property or public ways. 705 ILL. COMP. STAT. 405/5-805(2)(a) (2013).

150. *Id.* In California, there is actually a presumption that a juvenile who commits a specific, serious offense that falls within the statutory provision of a presumptive waiver is not a “fit and proper subject” to be handled within the juvenile justice system. Tamar L. Reno, Comment, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinative Sentencing in Texas*, 26 TEX. TECH. L. REV. 1421, 1442 (1995).

151. A judge must find by clear and convincing evidence that a juvenile is amenable to “the care, treatment, and training programs” that the juvenile justice system offers in their facilities. 705 ILL. COMP. STAT. 405/5-805(2)(b) (2013). In making this determination, the judge must consider a list of factors: age of the minor, history of the minor, circumstances of the offense, advantages of treatment, and whether the security of the public requires sentencing. *Id.*

152. *Roper*, 543 U.S. at 570 (explaining that adolescence is a mitigating factor for juvenile criminal behavior primarily because juvenile immaturity and reckless behavior are temporary; they subside with maturity); *Graham*, 560 U.S. 66–70 (maintaining that juveniles are more capable of change than adults are and that juveniles cannot be categorized in the same group as the “worst offenders” because of their marked differences from adults).

153. *Roper*, 543 U.S. at 570 (explaining that the immaturity, irresponsibility, influential nature of juveniles makes their offenses less “morally reprehensible” than adults).

154. U.S. CONST. art. VI, cl. 2 (stating that the United States Constitution is the supreme law of the land); *Brown v. Board of Education (II)*, 349 U.S. 294, 299–300 (1955) (ruling that federal law, including a judgment of the

juveniles are less culpable than adults.¹⁵⁵ Further, the Court has held that criminal sentences must be “directly related to the *personal* culpability of the criminal offender.”¹⁵⁶ Generalizations and presumptions about culpability are clearly inconsistent with this instruction. Likewise, broad arguments about retribution cannot save presumptive transfers when they fail to comply with basic constitutional principles. The Court already rejected the retribution argument for sending juveniles to adult correctional facilities and differentiating the application of retributive justifications to adults and juveniles.¹⁵⁷

To rebut such arguments, Illinois may argue that presumptive waivers are necessary for public safety.¹⁵⁸ It is not clear that such waivers actually improve public safety. The Supreme Court has recognized that juveniles denied the chance to rehabilitate have no meaningful incentive to become a productive, responsible citizen.¹⁵⁹ If juveniles have no incentive or desire to become law abiding, responsible adults, these transfer laws will have a minimal deterrent effect on juveniles and may even be counterproductive by forcing them into a life of crime. Even if such waivers did improve public safety, however, the narrow category of presumptive waivers would not be necessary to achieve this goal because there are other judicial waivers that achieve this same goal without wrongly presuming that adolescents are as culpable as adults. There are a number of judicial waivers that protect the public from the same undesired effect, like discretionary and prosecutorial waivers.¹⁶⁰ Presumptive waivers are not necessary; they are merely one of many ways to accomplish public safety. All of the juvenile transfer laws accomplish public safety directives; therefore, any of the other juvenile transfer laws could take the place of presumptive waivers.

Illinois may also argue that presumptive waivers are procedurally fair because they allow a juvenile to be heard in front of a judge before being transferred. This does not absolve the waiver’s inherent inconsistency with the Supreme Court’s

Supreme Court, could not be nullified by state legislation or action); *Ableman v. Booth*, 62 U.S. 506, 526 (1859) (holding that state courts cannot issue judgments that conflict with the United State Supreme Court’s judgments).

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

156. *Graham*, 560 U.S. at 71 (emphasis added).

157. *Id.*

158. BRANDAU, *supra* note 25, at 3; see Hector Linares & Derwyn Bunton, *An Open Door to the Criminal Courts: Analyzing the Evolution of Louisiana’s System for Juvenile Waiver*, 71 LA. L. REV. 191, 214 (2010) (arguing that the ineffective use or overuse of waivers can have a counterproductive effect on the youth, and would ultimately undermine the entire reason they were implemented in the first place—for public safety).

159. *Graham*, 560 U.S. at 79.

160. GRIFFIN ET AL., *supra* note 4, at 3.

previous rulings. The mere possibility that a judge might rule against a presumptive waiver provides little reassurance. In fact, such an argument is quite strange. The ability to contest a presumptive practice might improve the efficient operation of that practice. But the chance that a presumption might be inapplicable at certain times cannot possibly *justify* the presumption's application at other times. Thus, the real issue is the rebuttable presumption itself. Requiring a juvenile to show *by clear and convincing evidence* that he or she is amenable to treatment and less culpable than adults does not follow the Court's logic in *Roper* and *Graham*.

Because there is a presumption that juveniles are less culpable and more susceptible to treatment, they should not be treated otherwise without further evidence. Instead, they should be transferred based on their individual traits, as well as their offense.

IV. PROPOSAL

Abolishing presumptive waivers will neither interfere with Illinois's statutory scheme nor thwart its ability to transfer juveniles into the adult court system. Illinois already has several provisions in place that will accomplish the intended goals, without offending Supreme Court's jurisprudence.¹⁶¹ This Proposal still allows Illinois to offer discretionary and mandatory waivers, which provide a similar hearing, analysis of factors, and assessment of specific characteristics of the juvenile offender.¹⁶² Discretionary and mandatory waivers allow juveniles to be transferred into the adult criminal justice system without offending the Supreme Court's jurisprudence.

As described above, the Supreme Court has recently etched away at the overly harsh and stringent state statutory provisions specifically enacted to allow juveniles to be transferred into the adult court system.¹⁶³ In doing so, the Court has also created categorical rules about the general culpability of juveniles.¹⁶⁴ Contrary to Supreme Court jurisprudence, presumptive waivers

161. 705 ILL. COMP. STAT. 405/5-805(1), (3) contain mandatory and discretionary waivers, neither of which shift the burden of proof onto the juvenile. Rather, the burden of proof remains on the prosecutor to prove that the juvenile is not amenable to treatment in the juvenile justice system.

162. 705 ILL. COMP. STAT. 405/5-805(1), (3).

163. See Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 297 (2012) (recognizing that "[s]ince 2005, the United States Supreme Court has issued a trilogy of opinions affirming the proposition that children and adolescents are different than adults in fundamental—and constitutionally relevant—ways").

164. *Roper*, 543 U.S. at 552; *Graham*, 560 U.S. at 66–70; Smith & Cohen, *supra* note 99, at 91.

incorrectly assume that juveniles are just as culpable as adults and are not amenable to the juvenile justice system. In essence, presumptive waivers require that juveniles prove what the Supreme Court has already recognized. State legislatures need to amend their existing statutes to conform to these rulings.¹⁶⁵ Specifically, Illinois must abolish presumptive judicial waivers of juveniles into the adult court system. This imperative may be accomplished by repealing the statutory provision under 705 ILL. COMP. STAT. 405/5-805(2) that allows presumptive transfers of juveniles into the adult criminal justice system.

Removing this subsection from the statute does not impede the statutory scheme or purpose of 705 ILL. COMP. STAT. 405/5-805. Illinois still has multiple statutory provisions and waivers¹⁶⁶ that produce the same effect of efficiently transferring juvenile offenders into the adult court system. First, Illinois prosecutors have the ability to transfer juveniles into the adult court system by way of a discretionary judicial waiver. The judge has the ultimate discretion to transfer a juvenile offender into the adult court system after the judge has analyzed all of the statutory factors.¹⁶⁷ In Illinois, discretionary waivers are available when a juvenile offender who is thirteen-years or more of age is charged with a criminal offense.¹⁶⁸ In these circumstances, *the State*, not the juvenile, must move to transfer.¹⁶⁹ After an assessment of the facts of the case balanced against the statutory factors, the judge makes a decision whether the juvenile will be tried in the juvenile or adult court.¹⁷⁰

Second, Illinois prosecutors have the ability to transfer juveniles into the adult court system by way of a mandatory judicial waiver.¹⁷¹ Mandatory waivers require the juvenile court to initiate a case and automatically waive jurisdiction when the juvenile's offense meets certain statutory criteria.¹⁷² These criteria include age, offense, or prior record.¹⁷³ In Illinois, a juvenile

165. See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 85, 155 (2000) (concluding that the overwhelming expansion of juvenile transfer legislation has been "ill advised" and "misguided" and that "[t]ransfer should be reserved for those "extreme cases" to which it has traditionally been applied").

166. See 705 ILL. COMP. STAT. 405/5-805(1), (3).

167. See GRIFFIN ET AL., *supra* note 4, at 2 (explaining discretionary judicial waivers as setting forth expansive standards to be applied, factors to be determined, and mechanisms to be followed during the judge's decision making).

168. 705 ILL. COMP. STAT. 405/5-805(3).

169. *Id.* See CHILDREN'S ACTION ALLIANCE, *supra* note 35, at 6 (emphasizing that prosecutors may request discretionary waiver of juveniles into the juvenile court system).

170. 705 ILL. COMP. STAT. 405/5-805(3).

171. 405/5-805(1).

172. *Id.*

173. *Id.*

offender who commits a felony, forcible felony, aggravated discharge of a weapon in a school, or a listed crime under the 705 ILL. COMP. STAT. 405/5-805(1), and is fifteen years of age or older, will be mandatorily transferred into the adult court system if he or she committed a forcible felony, was previously convicted of a forcible felony, or committed his or her crime in furtherance of gang activity. The sole focus of mandatory waivers are the statutory criteria, which are far more extensive than the criteria set forth for presumptive waivers in Illinois.¹⁷⁴ Most important, the judge must establish that these criteria are satisfied. In contrast to this, presumptive waivers allow the state to trigger the presumption by motion whenever a juvenile commits a certain offense.¹⁷⁵ No other questions asked.

Although discretionary and mandatory waivers require different criteria than a presumptive waiver, they provide the same result as a presumptive waiver. Both waive jurisdiction in the juvenile court and transfer the juvenile to the adult court system.¹⁷⁶ The key differences between presumptive waivers and the discretionary or mandatory waivers are: (1) who is making the actual assessment and decision to transfer; (2) what criteria are considered, and (3) who has the burden of proof. Aside from these, all three waivers have the same operative effect and will function in the same capacity.

Illinois's presumptive judicial waiver shifts the burden of proof onto the juvenile to prove that he or she is less culpable and therefore amenable to the juvenile justice system.¹⁷⁷ When a presumptive waiver is used to transfer a juvenile into the adult court system, there are underlying assumptions that the juvenile is just as culpable as an adult and is not amenable to the juvenile justice system. These assumptions directly contradict the Supreme Court's holding in *Roper* that juveniles are categorically less culpable than adults.¹⁷⁸ Juveniles have the ability to change their behavior and reform their character and they are categorically amenable to treatment and rehabilitation in the juvenile justice system.¹⁷⁹ Because juveniles are categorically less culpable than adults and amenable to treatment in the juvenile justice system,¹⁸⁰

174. *Id.*

175. 405/5-805(2).

176. 405/5-805.

177. See 405/5-805(2)(a) (stating that juveniles who commit any offenses listed within this statute are deemed to be improper and "unfit" for any rehabilitation afforded by the juvenile justice system).

178. "Both *Roper* and *Graham* relied heavily on adolescent development and brain science research showing that adolescents are fundamentally different from adults in ways that render them categorically less culpable and less deserving of society's harshest forms of punishments." Keller, *supra* note 163, at 297.

179. *Roper*, 543 U.S. at 569–70.

180. *Id.*

Illinois cannot allow presumptive judicial waivers of juveniles into the adult court system.

V. CONCLUSION

Following the perception of a dramatic increase in juvenile crime in the late 1980s and 1990s, state legislatures enacted more expansive juvenile transfer laws to transfer juveniles into the adult court system more easily.¹⁸¹ Illinois's juvenile transfer laws include discretionary, presumptive, and mandatory judicial waivers, statutory exclusions, "once an adult always an adult laws," and blended sentencing.¹⁸²

Recently, the Supreme Court has responded to these statutory provisions, and categorically ruled that juveniles are less culpable than adults, and therefore, are more amenable to rehabilitative treatment.¹⁸³ Presumptive waivers directly conflict with the Court's finding because they shift the burden of proof onto the juvenile to prove that he or she is amenable to rehabilitation in the juvenile justice system, and incorrectly assume that juveniles are just as culpable as adults.

In our criminal justice system, culpability is a significant factor in determining sentencing and punishment. In light of this, Illinois courts should exercise caution when they make juvenile transfer determinations because transferred juveniles will be punished and sentenced as adults. Juvenile offenders that are transferred into the adult criminal justice system are not engaged in any type of meaningful rehabilitation, much less the extensive rehabilitation afforded in the juvenile justice system. Juveniles are mentally, emotionally, and developmentally different than adults, they are more susceptible to changing their behavior, and are more amenable to rehabilitation. Therefore, Illinois should not allow any type of rebuttable presumption that opposes or disregards these facts.

Although juvenile transfers are necessary in certain cases, Illinois should base the assessment of a juvenile transfer on the merits of the individual juvenile without presuming anything about the juvenile's culpability or amenability to rehabilitation. The burden of determining or proving that a juvenile should be transferred must be borne by the judge or the prosecutor, respectively. Juveniles must be presumed less culpable and more amenable to rehabilitation unless proven otherwise. In light of this, Illinois should repeal its presumptive judicial waiver statute, 705 ILL. COMP. STAT. 405/5-805(2) and re-focus its efforts on rehabilitating juveniles in the juvenile justice system.

181. ARYA, *supra* note 2, at 7.

182. GRIFFIN ET AL., *supra* note 4, at 2-4.

183. *See* Keller, *supra* note 163, at 297.

