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Article III Adultification of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers

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Article III Adultification of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers

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Abstract

There is no federal juvenile court system in the United States. Rather, teens can face charges in Article III courts and can be transferred to be tried and sentenced as adults in these venues. This Article is the first of two articles in the Washington and Lee Journal of Civil Rights and Social Justice seeking to shed light on the largely invisible processes and populations involved in federal youth prosecution. This Article focuses on the federal transfer and prosecution of American youth as adults. It considers constitutional and statutory law relating to these federal transfers and then considers why current practices are incompatible with Kent v. United States *and evolving standards of decency doctrine. It also warns of other dangers relating to prosecuting youth as adults in our federal criminal justice system.*

Table of Contents

I. Introduction

In the United States, juvenile law and justice have been long considered state-level concerns.[1] What many people do not

1. *See* PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT AND CONTROL, JUVENILE CRIME JUVENILE JUSTICE 5–7, 155 (Joan McCord et al. eds., 2001) (pointing out that there are fifty-one different juvenile justice systems in the U.S. and suggesting that juvenile justice is largely under the purview of the state).

realize, however, is that existing federal law allows young people under the age of eighteen to be prosecuted in U.S. district courts, too.[2] Although there is no federal juvenile court system with youth-specific features, teens in this country may face charges in Article III courts for a wide range of reasons.[3]

Beyond this, U.S. Attorneys have the power not only to proceed with federal charges against children—but to transfer them to be tried and sentenced as adults.[4] To date, little has been written about these largely invisible processes and populations. We seek to shed further light on the situation—particularly under the Trump Administration—in two different articles. This Article, published as part of *Washington and Lee Journal of Civil Rights and Social Justice*'s "Issues in Federal Sentencing" Symposium, will focus on federal transfer of youth and their prosecution as adults.[5] The second essay, to be published in the days ahead by the *Washington and Lee Journal of Civil Rights and Social Justice*, will examine the issue of prosecution of kids as kids in Article III courts.[6]

In Part I, this Article explains the constitutional standards for adult prosecution and sentencing of youth as established by the U.S. Supreme Court over several decades of juvenile justice

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2. *See id.* at 155 ("The federal government has jurisdiction over a small number of juveniles, such as those who commit crimes on Indian reservations or in national parks, and it has its own laws to govern juveniles within its system.").

3. *See id.*; *see also* 18 U.S.C. § 5032 (2018).

4. It should be noted at the outset that any juvenile case filed in federal court is considered "certified" from the state system to the federal system. 18 U.S.C. § 5032. This should not be confused with the term "certification" as used in some state systems to denote the process for trying to prosecute children as adult defendants. In the federal court system, that process is referred to as juvenile "transfer." *See id.* (using the term "transfer" throughout the statute). That is, a child's case will be transferred in the Article III court system when it moves from being treated as a juvenile delinquency case to an adult criminal matter. *Id.* Thus, throughout this Article we generally use the term "transfer" when talking about the process of deciding whether to prosecute a child as an adult in the federal or state court system.

5. By "we" here, I am referring to myself and my University of Florida Law student co-authors. As noted above, Grace McLaughlin is my co-author for this essay.

6. University of Florida Law Student Levi Bradford is my co-author for this forthcoming essay.

jurisprudence. Part II discusses the development over time of federal statutory law relating to the prosecution of children as adults in federal courts. It examines current federal statutes that allow juveniles to be tried as adults in the federal system, including the 1974 Juvenile Justice and Delinquency Prevention Act. And it considers whether such provisions comport with the letter and spirit of Supreme Court case law creating constitutional rights for court-involved youth.

Part III then looks at some of the current realities of Article III adultification of youth. It focuses on certain categories of children, in part through case studies, to demonstrate the ways in which current practices do not comport with *Kent* or modern evolving standards of decency doctrine. It also warns of the dangers of continued federal transfer strategies that traumatize already vulnerable youth—potentially leading to tragedy even before sentencing.

II. Supreme Court, Kent*, and Kids Categorically Less Culpable: A State-Focused Story*

A. Kent *and Basic Standards for Juvenile Transfer Proceedings*

Many lawyers and law students know about the 1967 landmark juvenile justice case of *In re Gault*.[7] In *Gault*, the U.S. Supreme Court addressed the practices of juvenile courts—specialized youth-focused venues that emerged all across the country starting in 1899—to handle child prosecutions.[8] In seeking to treat youth as different from adults, the Court declared that many of these courts had moved too far in the direction of informality.[9] Thus, it established a range of due process requirements for juvenile court prosecutions—including

7. *In re* Gault, 387 U.S. 1, 33, 36, 55 (1967) (holding that a juvenile has due process rights, including a right to notice of charges, counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination).

8. *Id.* at 14–15.

9. *Id.* at 26–27.

the rights to notice, to counsel, against self-incrimination, and to confront witnesses at trial.[10]

However, in 1966, one year prior to *Gault*, the Supreme Court decided another critically important case involving the due process rights of juveniles, which is much less well known. That case, *Kent v. United States*,[11] established basic standards juveniles should be afforded before being transferred to adult court to face criminal prosecution and sentencing.[12] Morris Kent became involved with the juvenile court system in the District of Columbia two years prior to his arrest for allegedly entering a woman's home, sexually assaulting her, and stealing her wallet.[13] At the time of his second arrest, Kent was sixteen years old and still on probation for crimes he committed at the age of fourteen.[14] Upon interrogation, Kent told police officers that he was involved in the new crimes.[15]

The government sought to try Kent as an adult.[16] Thus, Kent's attorney filed several motions with the juvenile court, including a motion requesting a hearing to challenge Kent's transfer.[17] To transfer Kent to adult criminal court, the juvenile court judge had to follow the District of Columbia Juvenile Court Act, which purportedly required a "full investigation" prior to transfer.[18]

Claiming it made the requisite "full investigation" into Kent's case, the trial court waived juvenile court jurisdiction without formally considering defense counsel's motions, allowing Kent to have a hearing, or providing "any reason for

10. *See id.* at 33, 36, 55 (articulating the particular rights extended to accused youth).

11. *See* Kent v. United States, 383 U.S. 541, 554 (1966) (imposing due process requirements for transferring youth from juvenile court to adult courts to face criminal charges).

12. *Id.* at 557.

13. *Id.* at 543.

14. *Id.*

15. *Id.* at 544.

16. *See id.* (outlining the arguments of the prosecution).

17. *See id.* at 545–46 (detailing the actions of the defendant's attorney when in juvenile court).

18. *Id.*

the waiver."[19] The court also took account of ex parte information that Kent was not provided in ultimately deciding Kent was beyond reach of juvenile court rehabilitation.[20]

Subsequently, Kent was indicted and convicted as an adult.[21] Thereafter, Kent was sentenced to a de facto term of life imprisonment.[22] The Supreme Court took certiorari, concerned that juveniles like Kent were being provided with less protection than adults suspected of criminal offenses.[23] Furthermore, the lack of process was in no way paternalistic on the part of the government.[24] In the end, the Court determined there had been "procedural error with respect to waiver of jurisdiction"[25] and mandated basic procedural due process protections for youth facing juvenile court transfer.

While the Court agreed the Juvenile Court Act properly allowed for the juvenile court's discretion when determining whether or not to waive jurisdiction over a particular juvenile, the Court also stated that "this latitude is not complete" and that the statute "does not confer upon the Juvenile Court a license for arbitrary procedure."[26] The Court held that based on "society's special concern for children," it would be inconceivable that a juvenile facing transfer would receive such a "tremendous consequence[] without ceremony."[27] Furthermore, the Court recognized that while a State may wish to view itself as "parens patriae rather than prosecuting attorney and judge," this "'parental' relationship [was] not an invitation to procedural arbitrariness."[28]

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19. Kent v. United States, 383 U.S. 541, 545–56 (1966).

20. *Id.* at 549.

21. *See id.* at 548 (describing outcome of prosecution in criminal case).

22. *See id.* at 550 (stating that the petitioner was further certified to a mental institution as part of the disposition in his case).

23. *Id.* at 551–52.

24. *See id.* at 555 (describing possible protectionist approach under guise of *parens patriae* doctrine).

25. *Id.* at 552.

26. *Id.* at 553.

27. *Id.*

28. *Id.* at 555.

The Court concluded that "as a condition to a valid waiver order, petitioner [w]as entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision."[29] Further, the Court held that at the time of juvenile court waiver, the transferring judge must "set forth the basis for the order with sufficient specificity to permit meaningful review."[30]

Kent further established that juvenile transfer or waiver constitutes a critical stage in the juvenile's court proceedings.[31] Therefore, the Court concluded, "[a]ppointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel."[32] While it did not set forth the exact steps that must be followed in a transfer proceeding, the Court explained "the hearing must measure up to the essentials of due process and fair treatment."[33]

To this end, the Court attached to the *Kent* decision an "Appendix to [the] Opinion of the Court," reflecting the policy in place at the time of Kent's waiver that was "promulgated by the Judge of the Juvenile Court [in the District of Columbia]."[34] Although not incorporated into the holding of the opinion, "the citation of the standards apparently represents the Court's sanction of the District of Columbia criteria of amenability to treatment."[35] And, indeed, many states have expressly adopted these procedural requirements in their juvenile codes to be used in connection with transfer hearings.[36]

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29. *Id.* at 557.

30. *Id.* at 561.

31. *Id.* at 556.

32. *Id.* at 562.

33. *See id.* at 562 (citing Pee v. United States, 107 U.S. App. D.C. 47, 50 (1959)).

34. *Id.* at 546 n.4.

35. Michael Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years since* Kent v. United States, 26 DEPAUL L. REV. 23, 26 (1976).

36. *See* Mae C. Quinn, *The Other Missouri Model: Systemic Juvenile Injustice in the Show-Me State,* 78 MO. L. REV. 1193, 1227–28 (2015)

The appendix explains that the determination to waive a child to adult court rests on the following summarized factors:

> 1. The seriousness of the alleged offense to the community . . . .
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or property . . . .
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile, including previous contacts with [police and the juvenile justice system].
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court.[37]

Thus, the *Kent* decision did not expressly address the possibility of, or process for, juvenile transfer in the federal Article III judicial system—which, as will be further discussed below, does not maintain separate forums known as juvenile courts.[38]

(describing the appendix in *Kent* as a standard adopted by most states for purposes of considering juvenile transfer—other than Missouri, which has rejected the "prosecutive merit" component).

37. *Kent*, 383 U.S. at 566–67.

38. Interestingly, while Kent's matter arose in the District of Columbia, which in many respects is considered a federal venue, the District maintains its own juvenile court system like all states. *See id.*

B. State Sentencing Matters and Evolving Standard of Decency for Youth

While *Kent* and *Gault* established basic due process rights of juveniles facing trial or transfer in state court, a separate body of Supreme Court jurisprudence addresses punishment and sentencing of juveniles. This series of cases, which emerged over the course of the twenty-first century, is rooted in the understanding that society's perception of youth is evolving.[39] This is in large part because of modern scientific findings surrounding adolescent brain development.[40] These cases provide answers to "one of the substantive issues left aside in *Kent*: whether some child sentences are just too harsh to withstand Eighth Amendment scrutiny."[41]

In 1988, during the get tough era of the 1970s to the 1990s, the Court in *Thompson v. Oklahoma*[42] considered the constitutionality of a death sentence for a juvenile convicted of first-degree murder for an offense committed at the age of fifteen.[43] Noting that there was "complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor" and that juries infrequently imposed the death penalty on such juveniles in the second half of the twentieth century, the *Thompson* court concluded there

39. *See* Mae C. Quinn, *Introduction: Evolving Standards in Juvenile Justice from Gault to Graham and Beyond*, 38 WASH. U. J.L. & POL'Y 1, 12 (2012) (describing how the evolving standards of decency doctrine has been expanded in youth justice cases).

40. *See id.* (explaining that thinking has changed regarding child sentencing practices through the consideration of developmental concerns).

41. *Id.* at 11.

42. *See* Thompson v. Oklahoma, 487 U.S. 815, 818 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of someone who committed first-degree murder at age fifteen or younger); *see also* Quinn, *supra* note 39, at 11 (describing how nation has moved back and forth from being protectionist to prosecutorial in its approaches to youth who break the law).

43. *See Thompson*, 487 U.S. at 818; *see also* Quinn, *supra* note 39, at 11 (commenting on how the courts analyzed the case).

was a national consensus against sentencing offenders younger than sixteen to death.[44]

The Court, "bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender"[45] additionally stated that "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" and that there was no penological justification for the execution of fifteen-year-old offenders.[46]

But the Court and the nation were not ready to concede that juveniles of all ages were "categorically less culpable" than adults.[47] In fact, in 1995, a Princeton professor, "prompted by rising crime rates and a handful of high-profile incidents," coined the term "super-predator" to describe predominately young black juvenile offenders.[48] This prompted an "American social war" through "rhetorical excess, political extremism, graphic media, punitive policies, and, perhaps most critically, the casting of the enemy as a moral reprobate."[49] Thus "nearly every state in the country enacted laws that made it easier to try kids as adults" and took other steps to treat them more harshly for childhood wrongdoing.[50] Thousands of youth, predominately Black and Brown males, were incarcerated as a result of this frenzy.[51]

In 2005, seventeen years after the Court's decision in *Thompson*, and as the super-predator myth was finally debunked, the Supreme Court held that sentencing any juvenile offender under the age of eighteen to death was unconstitutional

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44. *See Thompson*, 487 U.S. at 824, 832.

45. Roper v. Simmons, 543 U.S. 551, 574 (2005).

46. *Thompson*, 487 U.S. at 834.

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

48. Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, J. GENDER, RACE & JUST. 281, 281 (2012).

49. *Id*.

50. *Id*. at 281.

51. *See id.* at 282 (commenting on the mass incarceration that resulted as a consequence of legislation making it easier to try juveniles as adults).

under the Eighth Amendment.[52] In *Roper v. Simmons*,[53] the Court followed the same "two-pronged methodology" as in *Thompson*.[54] The Court first "consider[ed] 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue."[55] The Court also brought its own independent judgment to bear, again, to confirm that as a general rule youthful offenders needed to be treated differently from adults.[56]

Holding that juveniles were now categorically barred from receiving the death penalty, the Supreme Court identified three key differences between juveniles and adults that "render suspect any conclusion that a juvenile falls among the worst offenders."[57] The Court recognized those three differences as: (1) "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . result[ing] in impetuous and ill-considered actions and decisions,"[58] (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,"[59] and (3) "the character of a juvenile is not as well formed as that of an adult."[60] These differences demonstrated that the death penalty for kids amounted to cruel and unusual

52. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (holding that sentencing juvenile offenders to death is unconstitutional).

53. *See id.* at 559.

54. *See* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 302–04 (2015) (describing how *Roper* adopted the two-pronged method set out by *Thompson*).

55. Graham v. Florida, 560 U.S. 48, 61 (2010) (quoting *Roper*, 543 U.S. at 572).

56. *See id.* (stating that juvenile offenders should not be treated the same as adult offenders).

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

58. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

59. *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

60. *Id.* at 570.

punishment under the Eighth Amendment. Thus, *Thompson*'s rule was extended to all juveniles under the age of eighteen.[61]

In 2011, the Supreme Court in *Graham v. Florida*[62] identified and abolished another unconstitutional juvenile sentencing practice.[63] The issue in *Graham* was whether a juvenile offender who did not kill could receive juvenile life without parole (JLWOP).[64] To evaluate JLWOP as a constitutional punishment for non-homicide juvenile offenders, the Court "look[ed] beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'"[65] Additionally, the Court's analysis focused on "the concept of proportionality [] central to the Eighth Amendment."[66]

While the State in *Graham* argued that there was "no national consensus against the sentencing practice at issue" because "[t]hirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances," the Court disagreed.[67] In fact, the Court cited a nationwide study of juvenile nonhomicide offenders serving JLWOP sentences and concluded that "the sentencing practice . . . under consideration [was] exceedingly rare" and that therefore a "community consensus" did exist against the practice.[68] The Court additionally recognized that aside from determining whether a national consensus existed, "[t]he judicial exercise of independent judgment require[d] consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in

61. *Id.* at 570–71.

62. Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide").

63. *See id.* at 48 (abolishing juvenile life without parole in non-homicide matters).

64. *See id.* at 52.

65. *Id.* at 58 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

66. *Id.* at 59.

67. *Id.* at 62.

68. *Id.* at 67.

question" and whether JLWOP for nonhomicide offenses "serve[d] legitimate penological goals."[69]

In grappling with these issues, the Court again turned to adolescent brain science. The Court found that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," reaffirming the concerns laid out in *Roper*.[70] The *Graham* Court thus held nonhomicide juvenile offenders did not deserve the harshest possible punishment.[71]

The *Graham* case is important not only because it invalidated an extreme sentencing practice for juveniles, but also because it reaffirmed that youth differ from adults in terms of culpability and amenability to rehabilitation. Additionally, *Thompson*, *Roper*, and *Graham* all paved the way for the Court's findings in *Miller* and *Montgomery*.

In *Miller v. Alabama*,[72] decided in 2012, the Supreme Court held that a mandatory juvenile life without parole sentence was unconstitutional under the Eighth Amendment.[73] This was because the *Miller* Court recognized that a sentencing scheme that mandates JLWOP "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change.'"[74] The *Miller* decision was a consolidation of two state court cases involving fourteen-year-old offenders who were sentenced to JLWOP upon being convicted of murder.[75] Both boys were certified as adults for their crimes, and therefore, "[i]n neither case did the sentencing authority have any discretion to impose a different punishment" other than the mandatory JLWOP sentence.[76]

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69. *Id.*

70. *Id.* at 68.

71. *See id.* at 69 (asserting that crimes other than homicide deserve serious punishment but are morally different than the act of killing).

72. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory life imprisonment without parole for juveniles is unconstitutional).

73. *Id.* at 465.

74. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 68, 74 (2010).

75. *Id.* at 465.

76. *Id*. at 465, 466, 469.

The *Miller* Court turned to the findings in *Roper* and *Graham* that "establish[ed] that children are constitutionally different from adults for purposes of sentencing" because of their "diminished culpability and greater prospects for reform."[77] The Court yet again relied on scientific studies to underscore differences between juveniles and adults.[78] Additionally, the Court cited *Graham* in stating that "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate."[79]

The *Miller* Court determined mandatory JLWOP sentences contravene "*Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[80] An automatic death behind bars term would "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[81] For all of these reasons, JLWOP was to be imposed in only the rarest cases—where a child's actions reflected "irreparable corruption" and not "transient immaturity."[82] And four years after *Miller*, the Court extended the decision's reach retroactively in *Montgomery v. Louisiana*[83] to provide relief to the over 2,000 youth already serving mandatory JLWOP sentences across the country.[84]

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77. *Id.* at 471.

78. *See id.* at 471–72 (discussing and citing the studies discussed in *Roper* and *Graham*).

79. *Id.* at 473.

80. *Id.* at 474.

81. *Id.* at 476.

82. *See id.* at 479–80.

83. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 724 (2016) (holding that a retroactive application of relief should be applied to youths serving mandatory JLWOP sentences across the country).

84. *See id.* at 732 (explaining how *Miller* "announced a substantive rule that is retroactive in cases on collateral review").

III. The Untold Story—Federal Prosecution and Sentencing of Youth as Adults

The very same day the U.S. Supreme Court handed down its decision in *Montgomery*, President Barack Obama issued his own important juvenile justice decision.[85] As noted, *Montgomery* made clear that the ban on automatic life without parole sentences for youth applied retrospectively—focusing on youthful offenders held in state prisons.[86] In contrast, President Obama directed the nation's attention to youth in federal prisons and jails—a population that had received almost no attention in fifty years of U.S. Supreme Court decisions relating to juveniles.[87] In his declaration, made public in part by an op-ed written for the *Washington Post*, the President issued a ban on the use of solitary confinement for youth in federal custody.[88]

News coverage that followed President Obama's announcement suggested that youth prosecution in federal court is a rare occurrence and insignificant issue.[89] This, however, reflected a misconception that persists today.[90] Indeed, while it is not common knowledge, our federal district

85. *See* Barack Obama, Op-Ed, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html (last visited Mar. 3, 2020) [https://perma.cc/J8SZ-JVGF].

86. *Montgomery*, 136 S. Ct. at 732–38.

87. Obama, *supra* note 85.

88. *See id*. (hoping that by "banning solitary confinement for juveniles" and "expanding treatment for mentally ill," that these steps would "serve as a model for state and local corrections systems").

89. *See, e.g.*, David Smith, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, THE GUARDIAN (Jan. 25, 2016), https://www.theguardian.com/us-news/2016/jan/26/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons (last visited Mar. 3, 2020) (declaring that "just 13 juveniles" were known to have been placed in federal solitary confinement between 2014 and 2015) [https://perma.cc/VDP7-3ZTT].

90. *See* Arvo Mikkanen, *Federal Prosecution of Juveniles*, 58 U.S. ATT'YS' BULL. 52, 52 (2010) ("Contrary to the common misconception that the federal government generally does not prosecute juveniles, there are a significant number of offenders under the age of 18 who . . . are subject to federal court proceedings . . . .").

courts process a sizeable number of young people each year.[91] Many are ultimately prosecuted as adults on federal charges.[92] For a range of reasons described further below, it is difficult to obtain a completely accurate count of young people charged in federal court as juveniles or transferred to be prosecuted as adults in the federal system.[93] But what can be discerned from both history and data is deeply troubling.

A. History, Federal Statutes, and Current Practices

Few realize that youth have faced prosecution, transfer, and adult sentencing in our federal court system since our nation's founding. Although there was a wave of writing about federal prosecution of youth at the turn of this century, little scholarship or other examination of this phenomenon has happened in the last twenty years. As noted, at the start of the last century, individual states began creating specialized juvenile courts to provide a less harsh setting for youth accused of wrongdoing.[94] The first specialized court opened in Illinois in 1899, and by 1925, nearly every state in the nation had its own

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91. *Id*.

92. *See id*. (noting that "juvenile offenders have long been subject to federal court proceedings" and "the Juvenile Justice and Delinquency Prevention Act" "refined the special treatment of juveniles who have committed violations of criminal law within the federal system").

93. *Compare* Juvenile Law Center, *President's Ban on Solitary Confinement is a Model for States*, JUV. L. CTR. (Jan. 28, 2016), https://jlc.org/news/presidents-ban-solitary-confinement-model-states (last visited Mar. 3, 2020) (noting hundreds of youth were in federal custody at the time of President Obama's Executive Order on juvenile solitary confinement) [https://perma.cc/J9MJ-43UN?type=image], *with* Beth Schwartzkapfel, *There are Practically No Juveniles in Federal Prison—Here's Why*, THE MARSHALL PROJECT (Jan. 27, 2016), https://www.themarshallproject.org/2016/01/27/there-are-practically-no-juveniles-in-federal-prison-here-s-why (last visited Mar. 3, 2020) (reporting that there were fewer than 30 teens in federal custody at the time of President Obama's announcement) [https://perma.cc/WAY9-XTJP].

94. *See* Quinn, *supra* note 39, at 2–3 (examining how the Progressive Era led reformers to establish "specialized juvenile courts" to "protect wayward children rather than punish them like adults").

juvenile court system.[95] The informal and ad hoc features of these settings is what ultimately led the Supreme Court to establish the juvenile court standards in *Gault* and *Kent*. Article III courts, however, never created their own separate system for alleged youthful offenders.[96]

1. Federal Court Practices and Juvenile Transfer—Generally

Instead, the federal system largely resisted the reforms taking place across the states during the early part of the twentieth century.[97] Federal courts simply continued to process the cases of children facing federal criminal charges following the common law, not much differently than in the colonial era.[98] For instance, in 1895, in the case of *United States v. Safford*,[99] a seventeen-year-old was charged with a federal offense relating to the embezzlement of mail from the postal service.[100] In that matter, the court seemed concerned about the defendant's pro se status in light of the possible legal defenses that could be advanced.[101] Thus, the court appointed counsel for the defendant, but no mention was made of any specialized

95. *See id.* (discussing the history of the juvenile court system); *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–22 (1909) (describing state-level juvenile court innovations and calling for a broader embrace of the model).

96. *See* NAT'L RES. COUNCIL AND INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord et al. eds., 2001) (discussing how youth justice matters have been handled historically in the federal system).

97. *See* JAMES DOYLE, CONG. RESEARCH SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 1–2 (2018) (outlining options afforded to federal authorities when juveniles allegedly violate federal criminal laws).

98. *See id.* at 1 ("By 1930, the Wickersham Commission reported that only the federal government continued to uniformly treat children, charged with a crime, as adults.").

99. *See* United States v. Safford, 66 F. 942, 947 (E.D. Mo. 1895) (holding that the "defendant's plea of guilty will not be accepted . . . until he shall have had opportunity to consult with counsel" appointed by the court).

100. *Id.* at 943.

101. *See id.* at 942–43.

treatment given the defendant's youth.[102] Indeed, he faced the same possible penalty as any adult.[103]

Similarly, in *Ex Parte Beaver*[104] in 1921, a writ of habeas corpus was considered on behalf of a young person who had lied about his age to join the army, deserted, and then was prosecuted under federal law.[105] There, the court rejected the teen's application to receive different treatment because he had not yet reached majority.[106] Instead, the federal district court explained:

> [A] minor of the age of discretion is answerable for his criminal offenses, just as much as is an adult. If, therefore, a minor has misrepresented his age, and has thereby committed the offense of fraudulent enlistment, or if, after enlisting, he has been guilty of desertion, insubordination, communication with the enemy, or any one of the many offenses against military law, it is difficult to suggest a valid reason why he might not be detained and tried by the military authorities for such offenses.[107]

In 1938, Congress finally codified federal practices for youth prosecutions in the Federal Juvenile Delinquency Act (FJDA).[108] The law made clear that the U.S. Attorney General could prosecute youth in federal court for crimes where the federal government had a substantial interest, even if the state

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102. *Id*. at 947.

103. *Id* at 942–47.

104. See *Ex parte* Beaver, 271 F. 493, 498 (N.D. Ohio 1921) (holding that a minor is answerable for criminal offenses "just as much as is an adult" if a minor "has misrepresented his age, and has thereby committed the offense of fraudulent enlistment").

105. *See id*. at 493–94 (discussing the minor defendant's background).

106. *See id*. at 498 (concluding that "a minor of the age of discretion is answerable for his criminal offenses, just as much as is an adult").

107. *Id*.

108. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 116, https://www.justice.gov/archives/jm/criminal-resource-manual-116-juvenile-delinquency-prosecution-introduction (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) (explaining how "[p]rior to 1938, there was no federal legislation providing for special treatment for juveniles") [https://perma.cc/79T2-2E5G].

where the child resided had a juvenile court.[109] Under the FJDA, the Department of Justice was not only allowed to file youthful offender matters in federal courts, but in some cases, it could seek a "transfer" to have such youth face adult prosecution and sentencing.[110] This law singularly controlled federal prosecution of youth for nearly forty years.[111]

Thereafter, however, the 1974 Juvenile Justice and Delinquency Prevention Act (JJDPA) was passed to amend the FJDA, purportedly in part to account for the Supreme Court's decision in *Kent*.[112] In 1984, the Federal Sentencing Reform Act and other later legislative enactments sought to further modernize federal prosecution of juveniles.[113] In the end, the U.S. Department of Justice was still permitted to seek child "transfer" from the juvenile delinquency side of the federal docket to the criminal side—to have such youth face prosecution, sentencing, and imprisonment like any adult criminal defendant.[114]

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109. *See* 17 AM. JUR. 2D *Juvenile Courts, Etc.* § 27 (2020) (describing the "[c]ertification of state proceedings to federal court under Federal Juvenile Delinquency Act"). The second essay in this series, which will be published by this journal in the days ahead, will further explore non-criminal federal juvenile delinquency practices under 18 U.S.C. §§ 5031–5043.

110. *See* DOYLE, *supra* note 97, at 2–3 (highlighting how "any 16- or 17-year-old accused of a crime which carried a maximum penalty of death, life imprisonment, or imprisonment for ten years or more" was to be transferred under "the 1974 revision of federal juvenile law").

111. *Id*. at 2.

112. *See, e.g.*, *Legislation*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/about/legislation (last visited Mar. 3, 2020) [https://perma.cc/TPG7-FWA8?type=image]. Many in the field know that the JJDPA helped create the Office of Juvenile Justice and Delinquency Prevention (OJJDP), which funds and supports state-level juvenile justice reforms and initiatives. *See* Taylor Imperiale, *Keeping Juvenile Conduct in Juvenile Court: Why the Federal Juvenile Delinquency Act Does Not and Should Not Contain a Ratification Exception*, 13 U. CHI. LEGAL F. 287, 291 (2019) ("Congress also amended the FJDA so as to align the federal government's juvenile justice policies with the dictates of *Kent v. United States*.").

113. *See* DOYLE, *supra* note 97, at 2–3.

114. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 119, https://www.justice.gov/archives/jm/criminal-resource-manual-119-referral-state-authorities (last updated Jan. 22, 2020) (last visited Mar. 3, 2020)

Taken together, these laws seemed to make clear that the federal government was interested in focusing on youth crime even more than before. For instance, some say the new statutory scheme helped to create a "more active federal juvenile justice system."[115] Similarly, the federal system clearly embraced the super-predator myth that was debunked just a few years later.[116]

For instance, the Violent Crime Control and Law Enforcement Act of 1994 (VCC Act)[117] made a "dramatic change" in expanding the range of cases that could result in juvenile transfer, covering more crimes (such as assault and drug crimes), and more youth (including those as young as thirteen, with some exceptions for Native American youth living in Indian Country).[118] The VCC Act also suggested more youth should face adult sanctions for selling drugs.[119] The Act noted that if a young person involved others in drug sale activity, they ought to be seen as a leader for whom transfer was

(describing how alleged juvenile delinquents can be surrendered to state authorities) [https://perma.cc/K5TL-8RQ5?type=image].

115. Alicia K. Embley, *Federal Jurisdiction over Juveniles: Who Decides?*, 64 MO. L. REV. 171, 173 (1999); *see also* Imperiale, *supra* note 112, at 290–91 (describing how the legislative history for the FJDA expressly notes a desire for further federal involvement in juvenile justice enforcement—but at the same time might be read as seeking to limit the federal government's role).

116. *See* Laura K. Langley, *Giving up on Youth: Danger of Recent Attempts to Federalize Juvenile Crime*, 25 J. JUV. L. 1, 10–15 (2005) (laying out the "recent legislative efforts to increase federal jurisdiction over juveniles"); *see also* Charles Puzzanchera, *Juvenile Arrests, 2016 in Juvenile Justice Statistics*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Dec. 2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251861.pdf (including chart reflecting massive decline in juvenile crime since the middle of the 1990s) [https://perma.cc/RZ4Q-WBHE].

117. 42 U.S.C. §§ 13701–14223 (2018).

118. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 129, https://www.justice.gov/archives/jm/criminal-resource-manual-129-conditions-precedent-motion-transfer (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) (describing conditions that "must be met before a Motion to Transfer | B251 can be filed") [https://perma.cc/FJG5-BTYP].

119. *See id*. (listing alleged violations such as "drug trafficking," "drug importation," "drugs on vessels," and "drug manufacturing").

appropriate.[120] On the other hand, "absence of this [leadership] factor" did not "preclude transfer" in such cases.[121]

Strong interest in federal youth transfer during the mid-1990s is also evidenced by the training literature provided to Assistant U.S. Attorneys (AUSAs) during that time, still available as a suggested online resource for AUSAs today.[122] For instance, U.S. Attorney General Janet Reno's warnings from 1994 were included in the Department's Criminal Resource Manual:

> Clearly, youth violence is the greatest single crime problem that this nation faces. I have asked United States Attorneys, the Criminal Division of the Department of Justice, and our Office of Juvenile Justice and Delinquency Prevention to do everything possible to address the issues of youth violence. It is not only a criminal justice problem but it's one of the great public health problems we face in America today.[123]

The same section went on with a 1995 quote from Attorney General Reno:

> A close look at the nation's young people discloses something that is very alarming. Since 1985, we have seen an increase in the level of youth violence that is simply staggering, particularly for youth age fourteen to seventeen. . . . This surge in youth violence is particularly frightening when we

120. *See id*. (describing how the "Violent Crime Control and Law Enforcement Act of 1994 made a dramatic change in this law regarding applicability of transfer for juveniles younger than fifteen who commit certain violations").

121. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 133, https://www.justice.gov/archives/jm/criminal-resource-manual-133-second-factor-nature-alleged-offense (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) [hereinafter CRIMINAL RESOURCES MANUAL § 133] [https://perma.cc/E4KN-TQPN].

122. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 101, https://www.justice.gov/archives/jm/criminal-resource-manual-101-federal-prosecution-juveniles (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) (providing brief remarks regarding the manual's purpose) [https://perma.cc/PEJ9-KUFY?type=image].

123. *See id*. (recounting U.S. Attorney General Janet Reno's remarks from a Weekly Press Conference at the Department of Justice held on Oct. 27, 1994).

> realize that it occurred, for the most part, in a period when the number of young people in the category of age fourteen to seventeen was decreasing in the United States. . . . The nation's demographic data, makes quite clear, that the next twenty years will produce a significant increase in the number of young people, fourteen to seventeen. Unmistakably, the current rise of youth violence presages the next generation of even more tragic crime and violence unless we do something now.[124]

Other parts of the manual offered stronger condemnation, describing teens as drug traffickers, murderous gang members, and violent individuals often beyond rehabilitative intervention.[125] Even today, AUSAs are informed that the Department of Justice's Organized Crime and Gang Division are the suggested point of contact and consultation when dealing with a juvenile in federal court proceedings.[126] Such advice reflects an embedded assumption, that further villainizes and adultifies youth who find themselves in contact with federal officials.

Today, when a child faces charges in federal court, the Department of Justice can seek to prosecute them as an adult under 18 U.S.C. § 5032.[127] Section 5032 provides two avenues to

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124. *Id*.

125. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 102, https://www.justice.gov/archives/jm/criminal-resource-manual-102-juvenile-crime-facts (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) [https://perma.cc/AMP4-G79V?type=image]; *see also* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 149, https://www.justice.gov/archives/jm/criminal-resource-manual-149-conclusion (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) (quoting President Bill Clinton who said the federal justice system was dealing with "thirty years of developing social problems in the family and on the streets with crime and violence and drugs and gangs" that demanded accountability by way of "potent federal criminal statutes") [https://perma.cc/6799-9VBC?type=image].

126. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-8.000, https://www.justice.gov/jm/jm-9-8000-juveniles (last updated Jan. 22, 2020) (last visited Mar. 3, 2020) [hereinafter JUSTICE MANUAL § 9-8.000] ("The Organized Crime and Gang Section of the Criminal Division is available for consultation on all issues pertaining to the prosecution of juveniles . . . .") [https://perma.cc/GAD7-YGEX?type=image].

127. *See* 18 U.S.C. § 5032 (2018) (describing "[d]elinquency proceedings in district courts" and the "transfer for criminal prosecution").

adult sentencing for children.[128] The first is mandatory transfer. Under this provision, juveniles age sixteen or older, seen as repeat violent offenders, face automatic adult prosecution in federal court.[129] The other possibility is discretionary transfer. Using this avenue, the Department of Justice may ask the district court to convert certain matters involving children age thirteen or older from federal juvenile delinquency proceedings to adult prosecutions.[130] During a discretionary federal transfer hearing, Article III district court judges consider the following factors:

> 1. The age and social background of the juvenile;
> 2. The nature of the alleged offense;
> 3. The extent and nature of the juvenile's prior delinquency record;
> 4. The juvenile's present intellectual development and psychological maturity;
> 5. The nature of past treatment efforts and the juvenile's response to such efforts; and
> 6. The availability of programs designed to treat the juvenile's behavioral problems.[131]

If a youth has her case transferred under either provision, she will be prosecuted as an adult in federal court and face sentencing in the same manner as an adult criminal defendant.[132] Both provisions, however, appear to present constitutional concerns—in light of *Kent* and given the Court's evolving standards of decency jurisprudence.

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128. *Id*.

129. *Id.*

130. *Id*. As will be further discussed, there is an important exception under this law for Native American youth age thirteen or fourteen.

131. *See id*. (stating that the following factors "shall be considered" "in assessing whether a transfer would be in the interest of justice").

132. *See id*. ("[T]he court shall consider the extent to which the juvenile played a leadership role . . . or otherwise influenced other persons to take part in criminal activities . . . . Such a factor, if found to exist, shall weigh in favor of a transfer to adult status . . . .").

2. Discretionary Transfer, Side-Stepping Kent*, and Ignoring Youth*

There are similarities between the current federal discretionary transfer factors under 18 U.S.C. § 5032 and the factors embraced by the U.S. Supreme Court in *Kent*, when it sought to protect against arbitrarily transferring youth to adult courts for prosecution. Interestingly, however, unlike most states, the federal government did not adopt all of the *Kent* factors.[133] The differences are such that juvenile transfer in the federal system would seem more likely than state systems that follow *Kent*.

First and foremost, as in the state of Missouri, which is another outlier—the federal juvenile transfer statute does not expressly require a finding of "probable cause" or "prosecutive merit" prior to allowing for a youth's case to be moved to the adult criminal side of the prosecution docket.[134] Training materials for Assistant U.S. Attorneys reiterate this point, noting that under the second statutory factor—"nature of the alleged offense"—"the court shall assume the juvenile committed the offense."[135] It is recommended that the assigned federal prosecutors present some proof on this point.[136] They, nevertheless, are not directed to satisfy the kind of probable cause standards *Kent* expected. Thus, it seems clear that some cases in federal court may result in children facing adult prosecution while questions exist about the strength of the charges and whether the accused youth is the actual culprit.

Second, while the federal statute requires the court to evaluate the "nature of the alleged offense" when deciding whether to transfer, it does not provide any express guidance for what this means.[137] *Kent*'s factors surely are not perfect and can

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133. *See* Quinn, *supra* note 39, at 9–16 (outlining post-*Kent* decisions).

134. *See id.* at 12–13 (reviewing and analyzing Roper v. Simmons); *see also generally* 18 U.S.C. § 5032 (2018).

135. *See* CRIMINAL RESOURCES MANUAL § 133, *supra* note 121 (describing how "[t]his can be established through testimony of the case agent or other knowledgeable law enforcement officers").

136. *Id.*

137. *Id.*

also result in transfer of youth who might be good candidates for rehabilitative treatment. They at least require courts to focus on the state of mind of the youthful offender to ascertain whether the offense was committed in a premeditated or willful manner that might demonstrate mature reflection on the matter before acting.[138]

Federal courts are not provided with such clear parameters and have broad discretion when considering how the "nature" of the crime should be evaluated.[139] Even the Department of Justice's training manual talks about drug weight as being a factor that might make a crime seem "particularly serious," meriting the assumption that the child should be held accountable in the same way as an adult—regardless of *mens rea*.[140]

Finally, much of the Department of Justice's recommended interpretation of the 18 U.S.C. § 5032 factors, and the authorities upon which it relies, pre-date the U.S. Supreme Court decisions in *Roper, Graham, Miller* and *Montgomery*.[141] As noted, these cases all provide more nuanced legal understandings of the teenage mind and how modern scientific discoveries around adolescent development should be utilized when evaluating youthful wrongdoing. As such they debunk decades of urban myths and false assumptions about youth as behaving like, and being as culpable as, fully grown adults.

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138. *See* Kent v. United States, 383 U.S. 541, 566–67 (1966) (embracing appendix that set forth specific factors to be evaluated by "the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived").

139. *See generally* 18 U.S.C. § 5032 (2018).

140. *See* CRIMINAL RESOURCES MANUAL § 133, *supra* note 121 (stating that "[t]he court may be impressed that the offense may involve a large amount of drugs unlikely to be encountered in a first time exposure to the elicit business"); *see also* United States v. Elwood, 993 F.2d 1146, 1148–49 (5th Cir. 1993) (upholding a transfer of a juvenile to be tried as an adult in drug crime case pursuant to 18 U.S.C. § 5032).

141. *See generally* 18 U.S.C. § 5032; Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 560 U.S. 48, 48 (2010); Miller v. Alabama, 567 U.S. 460, 460 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 718 (2016).

For instance, *Roper* and its progeny make clear that the brain is in a state of underdevelopment and maturation.[142] Yet the Department of Justice's Criminal Justice Manual relies on a 1989 case, claiming that older teens should be transferred because the "more mature a juvenile becomes, the harder it is to reform the juvenile's values and behavior."[143] Similarly, the Manual talks about youth who fail to show remorse as demonstrating adult maturity,[144] and states that youth with "street-wise intellect or precociousness" should similarly be seen as worthy candidates for transfer.[145] Such assessments, however, reflect an outdated understanding of adolescent behavior, which evaluates the actions and reactions of young people in light of reasonable adults rather than reasonable youth.[146]

3. Mandatory Juvenile Transfer as Inconsistent with Miller

The federal juvenile transfer statute also appears to run afoul of the spirit, if not the letter, of the Supreme Court's

142. *See Roper*, 543 U.S. at 569 (stating that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young"); *see also Graham*, 560 U.S. at 72–73 (discussing *Roper* and how "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption").

143. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 132, https://www.justice.gov/archives/jm/criminal-resource-manual-132-first-factor-age-and-social-background-juvenile (last updated Jan. 22, 2020) (last visited Mar. 5, 2020) (citing United States v. H.S., 717 F. Supp. 911, 917 (D.D.C. 1989)) [https://perma.cc/J5MZ-9E9R].

144. *See* CRIMINAL RESOURCES MANUAL § 133, *supra* note 121 (citing United States v. M.H., 901 F. Supp. 1211, 1215 (E.D. Tex. 1995)).

145. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 135, https://www.justice.gov/archives/jm/criminal-resource-manual-135-fourth-factor-juveniles-present-intellectual-development-and (last updated Jan. 22, 2020) (last visited Mar. 5, 2020) (citing United States v. Doe, 49 F.3d 859, 868 (2d Cir. 1995)) [https://perma.cc/6W82-EL7E?type=image].

146. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 272–81 (2011) (discussing how "this Court has drawn these commonsense conclusions . . . [and] observed that children 'generally are less mature and responsible than adults'").

decision in *Miller v. Alabama*. Although *Miller*'s narrow holding banned automatic life without parole sentences for youth, its teachings have broader implications. That is, *Miller* can be read as precluding any blanket rule that fails to account for the individual features of a young person and their circumstances. But 18 U.S.C. § 5032 does just that. The statute provides that certain repeat offender cases involving youth "shall be transferred to the appropriate district court of the United States for criminal prosecution."[147]

Here, again, it does not appear that the Department of Justice has revisited the practice of seeking mandatory transfer in light of *Miller*'s 2012 mandates.[148] Even in its current Justice Manual for line attorneys, updated in 2018, the section on Motion to Transfer reiterates mandatory transfer as an appropriate avenue of action without any mention of recent Supreme Court caselaw.[149] But after *Miller*, jurisdictions across the country began reconsidering all kinds of mandatory rules relating to youth facing prosecution.[150] As for transfer in particular, Ohio struck down its mandatory transfer law as denying youth appropriate individualized determinations and process under the Constitution.[151] These post-*Roper* developments cast serious doubt on the Ninth Circuit's 2000 determination in *United States v. Juvenile*,[152] which upheld the

147. 18 U.S.C. § 5032 (2018).

148. *See* JUSTICE MANUAL § 9-8.000, *supra* note 126 (reflecting no reference to *Miller*).

149. *See id.* § 9-8.130.

150. *See, e.g.*, State v. Lyle, 854 N.W.2d 378, 403–04 (Iowa 2014) (holding "the remedy in this case is to resentence Lyle so a judge can at least consider a sentencing option other than mandatory minimum imprisonment").

151. *See* Carol Taylor, *Mandatory Transfer of Juveniles to Adult Courts is Unconstitutional*, CT. NEWS OHIO (Dec. 22, 2016), http://www.courtnewsohio.gov/cases/2016/SCO/1222/150677.asp#.Xl7lrC2ZN24 (last visited Mar. 5, 2020) (discussing how the Ohio Supreme Court ruled "that mandatory transfer of juveniles to the common pleas courts violates juveniles' right to due process as guaranteed by the Ohio Constitution") [https://perma.cc/YA85-Z8CK].

152. *See* United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000) (upholding mandatory juvenile transfer under 18 U.S.C. § 5032 and rejecting

federal mandatory transfer statute against a constitutional challenge.

B. Invisible Unworthies, Missing Data, and Other Unanswered Questions

As noted, when President Obama outlawed the practice of solitary confinement for juveniles in federal jails and prisons, many were completely surprised to learn that youth were being prosecuted in federal courts—much less sentenced as adults or housed in solitary confinement in federal prisons. At the time of President Obama's announcement, one reliable authority declared that there were several hundred federally detained youth.[153] In contrast, a different youth justice group stated there were fewer than thirty youth in federal custody on the day of the announcement.[154] This conflicting snapshot demonstrates another problem of juvenile prosecution and transfer in federal court—the nearly impossible task of obtaining a clear picture of how many juvenile delinquency and transfer cases have been processed in the federal system in years past, or even today.

At least some statistics suggest that juvenile case numbers in federal court increased—not decreased—from the mid-to-late 1990s.[155] For instance, the Administrative Offices of the U.S. Courts reported that in 1994, juvenile delinquency matters were commenced against only seventy-seven youth in the federal

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a claim that such a practice is unconstitutional as violative of due process or equal protection of the law).

153. *See* Juvenile Law Center, *supra* note 93 ("[A] few hundred youth are confined in federal prisons and jails . . . .").

154. Schwartzkapfel, *supra* note 93 and accompanying text.

155. *See* Malcolm C. Young & Jenni Gainsborough, *Prosecuting Juveniles in Adult Court*, THE SENT'G PROJECT, Jan. 2000, at 2 ("Fear of out-of-control juvenile crime and a coming generation of 'super-predators,' compellingly if erroneously described publicly and to Congress in 1996, has undermined the traditional practice of treating young offenders as different from adult criminals—less culpable because of their age and more amenable to rehabilitation.").

system.[156] In 1997, the number increased to 218.[157] And the next year, 1998, saw 245 federal juvenile court filings.[158] Interestingly, these numbers conflict with other sources which provide different data for the same time period. For instance, the U.S. Department of Justice, Bureau of Justice Programs reported that 134 juveniles were actually adjudicated delinquent in federal court in 1994—with more cases filed but resulting in dismissals or acquittals.[159] And neither of these sets of statistics would appear to account for youth who were not adjudicated delinquent but instead found guilty as adults.

A 2014 report from the National Center for Juvenile Justice—which in part relies upon 2011 findings of the Urban Institute—suggests relatively high numbers of youth were federally processed and transferred up through 2008.[160] But it also raises serious questions about the reliability of the data available. For instance, the report claims that between 1999 and 2008, federal agents arrested more than 3,200 children.[161] That reflects an average annual federal arrest rate of 320 youth.[162] The Urban Institute further found that approximately eighty-five percent of these arrests resulted in findings of guilt in federal court—either by way of juvenile delinquency finding or transfer.[163] Yet, somehow, during this same period 3,500 individuals were committed to the federal Bureau of Prisons for

156. *See* David Adair & Daniel Cunningham, *Pending Juvenile Legislation*, FED. PROB. J. 8, 8 (1999) ("In recent years, Congress has expressed considerable interest in amending the federal statutes governing the prosecution of juveniles and has proposed a number of bills that would result in significant changes to the existing juvenile provisions, including a potential increase in the number of juvenile proceedings.").

157. *Id.*

158. *Id.*

159. John Scalia, *Juvenile Delinquents in the Federal Criminal Justice System,* BUREAU JUST. STAT. SPECIAL REP., Feb. 1997, at 2.

160. *See* NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 109 (Melissa Sickmund & Charles Puzzanchera eds., 2014) (stating that federal agencies arrested an average of 320 juveniles each year between 1999 and 2008).

161. *Id.*

162. *Id.*

163. *Id.*

offenses committed when they were juveniles under age eighteen.[164] Of this number, only 1,335 were serving adult prison sentences following transfer—the rest were placed as juvenile delinquents through the federal court system.[165]

Some of the apparent inconsistencies and tensions in data may, in part, be explained by terminology. Words like "juvenile" and "conviction" may not be applied consistently by various reports and agencies.[166] And entities like the U.S. Sentencing Commission have issued studies that include juveniles under the age of eighteen under the banner of "youthful offenders," which covers all defendants up to age twenty-five.[167] But the dearth of reliable data, we believe, is also because of the near singular focus on state juvenile case data collection—even by the federal Office of Juvenile Justice and Delinquency Prevention. For instance, the agency's website provides a link for readers to obtain updated national information about juveniles tried as adults.[168] However, the material on that webpage relates only to state juvenile transfer proceedings.[169] Thus, as noted by the Urban Institute, "it is exceedingly difficult to distinguish juveniles prosecuted as adults from juveniles processed as delinquents in the data" provided for the federal system.[170]

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164. *Id.*

165. *Id.*

166. *See* NAT'L RES. COUNCIL AND INST. OF MED., *supra* note 96, at 26 (explaining that sources of data vary and may reflect different crime rates and trends).

167. *See, e.g.*, U.S. SENTENCING COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM 1 (2017) (defining youthful offenders as those who are twenty-five or younger at the time they are sentenced in the federal system).

168. *See Juveniles in Court*, OFF. OF JUV. JUST. & DELINQ. PROGRAMS, https://www.ojjdp.gov/ojstatbb/court/faqs.asp (last visited Mar. 6, 2020) (providing answers to questions ranging from juvenile population characteristics to number of juveniles in corrections centers) [https://perma.cc/HS4N-3KDK?type=image].

169. *See id.* (describing how procedures related to juveniles tried as adults vary from state to state).

170. *See* WILLIAM ADAMS ET AL., TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, at x (2011) ("All juvenile cases in the federal system begin as juvenile

In addition, all of the information on the OJJDP website is considerably outdated—with the most recent "updates" on adult prosecution of youth running through 2017 only.[171] What is more, the 114-page 2017 Juvenile Court Statistics Manual, issued jointly by OJJDP, NCJJ, and the National Institute of Justice, makes no mention whatsoever of youth cases being processed in the federal court system.[172] Thus, it is almost impossible to ascertain an accurate number of juveniles prosecuted as adults in the federal system between 2008 and today. And given the current culture within the federal administration, and its treatment of vulnerable youth at the border and otherwise, this dearth of data is especially concerning.

IV. Categories, Case Studies, and Implications of Federal Court Juvenile Transfer

A. Native American Youth

Some authorities claim that between 1999 and 2008, almost half of all youth charged in federal court were those from tribal lands.[173] Yet, Native youth reflect a very small proportion of the national population—just 1.6 percent.[174] This massive disproportionality is arguably in part because of the lack of prosecutorial resources and secure detention facilities on tribal

delinquency proceedings, and it is challenging to determine the proportion of juveniles that are transferred to adult status and handled as criminal cases.").

171. *See Juveniles in Court, supra* note 168 (providing some statistics that were last updated in 2013).

172. *See generally* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2017 (2019) (focusing on state juvenile courts).

173. *See* ADAMS, *supra* note 170, at ix ("Tribal youth represented about 40–55% of all juveniles in the federal system, depending on the stage in the system.").

174. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-591, NATIVE AMERICAN YOUTH: INVOLVEMENT IN JUSTICE SYSTEMS AND INFORMATION ON GRANTS TO HELP ADDRESS JUVENILE DELINQUENCY 31 (2018) (reporting that representation of Native American youth arrested, referred for adjudication, and confined at the federal level during the same period was greater at thirteen to nineteen percent).

lands.[175] And in recent years some restrictions have been placed on the federal government's ability to unilaterally funnel tribal youth into the federal system.[176] But inconsistent data collection continues, allowing tribal youth to remain invisible victims of a system built for adults.[177]

For instance, the Urban Institute built upon its 2011 investigation to further track federal prosecution of youth in Indian Country, issuing a new report in 2015.[178] That study found that federal agencies did little since the Institute's 2011 findings to improve on data collection and reporting to ensure that all Native youth processed in federal court were properly counted.[179] Similarly, the 2018 U.S. Department of Justice Indian Country Investigations and Prosecutions Report fails to provide specific data on the number of youth arrested, prosecuted, or transferred within the federal court system.[180] Only passing reference is made to the cases of children, with one case study involving the "declination" of prosecution of an alleged sexual assault case where both boys involved—alleged assailant and victim—were twelve years old.[181] Yet, the report further notes that closed federal cases in Indian Country had increased three percent—from 2,210 to 2,281—total.[182]

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175. *See* ADAMS, *supra* note 170, at viii (asserting that the federal system is better able to address serious offenders because of the limitations of tribal courts and detention facilities).

176. *See id*. at 2 (describing features of the 2010 Tribal Law and Order Act).

177. Addie Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & POL'Y 49, 49 (2016).

178. *See* WILLIAM ADAMS ET AL., EXAMINING INDIAN COUNTRY CASES IN THE FEDERAL SYSTEM 1 (2015) ("The report builds on an earlier study conducted by Urban, *Tribal Youth in the Federal Justice System* . . . which explored issues surrounding the measurement of American Indian juveniles whose criminal cases are processed in the federal justice system.").

179. *See id*. at 13 ("Except for EOUSA . . . . the agencies did not report changes in their data collection or reporting methods for IC cases.").

180. *See generally* U.S. DEP'T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS (2018) (focusing generally on Indian Country prosecutions).

181. *Id.* at 19.

182. *Id.* at 2.

The Trump Administration's recent announcement of a task force to focus on missing and murdered Native peoples on tribal lands—dubbed Operation Lady Justice—provides further reason for concern. Intended to clear high numbers of cold cases in Indian Country, the Administration has called for further arrests, prosecutions, and harsh sentences.[183] It may be that such action, focused on delivering results, may cause even more Native youth to be swept into the federal system to be tried as adults.[184]

B. "Gang Related" Matters

Alleged "gang members" face similar concerns of assumed adultification.[185] That is, by virtue of their purported affiliations, such children are treated as adults despite what the Supreme Court has held in decades of juvenile jurisprudence.[186]

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183. *See generally* Press Release, Dep't of Justice, Trump Administration Launches Presidential Task Force on Missing and Murdered Native Americans and Alaska Natives (Jan. 29, 2020), https://www.justice.gov/opa/pr/trump-administration-launches-presidential-task-force-missing-and-murdered-american-indians (last visited Mar. 29, 2020) ("The task force, designated Operation Lady Justice, has been empowered to review Indian Country cold cases, to strengthen law enforcement protocols, and work with tribes to improve investigations, information sharing and a more seamless response to missing persons investigations.") [https://perma.cc/9T4P-52K8?type=image].

184. *See* Stephanie Ebbs, *Trump Administration Launches Task Force on Missing, Murdered Indigenous Peoples: 'Operation Lady Justice,'* ABC NEWS (Jan. 29, 2020, 5:27 PM), https://abcnews.go.com/Politics/trump-administration-launches-task-force-missing-murdered-indigenous/story?id=68617962 (last visited Apr. 1, 2020) ("Annita Lucchesi, executive director of the Sovereign Bodies Institute, said the task force's goals are too vague to make a meaningful difference and that it feels like a matter of convenience in an election year.") [https://perma.cc/P6J5-B54V].

185. *See* Riane Miller Bolin, Adultification in Juvenile Corrections: A Comparison of Juvenile and Adult Offenders 2 (Aug. 9, 2014) (unpublished Ph.D dissertation, University of South Carolina) (on file with University of South Carolina Scholar Commons) ("These changes largely resulted from the growing belief that some juveniles, particularly those involved in violent and serious crimes, deserved to be treated as adults as they were engaging in adult crimes.").

186. *See id.* (stating that the Supreme Court began the transformation of the juvenile justice system beginning in the 1960s).

The continued transfer of juvenile gang members in federal criminal court is also contrary to the Supreme Court's twenty-first century teachings about adolescent development. A series of cases from the Eastern District of New York provides a stark example of the problem.[187]

In 2018, two boys—aged fifteen and seventeen—and a seventeen-year-old girl were transferred to be tried as adults in the U.S. District Court for the Eastern District of New York.[188] They were charged with conspiracy and acting in concert with other alleged members of the MS-13 gang to murder four youth—rival gang members—whom they helped lure to the woods.[189] Although it is unclear exactly what violent actions were taken by the juveniles once the victims arrived to the woods, there the victims were beaten and stabbed to death by a large group the MS-13—otherwise known as the La Mara Salvatrucha gang.[190]

Applying the federal juvenile transfer statute, the district court was required to consider "the age and social background of the juvenile, the nature of the alleged offense, the extent and nature of the juvenile's prior delinquency record, the juvenile's present intellectual development and psychological maturity, the nature of past treatment efforts and the juvenile's response

187. United States v. Juvenile Male (*Juvenile Male I*), 327 F. Supp. 3d 573 (E.D.N.Y. 2018); United States v. Juvenile Male (*Juvenile Male II*), 316 F. Supp. 3d 553 (E.D.N.Y. 2018); United States. v. Juvenile Female (*Juvenile Female*), 313 F. Supp. 3d 412 (E.D.N.Y. 2018).

188. *See Juvenile Male I*, 327 F.Supp. 3d. at 577 ("[A]fter carefully analyzing the required statutory factors, the Court concludes in its discretion that, notwithstanding the statutory presumption in favor of juvenile adjudication, the government in this case has rebutted that presumption and met its burden of proving by a preponderance of the evidence that the defendant's transfer to adult status is warranted."); *see also Juvenile Female*, 313 F. Supp. at 416 (same); *Juvenile Male II*, 316 F. Supp. 3d at 556 (same).

189. *See Juvenile Male I*, 327 F. Supp. 3d at 577 (describing the conspiracy and acting in concert allegations); *see also Juvenile Female*, 313 F. Supp. 3d at 416 (same); *Juvenile Male II*, 316 F. Supp. 3d at 556 (same).

190. *See Juvenile Male I*, 327 F. Supp. 3d at 577 (describing how a group acted together to take the victims' lives); *see also Juvenile Female*, 313 F. Supp. 3d at 416 (same); *Juvenile Male II*, 316 F. Supp. 3d at 556 (same).

to such efforts, and the availability of programs designed to treat the juvenile's behavioral problems."[191]

In the end, in all cases "the Court conclude[d] in its discretion that, notwithstanding the statutory presumption in favor of juvenile adjudication, the government has rebutted that presumption and met its burden by proving by a preponderance of evidence that the defendant's transfer to adult status is warranted."[192] While the crimes alleged resulted in the tragic loss of life, the group-think that was clearly at play suggests the teachings of *Roper*, *Graham*, and *Miller* were not sufficiently considered.[193]

The court explicitly gave much greater weight to membership in a gang and the nature of the offense than any other determinative statutory factor.[194] But the *Roper*, *Graham*, *Miller* trilogy recognizes that youth are more easily swayed by peers than adults.[195] Furthermore, the district court explained the nature of the alleged offense when "'a crime was particularly serious'" or "when the case involves '[t]he heinous nature of the crime of intentional murder'" supported transfer.[196] But, again, this does not account for the more nuanced approach offered by the U.S. Supreme Court in its most recent Eighth Amendment

191. *See* 18 U.S.C. § 5032 (2018) (providing federal law factors to be considered in assessing whether a juvenile transfer is appropriate).

192. *Juvenile Male I*, 327 F. Supp. 3d at 577; *Juvenile Female*, 313 F. Supp. 3d at 416; *Juvenile Male II,* 316 F. Supp. 3d at 556.

193. *See* Miller v. Alabama, 567 U.S. 460, 472, 479 (2012) (noting that making youth irrelevant to imposition of the harshest prison sentence poses too great a risk of disproportionate punishment) (citing Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)).

194. *See Juvenile Male I*, 327 F. Supp. 3d at 588 (finding that seriousness of the alleged offenses and MS-13 involvement weighed strongly in favor of transfer over other factors); *Juvenile Female*, 313 F. Supp. 3d at 427 (same); *Juvenile Male II*, 316 F. Supp. 3d at 565 (same).

195. *See* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 571 (2019) [hereinafter Quinn, *Constitutionally Incapable*] (noting that the Court acknowledged in *Roper*, *Graham*, and *Miller* that youth are "more susceptible to negative influences and pressures").

196. *Juvenile Male I*, 327 F. Supp. 3d at 581; *Juvenile Female*, 313 F. Supp. 3d at 421; *Juvenile Male II*, 316 F. Supp. 3d at 560 (quoting United States v. Nelson, 68 F.3d 583, 590 (2d Cir. 1995)).

jurisprudence that recognizes youth are categorically less culpable—even in murder cases.[197] In each of these acting-in-concert cases, the district court allowed the alleged crime to be nearly determinative of transfer, without also highlighting that "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*."[198]

As the Court stated in *Miller*, "'just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability."[199] But that did not happen either.[200] Rather, it seems the realities of the juveniles' social backgrounds, intellectual development, and psychological maturity were used against them.

For instance, Juvenile Male II was left by his parents at a young age in El Salvador, grew up in poverty, saw his uncle murdered by a gang, and was smuggled to the United States.[201] Yet rather than treat this as youth-related mitigation, the district court declared the child's "social background, taken in its entirety, suggests a low likelihood of rehabilitation within the short period of time before his release if convicted as a juvenile."[202]

As for Juvenile Male I, his doctor opined on apparent "immaturity and executive function issues;" however, the court concluded that this opinion was "of limited significance in the

197. *See generally* Quinn, *Constitutionally Incapable*, *supra* note 195 (outlining ways in which even homicide matters need to be approached with the presumption that youth are amenable to rehabilitation and change).

198. *Miller*, 567 U.S. at 472 (emphasis added).

199. *Id.* at 476 (quoting *Eddings*, 455 U.S. at 116).

200. *See, e.g.*, *Juvenile Female*, 313 F. Supp. 3d at 422 (stating that the older that a juvenile defendant is, the harder it becomes to reform his or her values and behavior).

201. *See Juvenile Male II*, 316 F. Supp. 3d at 561–62 (noting the difficulties the juvenile faced in moving to the United States from El Salvador).

202. *Id.* at 563.

context of this [transfer] motion."[203] This was because the court did not have confidence in the doctor's ability "to conclude whether the defendant's behavior reflects immaturity or simply a lack of remorse."[204] But a lack of confidence in determining whether a juvenile is able to be rehabilitated should weigh in favor of retaining juvenile jurisdiction, not waiving it, even for immigrant youth.[205]

Indeed, the court failed to determine whether each of the juveniles who had been lured into gang life was "irreparably corrupt."[206] As the *Montgomery* Court explained, *Miller* "rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth," therefore drawing a distinction "between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[207]

C. Immigrant Youth

Immigrant youth may find themselves facing federal criminal charges for far less than gang-related violent activity. Indeed, under the current federal Administration, this possibility seems more likely than ever before. Its practice of expedited processing for the supposed crime of improper entry and reentry may be resulting in further immigrant youth being swept up in federal court prosecutions that leave them with adult convictions.[208]

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203. *Juvenile Male I*, 327 F. Supp. 3d at 591.

204. *Id.*

205. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (noting that occasions for sentencing juveniles to the harshest possible sentences will be uncommon).

206. *See generally Juvenile Male I*, 327 F. Supp. 3d 573 (failing to discuss whether juvenile met the "irreparably corrupt" standard as set forth in *Montgomery*); *Juvenile Male II*, 316 F. Supp. 3d 553 (same); *Juvenile Female*, 313 F. Supp. 3d 412 (same).

207. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

208. *See Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL (Jan. 10, 2020), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions (last visited Mar. 8, 2020) (explaining that high conviction rates for these federal offenses lead to many migrants

Under the banner of "Operation Streamline," immigration-related prosecutions have been fast-tracked in many border locations, such that defendants often meet with their attorney the same day they resolve their case.[209] The number of prosecutions for such matters have risen from approximately 15,000 in 2004 to over 80,000 in 2019.[210] The sheer volume of cases being moved en masse strongly suggests that, beyond presenting due process violations, some significant percentage of these matters may involve juveniles under the age of eighteen who are being processed as adults.[211]

Indeed, not only are such matters being moved like an assembly line—sometimes with seventy to ninety defendants pleading guilty in one day—many of these illegal entry matters involve individuals who may have valid asylum claims.[212] Human Rights First researchers have documented hundreds of instances of such summary proceedings and confirmed with federal defenders that many of their clients appear to have valid asylum claims.[213] As described in one recent article, "[i]n

being subject to incarceration in federal prison for months or longer) [https://perma.cc/MDK9-7E4N].

209. *See id.* (describing the ways in which this rushed setting can impede an attorney's ability to provide quality representation).

210. *Id.*

211. *See* Curt Prendergast, *New Guidelines Cut Sentences for Illegal Border Crossings*, TUSCON.COM (Jan. 21, 2017), https://tucson.com/news/local/border/new-guidelines-cut-sentences-for-illegal-border-crossing/article_1b2685d2-9539-5fa2-a624-f1eba9e54b75.html (last visited Mar. 8, 2020) (providing sentencing statistics for a range of border re-entry cases where age of the defendant was unknown to the Federal Sentencing Commission) [https://perma.cc/HHD8-DWJ7?type=image].

212. *See* Eleanor Acer*, Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SECURITY (July 18, 2019), https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/ (last visited Mar. 8, 2020) (describing how in the first year after President Trump signed an executive order to make criminal prosecutions of immigration offenses a high priority, prosecutions rose and more asylum seekers were targeted) [https://perma.cc/4S7E-F5QV].

213. *See* HUMAN RIGHTS FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION'S MISUSE OF CRIMINAL PROSECUTIONS 12 (2018), https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf (stating that in some cases attorneys advise their

violation of Article 31, DHS continues to refer asylum seekers for criminal prosecutions, while federal prosecutors routinely fail to drop charges or stay prosecutions involving asylum seekers, and federal judges and magistrates proceed with convictions."[214]

Similarly, even when immigrant youth under the age of eighteen are placed with the Office of Refugee Resettlement rather than criminally prosecuted upon detection at the border—that does not mean they will remain.[215] Under the Trump Administration's policies, many such youth are merely being held until age eighteen and then turned over to the Department of Human Services and Homeland Security to be dealt with as adults.[216] It is clear many such youth are then deported. What is not as clear—but may be happening—is that such youth are pleading guilty as adults to the federal crime of illegal entry before their removal.

Even beyond border towns, immigrant youth are overrepresented in federal matters.[217] Reports suggest

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clients that raising asylum concerns will only be futile) [https://perma.cc/8P63-BBVB].

214. Acer, *supra* note 212.

215. *See* Alexandra Schwartz, *The Office of Refugee Resettlement is Completely Unprepared for the Thousands of Immigrant Children Now in Its Care*, THE NEW YORKER (July 21, 2018), https://www.newyorker.com/news/news-desk/the-office-of-refugee-resettlement-is-completely-unprepared-for-the-thousands-of-immigrant-children-now-in-its-care (last visited Mar. 8, 2020) ("One terrible irony of the current crisis is that a government office whose explicit goal is to reunify children with their families is now being used to hold children who have entered its jurisdiction because the government has forcibly removed them from their parents' care.") [https://perma.cc/2V7J-C95B?type=image].

216. *See* Emily Stewart, *Immigrant Children Can Be Detained, Prosecuted and Deported, Once They Turn 18*, VOX (June 21, 2018), https://www.vox.com/2018/6/21/17489320/unaccompanied-minors-ice-detention-family-separation-18 (last visited Mar. 8, 2020) ("Under the Trafficking Victims Protection Reauthorization Act of 2013, unaccompanied immigrant children in ORR custody after turning 18 are supposed to be placed in the 'least restrictive setting available' after taking into account whether they oppose a danger to themselves or others or might try to flee.") [https://perma.cc/9KN8-55EL].

217. *See* Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports

immigration officials are working in connection with local authorities to target non-citizens in an effort to deport them based upon relatively minor matters that are viewed as serious claims of wrongdoing in immigration court.[218] On the flip side, some local prosecutors have also begun referring matters to federal courts where they know youthful defendants are more likely to be tried as adults following federal transfer—and then potentially deported.[219]

Thus local prosecutors are declaring federal adult prosecution as their new "crime fighting strategy."[220] In one such recent matter, Nathaniel Valenzuela, a tiny teen accused of selling fentanyl and possessing a weapon was being held in custody as prosecutors sought to have him tried as an adult in federal court.[221] Tragically, Nathaniel—who in fact was a life-long resident of Albuquerque—never saw his day in court.[222] Instead, the small boy took his own life to avoid serving time in federal prison with adults.[223]

/youth2019.html (last visited Mar. 8, 2020) (detailing the racial disparities in juvenile facilities) [https://perma.cc/5J55-HTA2].

218. *See* Shamira Ibrahim, *Black Immigrants and the Prison to Deportation Pipeline*, VOX (Sept. 20, 2019), https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline (last updated Feb. 5, 2020) (last visited Mar. 8, 2020) (reporting that low-level crimes such as marijuana possession are lumped into the offense of "drug trafficking" in immigration court—even if it is a misdemeanor in criminal courts—mandating automatic deportation without any discretion for a judge to consider individual circumstances) [https://perma.cc/5R5S-NEM2].

219. *See* Elise Kaplan, *Referring Cases to Federal Court a Crime Fighting Strategy*, ALBUQUERQUE J. (Nov. 13, 2019, 6:15 PM), https://www.abqjournal.com/1391298/referring-cases-to-federal-court-a-crime-fighting-strategy.html (last visited Mar. 8, 2020) ("But referring cases to federal court is a strategy District Attorney Raúl Torrez has cited recently as a way to seek the detention of defendants pending trial, as well as longer sentences if they are convicted.") [https://perma.cc/44T6-QJ77].

220. *See id.* (providing examples of teenagers who did not meet the criteria to be tried as an adult locally but could nonetheless be if a federal judge decided to do so).

221. *See id.* (recounting that according to Nathaniel's attorney, a charge involving sixty fentanyl pills is not one normally prosecuted in federal court).

222. *Id.*

223. *Id.*

V. Conclusion

Little known by the general public, our federal court system is being used to prosecute and punish children in this country as if they are adults. Sadly, the exact extent of the problem is unknown—in large part because of the lack of accurate data about such cases. But it is no small problem. The numbers that we know about are significant. More than this, the practices used to transfer youth in federal court fail to sufficiently account for constitutional requirements established by the U.S. Supreme Court over several decades.

Youth are both being denied protections established by the Court in the 1970s for kids facing transfer and being adultified in ways that violate the letter and spirit of the Court's holdings that demonstrate that youth are categorically less culpable than their adult counterparts. Federal transfer is also used in ways that tend to overrepresent and further traumatize already marginalized youth—including tribal teens, immigrant youth, and those seeking connection through gang affiliation.

Federal prosecutors need to rethink their practices relating to child defendants, redirecting more such youth to juvenile courts and local venues where they can receive age-appropriate interventions and community-based supports. Courts should reject requests to try children as full-grown adults in federal courthouses. And, ultimately, federal statutes need to be revised to take account of modern understandings of the adolescent mind—and no longer allow for Article III adultification or erasure of childhood as a matter of law.