

They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?

On January 31, 1994, Edward Borrero, age fifteen, and Terrance Robinson, age sixteen, attempted to rob an American Mail Box Etc. store in Silver Spring, Maryland.¹ When a neighboring store owner intervened, Borrero shot and killed him and injured the American Mail Box store owner.² The state charged both teenagers as adults, Borrero for murder and Robinson for felony murder.³ Borrero was sentenced to life in prison with the possibility of parole after fifteen years and Robinson, the accomplice to the shooting, was sentenced to twenty years in prison.⁴

I. INTRODUCTION

As of 2005, every state has a transfer statute that authorizes the state to prosecute juveniles like Borrero and Robinson in adult criminal court.⁵ A transfer statute is “[a] provision that allows or mandates the trial of a juvenile as an adult in a criminal court for a criminal act.”⁶ Transfer occurs in a number of different ways and each state’s statute is unique, but there are three basic models followed: prosecutor directed transfer, judicial discretion transfer, and automatic waiver.⁷

1. *2nd Teen Guilty in Slaying Of Silver Spring Merchant*, WASH. POST, July 20, 1994, at D5 [hereinafter *Teen Slaying*] (reporting robbery and murder committed by Maryland teens).

2. *Id.* (explaining events of night teenagers committed crimes).

3. *Id.* (discussing murder and felony murder charges brought against boys).

4. *See District Man Convicted in Death of Md. Merchant*, WASH. POST, Sept. 30, 1994, at D6 (reporting sentence for felony murder of juvenile accomplice); *Life Sentenced in Md. Slaying*, WASH. POST, October 7, 1994, at D6 (recounting sentencing of shooter in murder of store clerk).

5. Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 45 (1998) [hereinafter *Best Interests*] (indicating all states except Hawaii enacted transfer statutes by 1998); HAW. REV. STAT. § 571-22 (2005) (allowing judicial transfer of juveniles into adult criminal court).

6. BLACK’S LAW DICTIONARY 1536 (8th ed. 2004) (defining transfer statutes and explaining process of juvenile transfer into adult court). States use the terms transfer, waiver, certification, and petition interchangeably in their transfer statutes. *See* ALA. CODE § 12-15-34 (2005) (utilizing “transfer” as terminology to explain juvenile treatment as adult); FLA. STAT. § 985.227 (2001 & supp. 2006) (employing language of “filing” to describe transfer process); HAW. REV. STAT. § 571-22 (2005) (defining transfer process as waiving jurisdiction); NEV. REV. STAT. § 62B.390 (2002) (describing transfer process as “certification” of child as adult).

7. *See, e.g.*, ALA. CODE § 12-15-34 (1995); FLA. STAT. § 985.227 (2001 & supp. 2006); NEV. REV. STAT. § 62B.390 (2002) (giving both discretionary and mandatory transfer power over juveniles to state prosecutor); *see also* COLO. REV. STAT. § 19-2-518 (2005); HAW. REV. STAT. § 571-22 (2005); VA. CODE ANN. § 16.1-269.1 (2003) (allowing judicial discretion over juvenile transfers). *But see* GA. CODE ANN. § 15-11-28 (2005); MD.

In the mid-1990s, due to a number of highly-publicized cases involving juveniles committing serious crimes, forty-seven states and the District of Columbia enacted “get tough” policies to transfer more juveniles to adult criminal courts and bolster their potential sentences.⁸ States enacted tougher policies on juvenile crime to deter other juveniles from committing crimes.⁹ Florida’s philosophy exemplifies this ideology: “if you are old enough to do the crime, you are old enough to do the time.”¹⁰ Research indicates, however, that juvenile crime rates were decreasing before states passed “get tough” policies.¹¹

Studies suggest that transferring juveniles has neither a deterrent nor a rehabilitative effect.¹² If a juvenile is transferred and convicted as an adult, forty-five states and the District of Columbia incarcerate the juvenile in the same facility with adults.¹³ Transferring juveniles and incarcerating them with adults increases the likelihood of recidivism because prisons can be schools for crime.¹⁴ Furthermore, juveniles housed in adult prison facilities not only face the harsh realities of adult prison life at young ages, but also have fewer educational opportunities than juveniles incarcerated in juvenile facilities.¹⁵

Borrero and Robinson plead guilty, and pursuant to a Maryland law were

CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002) (mandating automatic transfer for certain juvenile offenders).

8. Jarod K. Hofacket, Comment, *Justice or Vengeance: How Young is Too Young for A Child to be Tried and Punished as an Adult?*, 34 TEX. TECH L. REV. 159, 167 (2002) (explaining trends for “get tough” legislature). The “get tough” policies facilitated the transfer of juveniles into adult court with adult sanctions. *Id.*

9. See Hofacket, *supra* note 8, at 167 (indicating state’s reasons for passing “get tough” policies as punishment and deterrence). High-profile juvenile crime cases create a perceived rise in juvenile crime rates. *Id.* at 164-65. This perception led legislatures to believe that the juvenile justice system and its rehabilitative ambitions had failed. *Id.* at 165.

10. Alan Gomez, *Krischer Standing Firm on Juvenile*, PALM BEACH POST, Mar. 15, 2004, at 1A (reporting Florida policies behind utilization of prosecutor directed juvenile transfer statute). In Florida, the prosecutor has discretion to transfer fourteen- and fifteen-year-olds who commit certain crimes but must transfer juveniles over sixteen who commit serious crimes. FLA. STAT. § 985.227 (2001 & supp. 2006).

11. See Hofacket, *supra* note 8, at 164-65 (noting criminals serve as role models for juveniles in adult prisons).

12. See Conward, *Best Interests*, *supra* note 5, at 49 (explaining transfer of juveniles has small effect on deterrence if any). Although legislatures defend “get tough” policies by explaining their deterrent effect, many states, like Florida, found recidivism greater in juveniles who have been transferred to adult court. *Id.* at 46-47.

13. See, e.g., ALA. CODE § 12-15-61 (2005); FLA. STAT. § 985.233 (2001); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-22 (West 2002) (allowing juvenile detention with adults once transferred and convicted); see also *infra* notes 104-106 (listing states incarcerating juveniles with adults). Although forty-five states and the District of Columbia incarcerate juveniles with adults, twenty-six require some form of separation between the adults and the juveniles. See *infra* notes 104-106.

14. See Hofacket, *supra* note 8, at 174 (arguing against transfer, citing higher recidivism rates for transferred juveniles).

15. See Cynthia Conward, *Where Have All The Children Gone?: A Look At Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2447 (2001) [hereinafter *Where Have All the Children Gone?*] (describing lack of educational opportunities for incarcerated juveniles when released).

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automatically transferred to adult criminal court.¹⁶ In Maryland, the juvenile court does not have jurisdiction over children older than fourteen who are charged with acts punishable by death or life imprisonment.¹⁷ The state charged Borrero with murder, and after testifying against adults involved in the crime he was sentenced to life imprisonment with a possibility of parole after fifteen years.¹⁸ Robinson pled guilty to felony murder.¹⁹ When a death occurs during the commission of a dangerous felony, it is considered murder, even where, like with Robinson, the person charged with felony murder was not the person who pulled the trigger.²⁰ Teens like Borrero and Robinson are subject to adult prison conditions at young ages, which make them far more likely to be assaulted, depressed, or suicidal.²¹

This Note analyzes whether the Eighth Amendment prohibits the incarceration of juveniles with adults. Part II(A) explains the three typical transfer statutes.²² Part II(B) analyzes the Eighth Amendment in the context of prisoners' rights and discusses Supreme Court precedent.²³ Part II(C) examines trends in substantive due process rights at the pretrial stage and presents an overview of the Juvenile Justice and Delinquency Prevention Act (JJDP A).²⁴ Part II(D) explores the consequences of incarcerating juveniles with adults.²⁵ Lastly, Part III argues that it is cruel and unusual punishment to incarcerate transferred convicted juveniles in adult facilities.²⁶

16. See *Teen Slaying*, *supra* note 1, at D5 (reporting sentencing of teens in felony murder case); see also MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002) (describing juvenile automatic transfer process into adult court).

17. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002) (demonstrating breadth of Maryland juvenile court jurisdiction).

18. See *Life Sentenced in Md. Slaying*, WASH. POST, October 7, 1994, at D6 (describing sentence of teen who plead guilty to murder).

19. See *Teen Slaying*, *supra* note 1, at D5 (recounting teen's charge and guilty plea).

20. See *Teen Slaying*, *supra* note 1, at D5 (describing defendant's plea bargain). Felony murder is "murder that occurs during the commission of a dangerous felony (often limited to rape, kidnapping, robbery, burglary, and arson)." BLACK'S LAW DICTIONARY 200 (8th ed. 2004); see also Rudolph Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 763-64 (1999) (detailing felony murder rule's application and consequences).

21. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-22 (West 2002) (allowing transferred juveniles' incarceration with adults); see also Hofacket, *supra* note 8, at 173 (discussing ramifications for juveniles incarcerated with adults). For example, juveniles in adult prisons, as compared to juveniles in juvenile facilities, are 7.7 times more likely to commit suicide, five times as likely to be sexually assaulted and twice as likely to be beaten by staff. Hofacket, *supra* note 8, at 173.

22. See *infra* Part II.A (illustrating three types of transfer statutes and providing examples).

23. See *infra* Part II.B (summarizing Eighth Amendment precedent).

24. See *infra* Part II.C (highlighting JJDP A and rights of pretrial detainees).

25. See *infra* Part II.D (describing consequences for juveniles incarcerated in adult facilities).

26. See *infra* Part III (arguing separation of juveniles from adults required under Eighth Amendment).

II. HISTORY

A. Background on Juvenile Transfer

To understand how juveniles end up incarcerated with adults it is necessary to understand how they are transferred into the adult criminal system. The legislatures of all fifty states and the District of Columbia have enacted some form of a juvenile transfer statute.²⁷ The first transfer statutes were ratified in the 1970s after an increase in violent juvenile crimes caused state legislatures to demand juvenile accountability.²⁸ Before being subjected to the realities of adult criminal courts and their corresponding sanctions, transferred juveniles are entitled to a hearing, counsel, and the enumerated reasons for the transfer.²⁹ Waiver has become increasingly popular, and states have found different ways to increase the number of juveniles transferred into adult criminal court.³⁰ While every state has its own transfer statute, there are three basic models: prosecutor directed transfer, judicial discretion transfer, and legislative transfer.³¹

1. Prosecutor Directed Transfer

Many states allow prosecutors to charge juveniles as adults, yet prosecutors' decisions are not always purely discretionary as most of these states also have mandatory transfer provisions.³² For example, Florida prosecutors have full

27. See Conward, *Best Interests*, *supra* note 5, at 45 (indicating all states except Hawaii had juvenile transfer statutes in 1998). *But see* HAW. REV. STAT. § 571-22 (2005) (permitting judicial transfer of juveniles into adult criminal court).

28. Conward, *Best Interests*, *supra* note 5, at 44-45 (explaining juvenile transfer origins in United States). Many states used the social reform movement of the 1960s as a basis for justifying tougher penalties for juvenile crime. *Id.*

29. *Kent v. United States*, 383 U.S. 541, 557 (1966) (listing mandatory juvenile rights for states to consider when transferring juveniles).

30. THE BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 3 (2000) [hereinafter JUVENILES IN ADULT PRISONS] (describing methods and increased transfer), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>. Legislatures increased the number of juveniles transferred into adult criminal court by either lowering the transfer age or increasing the list of crimes that allow discretionary or mandatory transfer. *Id.* Some states allow waiver of juveniles into adult court for attempting to escape juvenile correctional facilities and for crimes against property. *Id.* Most of the crimes, however, that trigger transfer are violent crimes against people. *Id.*

31. See, e.g., FLA. STAT. § 985.227 (2001 & supp. 2006) (giving prosecutor discretion to transfer juveniles in most cases); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002) (mandating automatic transfer for juveniles over certain age committing certain crimes); VA. CODE ANN. § 16.1-269.1 (2003) (giving juvenile judge discretion over transfer of juveniles); see also Hofacket, *supra* note 8, at 168 (discussing types of transfer statutes).

32. See FLA. STAT. § 985.227 (2001 & supp. 2006) (giving prosecutor discretion to transfer juveniles over fourteen, but mandating transfer in other situations). If the juvenile is under fourteen, the prosecutor has no discretion and may not charge the juvenile as an adult. *Id.* The prosecutor must transfer sixteen- and seventeen-year-olds into adult court if they commit certain serious crimes. *Id.*; see also ARIZ. REV. STAT. § 13-501 (2001) (providing both mandatory and discretionary language for prosecutor varying by age of juvenile).

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discretion over transferring juveniles between fourteen and fifteen who commit certain felonies, such as arson, murder, rape, and kidnapping.³³ Florida prosecutors have no discretion and must transfer sixteen and seventeen year old juveniles with prior records and who commit similar crimes, or any juvenile who caused a death while in possession of a stolen vehicle.³⁴ Florida's statute is paradigmatic of a prosecutorial transfer statute, as it contains both discretionary and mandatory language.³⁵

Prosecutorial directed transfer is the least utilized form of juvenile transfer

33. FLA. STAT. § 985.227 (2001 & supp. 2006) (enumerating circumstances in which prosecutors have discretion over juvenile transfers). Florida prosecutors have full discretion over juveniles who, at the time of the alleged crime, were between fourteen and fifteen and committed, attempted, or conspired to commit:

Arson; Sexual battery; Robbery; Kidnapping; Aggravated child abuse; Aggravated assault; Aggravated stalking; Murder; Manslaughter; Unlawful throwing; Placing or discharging of a destructive bomb; Armed burglary in violation of s. 810.02(2)(b) or specified burglary of a dwelling or structure in violation of s. 810.02(2)(c), or burglary with an assault or battery in violation of s. 810.02(2)(a); Aggravated battery; Any lewd or lascivious offense committed upon or in presence of a person less than sixteen years of age; Carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony; Grand theft in violation of s. 812.014(2)(a); Possessing or discharging any weapon or firearm on school property in violation of s. 790.115; Home invasion robbery; Carjacking; or Grand theft of a motor vehicle in violation of s. 812.014(2)(c)6. or grand theft of a motor vehicle valued at \$20,000 or more in violation of s. 812.014(2)(b) if the child has a previous adjudication for grand theft of a motor vehicle in violation of s. 812.014(2)(c)6. or s. 812.014(2)(b).

Id. Florida prosecutors also have discretion to transfer juveniles between ages sixteen and seventeen for felonies and, in the case of misdemeanors, if the juvenile has been adjudicated delinquent at least twice, one of which was for a felony. *Id.*

34. *Id.* (providing criteria for mandatory juvenile transfer to adult criminal system). Florida's transfer statute is mandatory with respect to juveniles between sixteen and seventeen who have previously been adjudicated delinquent for a violent crime and are currently charged with a subsequent violent crime. *Id.* A Florida juvenile charged with a violent felony, having previously been adjudicated delinquent for three felonies, and who is over the age of sixteen, is automatically transferred to adult criminal court. *Id.* Florida prosecutors must also transfer juveniles over sixteen who possessed a firearm during the commission of a felony. *Id.* The prosecutor does not have discretion and must transfer any juvenile, regardless of age, charged with causing a death or serious bodily injury while in possession of a stolen vehicle to a victim not involved in the crime. *Id.*

35. *Id.* (allowing discretion over some juveniles but automatic transfer over others). Most states that have prosecutorial directed transfer statutes have a system that blends prosecutor discretion and automatic transfer or prosecutor discretion and judicial discretion. *See, e.g.,* ALA. CODE § 12-15-34 (2005) (granting prosecutor power to request transfer but allowing juvenile court discretion to permit request); ARIZ. REV. STAT. § 13-501 (2001) (providing mandatory situations in which prosecutor must transfer juveniles and also delineating discretionary situations); NEV. REV. STAT. § 62B.390 (2002) (allowing juvenile court discretion after prosecutor files motion to transfer). Arizona, Nevada, and Florida statutes give the prosecutor discretion to transfer juveniles older than fourteen who commit felonies such as murder, rape, and arson. ARIZ. REV. STAT. § 13-501 (2001); FLA. STAT. § 985.227 (2001 & supp. 2006); NEV. REV. STAT. § 62B.390 (2002). These statutes, however, mandate that the prosecutor charge a juvenile older than sixteen who commits other serious felonies to adult court. *Id.* Alabama prosecutors, however, have almost full discretion to charge juveniles over fourteen except those who are mentally ill, under the influence of a substance, or emotionally disturbed. ALA. CODE § 12-15-34 (2005). Alabama's statute has no mandatory transfer language. *Id.*

and the most criticized.³⁶ Only fifteen states have implemented prosecutorial directed transfer, most of which are blended with another type of transfer statute.³⁷ A few states, however, allow a prosecutor to file any offense in adult criminal court.³⁸ The biggest critique of prosecutorial waiver is that it is too political and does not contemplate the best interests of the child.³⁹

2. Judicial Discretion Transfer

Judicial discretion is the most common transfer process.⁴⁰ Judicial transfer is embraced by the majority of jurisdictions because it is the most protective of juveniles' due process rights.⁴¹ In *Kent v. United States*,⁴² the Court listed eight factors that judges should consider when deciding whether to transfer juveniles to adult criminal court:

- 1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;
- 2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- 3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
- 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 (to be determined by consultation with the United States Attorney);
- 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 who will be charged with a crime in [District Court];
- 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 the Youth Aid Division, other law

36. See Joshua Rose, Note, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 982 (2003) (criticizing prosecutorial waiver as vesting too much power with prosecutors).

37. See *id.* (discussing blending of different types of transfer statutes).

38. See *id.* (highlighting critiques and lack of pervasiveness of prosecutorial waiver).

39. See Hofacket, *supra* note 8, at 171 (evaluating prosecutorial waiver and its shortcomings). Opponents of prosecutorial waiver argue that it ignores that Court's requirement of ensuring "individualized consideration of the maturity and moral responsibility of charged juveniles." *Id.* (quoting *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

40. See *id.* at 168 (commenting on judicial determination's popularity and benefits).

41. See *id.* at 168-69 (discussing reasons for general acceptance of judicial waiver). The majority of scholars, the American Bar Association, and the National Advisory Committee on Criminal Justice Standards support judicial waiver because it protects minors' due process rights and is probably what the Supreme Court contemplated in *Kent v. United States*, 383 U.S. 541 (1966). Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 571 (1996) (summarizing support for judicial waiver). But see Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport With the Requirements of Due Process?*, 26 TEX. TECH L. REV. 813, 833 (1995) (explaining vague standards and diagnostic tools make judicial waiver arbitrary).

42. 383 U.S. 541 (1966).

enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; and 8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.⁴³

Juvenile court judges must consider the eight *Kent* factors as well as their state's unique judicial waiver statute.⁴⁴ For example, Hawaii's transfer statute allows a judge, after considering certain enumerated factors, to transfer a juvenile over the age of sixteen to adult criminal court if he or she is charged with a felony.⁴⁵ Conversely, Colorado, like many other states with judicial transfer statutes, utilizes blended judicial and prosecutorial discretion.⁴⁶ The Colorado juvenile court judge has the power to transfer some juveniles, but in certain situations the prosecutor may directly file a transfer petition with the adult criminal court, bypassing the juvenile court judge's authority.⁴⁷ A

43. *Id.* at 566-67 (instructing lower courts on juvenile transfer factors). In *Kent*, a juvenile was transferred to adult criminal court "silently," without any reasons given by the judge, and the Supreme Court held that the silent transfer violated his due process rights. *Id.* at 561-62. As a result, the Supreme Court enumerated eight factors for judges to consider when waiving jurisdiction over a juvenile pursuant to a judicial waiver statute. *Id.* at 566-67; see also Rose, *supra* note 36, at 980-81 (discussing *Kent* factors).

44. See, e.g., COLO. REV. STAT. § 19-2-518 (2004); HAW. REV. STAT. § 571-22 (2005); VA. CODE ANN. § 16.1-269.1 (2003) (allowing judicial discretion over juveniles charged with certain crimes while considering other factors). The Colorado and Virginia statutes provide judicial discretion as well as prosecutorial directed transfer depending on the age and nature of the crime. COLO. REV. STAT. § 19-2-517(1)(a) (2004); VA. CODE ANN. § 16.1-269.1 (2003). Hawaii's statute is purely judicially discretionary, and while it provides criteria and factors for the judge to weigh, the judge makes the ultimate decision. HAW. REV. STAT. § 571-22(a) (2005).

45. HAW. REV. STAT. § 571-22(a) (2005) (detailing criteria for judicial discretion of juvenile transfers). A Hawaii judge may only transfer a juvenile over sixteen who has been charged with a felony if there is no evidence that the child is mentally ill or treatable by a facility set up for children, and safety requires that the person be subject to institutionalization for longer than the person's minority. *Id.* A juvenile over fourteen charged with a felony may be transferred to adult criminal court if the judge finds that the act resulted in "serious bodily injury to a victim," the "act constitute[d] a class A felony," the juvenile "ha[d] more than one prior adjudication for acts that would constitute felonies if committed by an adult, and there is no evidence the person is committable to an institution for the mentally . . . ill." *Id.* The legislature also implemented the *Kent* factors in the juvenile transfer statute for the judge to consider when determining whether transfer is appropriate. Compare § 571-22 (delineating 8 factors from *Kent* for judge to consider when deciding issue of transfer), with *Kent*, 383 U.S. at 566-67 (holding due process requires juvenile judge to consider eight factors before transferring juvenile).

46. COLO. REV. STAT. § 19-2-517 (2004) (setting forth circumstances for judicial and prosecutorial discretionary transfer).

47. COLO. REV. STAT. § 19-2-518(1)(a) (2004) (exhibiting circumstances when judge retains discretion versus prosecutor's discretion). Colorado has a dual system of judicial and prosecutorial discretion. § 19-2-518; see also COLO. REV. STAT. § 19-2-517 (2004). Under certain circumstances the prosecutor may file directly with adult criminal court, even though generally the judge has discretion to transfer the juvenile. *Id.* These situations include when a juvenile is fourteen and older and has committed a crime of violence, has "used, possessed or threatened to use a deadly weapon during the commission of a crime of violence against a person," has "committed vehicular homicide, vehicular assault, or felonious arson," if the juvenile had previously been convicted in adult criminal court of a felony, or if the juvenile is determined to be a "habitual

Colorado juvenile court judge may transfer a juvenile if he or she is over age twelve and charged with a class one or class two felony or if he or she is over age fourteen and charged with or has previously committed any felony.⁴⁸

Despite the protections that judicial waiver affords juveniles, many legislatures, feeling the pressure of increasing crime rates, enacted “get tough” policies that favor automatic transfer statutes.⁴⁹ Proponents of the judicial transfer statutes argue that they are necessary to ensure juveniles’ due process rights because a judge will, at the very least, weigh the eight *Kent* factors when determining whether transfer is appropriate.⁵⁰ Opponents of judicial discretion transfer statutes claim that they are arbitrary and vague and therefore should not be utilized.⁵¹

3. Legislative Transfer

Legislative transfer, or automatic transfer, is the second most common form of juvenile transfer statute.⁵² These statutes mandate transfer when a juvenile over a specified age is charged with an enumerated felony.⁵³ The typical minimum age for automatic transfer statutes is fourteen, and legislatures are adding additional triggering felonies to support their “get tough” policies.⁵⁴

Maryland’s statute, for example, provides that juvenile courts do not have jurisdiction over juveniles older than fourteen who commit crimes punishable by life imprisonment or death.⁵⁵ Additionally, Maryland juvenile courts, like most juvenile courts with automatic transfer statutes, do not have jurisdiction

offender.” § 19-2-517(1)(a)(II-IV). A habitual juvenile offender is a juvenile who has previously been adjudicated for two separate delinquent acts that would be felonies if they were committed by adults. COLO. REV. STAT. § 19-1-103 (2004). The prosecutor may also directly file with the adult criminal court if the juvenile is sixteen or older and is charged with a class three felony, and was previously convicted of a delinquent act that would constitute a felony if committed by an adult within the two previous years. § 19-2-517.

48. § 19-2-518 (providing juvenile transfer criteria for judicial discretion). The judge has discretion to transfer all juveniles except in those circumstances provided in COLO. REV. STAT. § 19-2-517 (2004). *Id.* The judge must then hold a hearing to determine whether transferring the juvenile would be in the best interests of both the public and the juvenile, taking into account the *Kent* factors, and, upon such a finding, may then transfer the juvenile to adult criminal court. *Id.*; see also *Kent*, 383 U.S. 541, 566-67 (1966).

49. See Rose, *supra* note 36, at 982 (describing recent trends of legislatures enacting “get tough” policies).

50. See Fritsch & Hemmens, *supra* note 41, at 571 (explaining judicial waiver most common and approved of form of transfer). Scholars, professional organizations, and the American Bar Association all advocate the use of judicial waiver as the preferred method of transferring juveniles. *Id.*

51. See Hager, *supra* note 41, at 832-34 (explaining vague and arbitrary nature of judicial transfer). Hager argues that an inherent problem with judicial waiver is that it presupposes that juvenile court judges have tools to help them assess whether a particular juvenile is dangerous or likely to be rehabilitated. *Id.* at 833.

52. See Rose, *supra* note 36, at 981-82 (describing typical legislative waiver statutes).

53. See Rose, *supra* note 36, at 981-82 (summarizing criteria of automatic waiver statutes).

54. See Rose, *supra* note 36, at 981-82 (noting typical minimum age for automatic transfer is fourteen to sixteen).

55. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002) (mandating transfer of juveniles for felonies requiring life imprisonment or death).

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over juveniles older than sixteen who are charged with certain enumerated felonies.⁵⁶ Automatic transfer statutes do not provide the same case-by-case analysis that judicial waiver, or even prosecutorial transfer statutes, provide.⁵⁷ Opponents criticize this inflexibility, but proponents point to the efficiency and rationality of automatic transfer statutes.⁵⁸

While state legislatures generally follow three basic juvenile transfer models, many states combine them, resulting in unique variations.⁵⁹ Each transfer statute has shortcomings, and automatic transfer and prosecutorial directed transfer statutes receive the most criticism.⁶⁰ Critics of automatic transfer statutes argue that the rehabilitative purpose of the juvenile justice system is undermined by eliminating any discretion.⁶¹ Opponents of prosecutorial directed transfer statutes claim they do not fully comply with *Kent* and do not consider the maturity of each juvenile.⁶² Most scholars and professional organizations prefer judicial transfer statutes.⁶³ Prosecutor discretion and automatic waiver statutes have gained support among legislatures in recent years as public sentiment has moved toward treating juveniles who commit violent crimes as adults.⁶⁴

56. *Id.* (listing felonies requiring transfer). Juveniles over sixteen will automatically be transferred to adult criminal court if they are charged with abduction; kidnapping; second degree murder; manslaughter (except involuntary manslaughter); second degree rape; robbery; second degree sexual offense; third degree sexual offense; a crime in violation of public safety articles; using, wearing, carrying, or transporting a firearm during and in relation to a drug trafficking crime; use of a firearm; carjacking; assault in the first degree; attempted murder in the second degree; attempted rape in the second degree; attempted sexual offense in the second degree; attempted robbery; or possession or use of a machine gun. *Id.*; see also MD. CODE ANN., CTS. & JUD. PROC. §§ 4-203, 4-204, 4-404, 4-405, 5-133, 5-134, 5-138 (West 2002). Lastly, Maryland juvenile courts do not have jurisdiction over children of any age who have previously been convicted of a felony as an adult and have been charged with an act that would be considered a felony if committed by an adult. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002).

57. See Hofacket, *supra* note 8, at 169 (noting rigidity of automatic transfer statutes and benefits of other discretionary types).

58. See Hofacket, *supra* note 8, at 169 (conceding positive aspects of automatic transfer statutes). Proponents of automatic transfer statutes advocate that they are "rational, non-discriminatory, and easily administrated." *Id.*

59. See Hofacket, *supra* note 8, at 168 (noting trend of blending different types of statutes).

60. See Rose, *supra* note 36, at 978 (favoring judicial discretion as preferred method of transfer); see also Hofacket, *supra* note 8, at 169-71 (arguing against automatic transfer and prosecutorial directed transfer).

61. See Rose, *supra* note 36, at 978-79 (explaining negative effects of automatic transfer). Automatic transfer statutes that do not rely on judicial determination undermine the entire juvenile justice system by failing to consider children individually. *Id.* The deterrent effect of automatic transfer statutes is non-existent, as recidivism rates for juveniles incarcerated with adults are higher than those of juvenile offenders adjudicated in the juvenile court system. *Id.* at 979.

62. See Hofacket, *supra* note 8, at 170-71 (discussing shortcomings of prosecutorial directed transfer). Opponents of prosecutorial directed transfer statutes maintain that it cannot fully consider the individuality of each child and that prosecutor discretion strips the judiciary of its traditional role in the adjudication of children. *Id.*

63. See Hofacket, *supra* note 8, at 168-69 (stating rationale for supporting judicial transfer).

64. See Hofacket, *supra* note 8, at 167 (outlining reasoning behind "get tough" legislature).

B. Eighth Amendment Violation

The Eighth Amendment, which bars cruel and unusual punishment, applies to the states through the Fourteenth Amendment.⁶⁵ The Supreme Court, while recognizing the need to interpret the Constitution in light of history, tradition, and precedent, uses an “evolving standards of decency” test in interpreting the Eighth Amendment.⁶⁶ The Supreme Court, in *Roper*, reaffirmed the two-step analysis used to determine whether the Eighth Amendment’s ban on cruel and unusual punishment prohibits a type of punishment.⁶⁷ First, the Court asks, what are the “objective indicia of consensus?”⁶⁸ Second, the Court looks at whether the punishment is disproportionate to the crime.⁶⁹

1. Objective Indicia of Consensus

The “objective indicia of consensus” measures the *Trop* “evolving standards of decency” test and is necessary for any Eighth Amendment analysis.⁷⁰ The Supreme Court first considered the issue of whether it was cruel and unusual punishment to execute a juvenile over age sixteen in *Stanford v. Kentucky*.⁷¹ The *Stanford* Court held that the Eighth Amendment did not prohibit executing juveniles over age sixteen because the national consensus in the country was

65. U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment). The Eighth Amendment bars the use of cruel and unusual punishment. *Id.* The United States Supreme Court has incorporated the Eighth Amendment into the Fourteenth Amendment so as to apply it to the states. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 559 (2005); *Furman v. Georgia*, 408 U.S. 238, 239 (1972); *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (applying Eighth Amendment to states through Fourteenth Amendment).

66. *See Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (stating notion of cruel and unusual punishment not static). The *Trop* Court developed the evolving standards of decency test, acknowledging that society evolves. *Id.* at 101. The Court recognized that while the framers’ intent is a necessary component of interpreting the Constitution, society’s values and notions of what constitutes cruel and unusual punishment change and thus the evolving standards of decency test should be applied to Eighth Amendment violations. *Id.*

67. *See Roper v. Simmons*, 543 U.S. at 564 (reaffirming Eighth Amendment violations analysis after briefly abandoning it in prior juvenile death penalty case).

68. *Id.* (explaining objective indicia first step in Eighth Amendment analysis). The *Roper* Court explained that the first step in determining whether a punishment is cruel and unusual under the Eighth Amendment is the objective indicia test, which requires courts to determine whether state legislatures have recognized a prohibition of the punishment. *Id.* at 564-67. In *Stanford v. Kentucky*, the Court recognized that the evolving standards of decency require an objective analysis. *Stanford v. Kentucky*, 492 U.S. 362, 369 (1989). Although *Roper* overruled *Stanford*’s central holding and declared that the execution of juveniles is prohibited by the Eighth Amendment, both cases recognized that objective factors are necessary to determine whether society’s evolving standards of decency necessitate the ban. *Roper*, 543 U.S. at 564-67; *Stanford*, 492 U.S. at 369.

69. *Roper*, 543 U.S. at 564-67 (declaring proportionality test necessary second step in Eighth Amendment analysis).

70. *See Trop*, 356 U.S. at 100-01 (explaining evolving standards of decency necessary to determine Eighth Amendment issues); *Roper*, 543 U.S. at 564-67 (detailing process determining objective indicia test). In *Roper*, the defendant was convicted of a murder he committed when he was seventeen years old. *Roper*, 543 U.S. at 551. The Court overruled *Stanford* and held that the objective indicia of consensus had changed in the sixteen years between the holdings and furthermore that states no longer accepted the use of the death penalty against a juvenile under eighteen. *Id.* at 564-67.

71. *Stanford*, 492 U.S. at 362 (determining constitutionality of juvenile death penalty).

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not against capital punishment for juveniles.⁷² The Court next revisited the issue in 2005, and the *Roper* Court recognized that public sentiment changed in the sixteen years since the Court's holding in *Stanford*.⁷³ During those sixteen years, five state legislatures abolished the death penalty for juveniles, and of the twenty states that allowed the execution of juveniles only six states actually executed a juvenile.⁷⁴ The *Roper* Court reasoned that the objective indicia of consensus, while not as "telling" as previous death penalty decisions, revealed that society no longer accepted the death penalty as punishment for juveniles, and thus the Court next turned to the proportionality test to determine whether an Eighth Amendment violation existed.⁷⁵

2. Proportionality Test

The second step in the Eighth Amendment analysis is to determine the punishment's goals and proportionality to the crime.⁷⁶ The Supreme Court weighs the severity of the punishment against the penological goals of retribution and deterrence.⁷⁷ In order to determine if the punishment meets

72. *Stanford*, 492 U.S. at 369-78 (holding objective indicia demonstrate country not opposed to death penalty for juveniles). In 1989, of the thirty-seven states that allowed the death penalty, only twelve states prohibited the use of the death penalty for juveniles seventeen years old and younger. *Id.* at 369.

73. *Roper v. Simmons*, 543 U.S. 551, 564-68 (2005) (giving objective reasons for overruling *Stanford* and banning juvenile execution); *Stanford*, 492 U.S. at 369 (holding execution of juveniles over sixteen not unconstitutional).

74. *Roper*, 543 U.S. at 564-65 (explaining states' decreasing acceptance of juvenile death penalty). The Court reasoned even though the abolition rate of the juvenile death penalty was not dramatic, the fact that states were consistently refusing to apply the death penalty, though legal, was an important factor for the objective indicia of consensus. *Id.* Although six states sentenced juveniles to death between the Court's decisions in *Stanford* and *Roper*, the *Roper* Court noted that only three states executed juveniles in the ten years prior to the *Roper* decision. *Id.* The Court explained that the slower rate for the abolition of the juvenile death penalty was a result of the fact that many states had already de facto banned the death penalty as applied to juveniles. *Id.* By the time the Court heard the issue in *Stanford*, legislatures had already considered the juvenile death penalty as cruel and unusual punishment. *Id.* at 566-67. The Court also noted that the defendant they condemned in *Stanford* by failing to find an Eighth Amendment violation, had been spared by the governor of Kentucky, who declared "[w]e ought not to be executing people who, legally, were children." *Id.* at 565 (quoting LEXINGTON HERALD-LEADER, Dec. 9, 2003, at B3).

75. *Roper v. Simmons*, 543 U.S. 551, 564-68 (2005) (holding executing juveniles violates Eighth Amendment as shown by objective indicia); see also *Atkins v. Virginia*, 536 U.S. 304, 314-17 (2002) (reasoning executing mentally retarded cruel and unusual punishment). The *Atkins* Court had more compelling data than the *Roper* Court to determine the objective indicia of consensus, which it labeled "telling." *Atkins*, 536 U.S. at 316. In *Atkins*, the Court overruled its prior decision in *Penry v. Lynaugh*, which held it was not an Eighth Amendment violation to execute a mentally retarded person. *Atkins*, 536 U.S. at 314-15; *Penry v. Lynaugh*, 492 U.S. 302, 315-16 (1989). In the thirteen years between the two decisions, the *Atkins* Court observed that twenty-eight states changed their policies (previously only two states banned executing mentally retarded individuals) and either completely abandoned the death penalty or abolished the death penalty against the mentally retarded. *Atkins*, 536 U.S. at 313-15. The Court further indicated that of the twenty states without a formal prohibition, only five states executed a person with an IQ below seventy since the *Penry* decision. *Id.* at 314-15.

76. *Roper*, 543 U.S. at 564 (indicating punishment must be proportionate to crime).

77. See, e.g., *Roper*, 543 U.S. at 568-75 (reasoning murder disproportionate to death penalty of juvenile under eighteen); *Thompson v. Oklahoma*, 487 U.S. 815, 833-38 (1998) (reasoning murder disproportionate to

these goals, the court considers the defendant's age, mental capacity, and other pertinent factors.⁷⁸

The Supreme Court held in *Thompson* and *Roper* that juveniles' culpability and blameworthiness are substantially diminished due to their immaturity, susceptibility to peer pressure, and unformed character.⁷⁹ These factors make retribution disproportionate to the severity of capital punishment.⁸⁰ The Courts further reasoned that the same traits that make juveniles less blameworthy also make them less likely to be deterred.⁸¹

The Supreme Court is persuaded by international trends and laws when it examines an Eighth Amendment issue.⁸² The Court does not base its decisions on international laws, as its role is to interpret the United States Constitution.⁸³ The Court looks to these laws, however, for instruction on issues of cruel and unusual punishment, especially when the United States is alone in employing the punishment.⁸⁴ The *Roper* Court supported its decision, in part, by pointing

death penalty of juvenile under sixteen); *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (reasoning rape disproportionate to death penalty). *But see* *Stanford v. Kentucky*, 492 U.S. 362, 377-78 (1989) (rejecting proportionality test as necessary step for Eighth Amendment analysis). In *Roper*, however, the Court explicitly reaffirmed the proportionality test and rejected the Court's previous reasoning in *Stanford*. *Roper*, 543 U.S. at 574-75. The *Roper* Court reasoned that capital punishment for a juvenile under eighteen was disproportionate to any crime the juvenile could commit or any penological purpose. *Id.* at 571-75. The Court noted that juveniles lack the requisite maturity and cognitive functioning to be deterred and that retribution is inappropriate because juveniles cannot fully understand the nature of their criminal conduct. *Id.* at 569-74. The *Roper* Court adopted the *Thompson* Court's reasoning when it held that juveniles under eighteen could not be executed. *Roper*, 543 U.S. at 569-72; *Thompson*, 487 U.S. at 838.

78. *See, e.g., Roper*, 543 U.S. at 571-72 (determining death penalty for juveniles under eighteen unacceptable and disproportionate to any crime); *Atkins*, 536 U.S. at 319-20 (holding goals of punishment improper for mentally retarded defendants); *Thompson*, 487 U.S. at 833-38 (concluding retribution and deterrence inappropriate goals for juvenile defendants).

79. *See Roper*, 543 U.S. at 569-71 (noting juveniles' underdeveloped sense of responsibility and maturity); *Thompson*, 487 U.S. at 833-38 (explaining juveniles' culpability diminished due to juvenile-specific traits).

80. *See Roper v. Simmons*, 543 U.S. 551, 569-71 (2005) (determining goal of retribution ineffective for juveniles under eighteen due to special characteristics); *Thompson*, 487 U.S. at 833-38 (reasoning juveniles' diminished blameworthiness makes retribution ineffective). The *Roper* Court and *Thompson* Court reasoned that juveniles' unformed character and transitory personalities makes them more likely to be reformed and rehabilitated. *Roper*, 543 U.S. at 569-71; *Thompson*, 487 U.S. at 833-38.

81. *See Roper*, 543 U.S. at 571-72 (describing characteristics which make deterrence ineffective for juveniles); *Thompson*, 487 U.S. at 837 (noting unlikelihood of deterring juveniles from committing crimes due to immaturity). The *Roper* and *Thompson* Courts explained that the likelihood that even a mature juvenile does a significant analysis that weighs in the possibility of capital punishment is unlikely, which makes deterrence ineffective. *Roper*, 543 U.S. at 571-72; *Thompson*, 487 U.S. at 837.

82. *Roper*, 543 U.S. at 575-78; *accord Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Thompson*, 487 U.S. at 830-31; *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (finding international authorities instructive on interpretation of cruel and unusual punishment).

83. *See Roper*, 543 U.S. at 578 (explaining not dishonor to American Constitution to consider international trends).

84. *See id.* at 575-78; *Atkins*, 536 U.S. at 317; *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1998); *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 596; *Trop*, 356 U.S. at 102-03 (arguing pervasiveness of world trends persuasive for Eighth Amendment interpretation). The *Roper* Court noted that the United Nations

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to the fact that the United Nations Convention for the Rights of the Child (UNCRC) expressly prohibits capital punishment against juveniles under the age of eighteen.⁸⁵

The Eighth Amendment's ban on cruel and unusual punishment applies to actual punishment, and therefore, it is necessary to explain how the Supreme Court has defined "punishment."⁸⁶ When the punishment being complained of is not directly attributable to the state, but an incident of imprisonment, the Court will find an Eighth Amendment violation only when the state has acted with deliberate indifference to inmates' constitutional rights.⁸⁷ For example, a prison official acts with deliberate indifference when he or she consciously disregards a known substantial risk of serious harm to an inmate.⁸⁸ Further, a policymaker acts with deliberate indifference to the inmate's constitutional rights when, through actual or constructive notice, he or she consciously disregards a known or obvious risk.⁸⁹ The Court will therefore only find an Eighth Amendment violation of incarcerating juveniles with adults if the policymakers acted with deliberate indifference by consciously disregarding a known or obvious risk to the juveniles.⁹⁰

Convention on the Rights of the Child expressly bars capital punishment against juveniles. *Roper*, 543 U.S. at 576. Only seven countries other than the United States have executed a juvenile since 1990. *Id.* at 577. However, each of these seven nations, including Iran, Pakistan, and the Democratic Republic for the Congo, has since abolished the use of the death penalty against juveniles, leaving the United States alone in utilizing capital punishment against minors. *Id.*

85. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (bolstering holding with United Nations condemnation of juvenile death penalty).

86. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding not segregating inmate constituted punishment if guards aware of substantial risk of harm). The *Farmer* Court considered whether it was cruel and unusual punishment to house a transsexual inmate with the general prison population. *Id.* at 830. The Court held that when a prison official knows that an inmate faces a substantial risk of harm, and the prison official consciously disregards that risk by failing to take reasonable measures against the harm, then the prison official may be liable under the Eighth Amendment for denying humane conditions of confinement. *Id.* at 847.

87. *Id.* at 838-40 (ruling prison official deliberate indifference if aware of substantial risk of harm); *Estelle v. Gamble*, 429 U.S. 97, 104 (1977) (requiring state official's deliberate indifference to find Eighth Amendment violation). The Supreme Court originally interpreted the Eighth Amendment's ban on cruel and unusual punishment very narrowly, applying it only to torture and methods of capital punishment that were deemed inhumane. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1879). Since that time, federal courts have interpreted the Eighth Amendment more liberally by holding that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency . . ." *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). In *Estelle*, the Court held that the evolving standards of decency of a maturing society require the government to provide medical care to inmates in its custody. *Estelle*, 429 U.S. at 103.

88. *Farmer*, 511 U.S. at 839 (defining deliberate indifference as subjective recklessness test).

89. *Id.* (discussing deliberate indifference test for policymakers). While the test is basically one of actual knowledge for prison guards, the Supreme Court acknowledged that in cases of liability on the part of a policymaker, the deliberate indifference test is less subjective and depends on the obviousness of the constitutional violation and whether the policymakers have actual or constructive notice. *Id.* at 841.

90. *Id.* at 839 (defining deliberate indifference in context of policymakers). Deliberate indifference is a difficult standard for prisoners to argue because the Eighth Amendment does not outlaw "cruel and unusual conditions," it outlaws cruel and unusual "punishment." *Id.* at 837.

C. Juvenile Pre-Trial Detainees and the Juvenile Justice and Delinquency Prevention Act

The Fourteenth Amendment and the Juvenile Justice and Delinquency Prevention Act (JJDP A) protect juveniles in the pretrial stage of the criminal process.⁹¹ The constitutional standard for determining whether there is a due process violation for juvenile pretrial detainees is whether the juvenile is being held in conditions that amount to “punishment.”⁹² Thus, the Fourteenth Amendment affords juveniles the same rights and protections as the Eighth Amendment.⁹³

Congress ratified the JJDP A in 1974 to examine the problems with the American juvenile justice system.⁹⁴ The JJDP A requires sight and sound separation for juveniles who were not transferred to adult criminal court but held during the pretrial stage in adult prisons.⁹⁵ Juveniles being tried as adults are not protected under the Act and are often in contact with adult inmates during mealtime, admission to the facility, and transport.⁹⁶ Juveniles tried in

91. U.S. CONST. amend. XIV, § 1 (granting due process for all United States citizens); Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(14) (2000) (protecting juveniles’ rights by giving states incentives to detain them separately). The Fourteenth Amendment provides, in part, that “no state shall deprive any person of life, liberty, or property without due process of law” U.S. CONST. amend XIV, § 1. The due process clause of the Fourteenth Amendment protects free citizens and pretrial detainees from unlawful deprivations of life and liberty. *Schall v. Martin*, 467 U.S. 253, 277 (1984). The Supreme Court has held that incarcerating a juvenile at the pretrial stage does not violate the juvenile’s Fourteenth Amendment rights. *Id.*

92. *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (upholding pretrial detainee incarceration unless amounting to punishment). The Court concluded that incarcerating a person at the pretrial stage to ensure his or her presence at a later trial date was a legitimate state goal. *Id.* at 535-37. Therefore, the Constitution is only violated if the restrictions and conditions of detention amount to actual punishment. *Id.* In *Bell*, the inmates brought an action against the state of New York for their conditions of confinement, specifically “double bunking,” which entailed housing two prisoners in a room originally intended for one person. *Id.* at 523-24. The Court held that the practice of double bunking the pretrial detainees was not punishment, and consequently not a Fourteenth Amendment violation. *Id.* at 536.

93. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 12 (explaining standards and privileges under Eighth and Fourteenth Amendment).

94. See Conward, *Best Interests*, *supra* note 5, at 44 (discussing JJDP A origins). The JJDP A established the President’s Commission on Law Enforcement and Administration of Justice to study the juvenile justice system. *Id.* The Commission found that the juvenile justice system was failing and recommended that states establish neighborhood youth-serving agencies, limit confinement, encourage early intervention, and provide services outside the juvenile justice system. *Id.*

95. Juvenile Justice and Delinquency Prevention Act 42 U.S.C. §§ 5633(a)(12)-(14) (2000) (requiring states maintain core practices of JJDP A to receive funding). The JJDP A requires “sight and sound separation” between adults and non-transferred juveniles. *Id.* §§ (a)(11)-(12). The requirement of “sight and sound separation” means juveniles may not come into any contact with adult inmates while in prison facilities. *Id.* While Congress cannot mandate that the states follow the JJDP A, they may use incentives like the receipt of funding in order to ensure that states follow the Act. *New York v. United States*, 505 U.S. 144, 149 (1992).

96. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 13-14 (discussing JJDP A’s sight and sound separation requirement). The JJDP A only requires sight and sound separation for juveniles who remain under juvenile court jurisdiction. *Id.*

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juvenile court were protected under the Act, but they were often deprived of constitutional liberties in order to adhere to the sight and sound separation requirement of the JJDP. ⁹⁷ The Act was amended in 1980 so that delinquent children may only be locked up in adult prisons for a few hours before and after their hearings. ⁹⁸ Juveniles being tried as adults, however, do not have any of the extra rights and privileges afforded juveniles remaining under juvenile court jurisdiction and are only protected in the same manner as other adult offenders by the Fourteenth Amendment. ⁹⁹

D. Consequences of Juvenile Confinement with Adults

The juvenile justice system was created to rehabilitate and save children, while the adult punishment scheme focuses on retribution and deterrence. ¹⁰⁰ In the year 2000, approximately 107,000 youth were incarcerated in either adult or juvenile facilities. ¹⁰¹ Of the 107,000, 14,500 were confined with adults. ¹⁰² In the year 2000, forty-four states housed juveniles in adult facilities. ¹⁰³ Of those forty-four states, only nineteen states house any transferred and convicted juvenile with adults without any separation conditions. ¹⁰⁴ Although many

97. See *Juveniles in Adult Prisons*, *supra* note 30, at 14 (conveying unforeseen consequences of sight and sound separation). Congress amended the JJDP because states often unintentionally violated other constitutionally protected rights when separating juveniles from adults by isolating juveniles for long periods of time. *Id.*

98. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 14 (explaining reasons for amending JJDP).

99. See *Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (holding deprivation of juveniles' liberty if act amounts to punishment); JUVENILES IN ADULT PRISONS, *supra* note 30, at 14 (revealing protections for juveniles not transferred to adult court). Because transferred juveniles are treated as adults, their rights are not protected by the JJDP's additional precautions, and they are therefore only protected under *Bell* if the conditions of their detainment and confinement amount to "punishment." *Bell*, 441 U.S. at 536.

100. Bree Langemo, Comment, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U. L. REV. 141, 161 (2004) (examining rationale behind juvenile justice system).

101. See JUVENILES IN ADULT PRISONS, *supra* note 30, at x (revealing number of incarcerated youth in Country).

102. See JUVENILES IN ADULT PRISONS, *supra* note 30, at x (detailing major findings of study); see also ALA. CODE § 12-15-61 (2005); ALASKA STAT. § 47.12.240 (2004); ARK. CODE ANN. § 9-27-336 (2002); FLA. STAT. § 985.215 (2001); IDAHO CODE ANN. § 20-509 (2004) (allowing incarceration of juveniles with adults once transferred into adult criminal system). Of the 14,500 youth incarcerated with adults, approximately 9,100 are incarcerated in local jails while the other 5,400 are jailed in adult prisons. JUVENILES IN ADULT PRISONS, *supra* note 30, at x.

103. See *Juveniles in Adult Prisons*, *supra* note 30, at x (reporting state data of youth confinement with adults). Youthful offenders in adult state prisons comprised roughly .5% of the total prison population. *Id.* at 36-37.

104. See ALA. CODE § 12-15-61 (2005); ALASKA STAT. § 47.12.240 (2004); ARK. CODE ANN. § 9-27-336 (2002); FLA. STAT. § 985.215 (2001); IDAHO CODE ANN. § 20-509 (2004); 705 ILL. COMP. STAT. 405/5-130ci (1999); IOWA CODE § 232.8c (2000); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-16 (West 2002); MONT. CODE ANN. § 41-5-341 (2003); N.H. REV. STAT. ANN. § 169-B:27 (2002); N.J. STAT. ANN. § 2A:4A-28 (1987); N.M. STAT. ANN. § 31-18-15.3 (2005); N.D. CENT. CODE § 27-20-16 (1991); R.I. GEN. LAWS § 14-1-7.3 (2002); S.C. CODE ANN. § 20-7-7210 (2005); TENN. CODE ANN. § 37-1-116 (2005); VA. CODE ANN. § 16.1-249 (2003); WASH. REV. CODE § 13.04.116 (2004); WYO. STAT. ANN. § 14-6-237 (2005) (treating transferred

juveniles are detained with adults, a number of states still house juveniles separately in youth-only facilities until they reach a certain age.¹⁰⁵ Other states separate juveniles from adults by sight and sound, by requiring separate cells for juveniles in the adult jails, or by putting other conditions on juvenile confinement with adults.¹⁰⁶

According to a Bureau of Justice study, seventy-five percent of juveniles being held in adult prisons were sentenced as adults while only twenty-one

juveniles as adults for purposes of incarceration).

105. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 37-38 (comparing number of youth incarcerated in youth-only facilities to youth incarcerated with adults). Of the fifty-four jurisdictions that participated in the study, seventeen indicated that they maintained separate housing facilities for youth. *Id.* at 36. However, not all youthful offenders in these states were housed separately. *Id.* These states prohibit the incarceration of juveniles with adults, regardless of whether they have been transferred and regardless of the crime they committed, until they reach a specified age. See CONN. GEN. STAT. § 46b-126 (2004) (forbidding juvenile confinement in adult facilities if under age sixteen); KAN. STAT. ANN. § 38-16,111 (2000) (banning juvenile under age sixteen from detention with adults); MASS. GEN. LAWS ch. 119, § 67 (2002) (prohibiting juvenile under seventeen from incarceration with adults); N.C. GEN. STAT. § 7B-2809 (2005) (requiring juveniles' separation from adults to every extent possible); OHIO REV. CODE ANN. § 5120.16 (LexisNexis 2004) (forbidding imprisoning juveniles under eighteen with adults); OR. REV. STAT. § 419B.160 (1999) (barring juvenile confinement with adults). Massachusetts, for example, requires separate facilities for juveniles until they reach the age of seventeen, at which point they are transferred to an adult facility. MASS. GEN. LAWS ch. 119, § 67 (2002).

106. See ARIZ. REV. STAT. ANN. § 8-305 (1999) (permitting juvenile incarceration with adults but requiring sight and sound separation); CAL. WELF. & INST. CODE § 207.1 (West 1998) (permitting juvenile confinement with adults once transferred and upon condition of sight and sound separation); COLO. REV. STAT. § 19-2-508 (2004) (providing required physical segregation of juveniles when confined with adults); DEL. CODE ANN. tit. 10, § 1009 (1999) (barring juveniles under fifteen from adult prisons); D.C. CODE § 16-2313(e) (2005) (requiring separate facilities for juveniles under sixteen and mandating sight and sound separation otherwise); GA. CODE ANN. § 15-11-48 (2005) (requiring sight and sound separation for juveniles incarcerated in adult facilities); HAW. REV. STAT. § 571-32 (2005) (requiring sight and sound separation between detained juveniles and adults); IND. CODE § 31-37-19-7 (1999) (demanding sight and sound separation between juveniles and adult prisoners in prison facilities); KY. REV. STAT. ANN. § 635.020(4) (West 1999) (prohibiting juvenile incarceration with adults until eighteen unless juvenile attempts escape); LA. CHILD. CODE ANN. art. 305 (2004) (forbidding juvenile imprisonment with adults if under fifteen); ME. REV. STAT. ANN. tit. 15, § 3101 (2003) (permitting juvenile incarceration with adults if no other less restrictive alternative); MICH. COMP. LAWS § 750.139 (2004) (requiring separate facilities for juveniles under sixteen); MINN. STAT. § 260B.176 (2003) (permitting juvenile judge discretion over sentencing either to youth facility or adult facility); MISS. CODE ANN. § 43-21-159 (1999) (authorizing juvenile incarceration with adults prisoners if held in separate cells); MO. REV. STAT. § 211.073 (2004) (giving discretionary power to sentencing judge to determine where to imprison juvenile); NEB. REV. STAT. § 43-250 (2004) (maintaining separate facilities for juveniles under sixteen, and requiring sight and sound separation over sixteen); NEV. REV. STAT. § 62C.030 (2002) (mandating sight and sound separation for juveniles detained in adult detention centers); N.Y. FAM. CT. ACT § 304.1 (McKinney 1999) (allowing juvenile incarceration with adults only upon approval of state youth services); OKLA. STAT. tit. 10, § 7304-1.1 (1998) (conditioning juvenile incarceration with adults on sight and sound separation); 42 PA. CONS. STAT. § 6327 (2000) (banning juveniles under fifteen from incarceration with adults); S.D. CODIFIED LAWS § 26-7A-26 (1999) (mandating transferred juveniles' incarceration with adults provided physically segregated); TEX. FAM. CODE ANN. § 51.12 (Vernon 2002) (permitting juvenile confinement in adult facility but with sight and sound separation); UTAH CODE ANN. § 78-3a-114 (2002) (allowing juvenile incarceration in adult facility but requiring sight and sound separation); VT. STAT. ANN. tit. 33, § 5514 (2001) (authorizing juvenile incarceration with adults for juveniles sentenced to life and danger to others); W. VA. CODE § 49-5-16 (2004) (requiring sight and sound separation of all juveniles in adult facilities); WIS. STAT. § 938.209 (2000) (allowing juveniles over fifteen confinement with adults).

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percent of the juveniles were held in adult jails as pretrial detainees or juvenile offenders.¹⁰⁷ The United Nations Convention on the Rights of the Child (UNCRC) condemns incarceration of children except as a last resort and urges such justified child incarceration for the shortest amount of time possible.¹⁰⁸ The United Nations further recommends considering the child's best interests when incarcerating the juvenile.¹⁰⁹

Adult prisons are violent and dangerous places for juveniles.¹¹⁰ As compared to juveniles incarcerated in juvenile facilities, juveniles imprisoned in adult jails are much more likely to be victims of violent crimes.¹¹¹ Juveniles incarcerated in adult prisons are 7.7 times more likely to commit suicide than juveniles incarcerated in juvenile facilities.¹¹² They are also five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than their counterparts in juvenile justice facilities.¹¹³ The statistical comparison of violence between juveniles in adult facilities and adults in the same institutions also demonstrates the realities juveniles face in these prisons: juveniles are eight times more likely to commit suicide, 500 times more likely to be sexually assaulted, and 200 times more likely to be beaten by staff than are adults.¹¹⁴ Juveniles are not only affected by a more violent environment in adult prisons, but they also face a lack of educational opportunities and inadequate health care.¹¹⁵ These adult

107. See JUVENILES IN ADULT PRISONS, *supra* note 30, at x (providing percentage of juveniles sentenced as adults and juvenile offenders). This data was based on a 1998 study of incarcerated youth "on any given day." *Id.*

108. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 37a, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter UNCRC] (condemning juvenile incarceration).

109. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 37b, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (highlighting primary consideration should be child when sentencing juveniles).

110. See Conward, *Where have all the Children Gone?*, *supra* note 15, at 2446-47 (examining implications of juvenile incarceration with adults).

111. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 8 (summarizing violent conditions of adult prisons). According to the Bureau of Justice report, in 1988 forty-seven percent of juveniles in adult facilities were victims of violent crimes compared to thirty-seven percent of juveniles in juvenile facilities. *Id.* Inmates and prison staff are both responsible for the violence juveniles experience. *Id.*

112. See Hofacket, *supra* note 8, at 173 (describing conditions juveniles experience in adult jails). These statistics are based on a 1996 study conducted by the Office of Juvenile and Delinquency Prevention. *Id.* at 173 n.125.

113. See Hofacket, *supra* note 8, at 173 (comparing confinement conditions for juveniles in adult prisons to juveniles in juvenile facilities).

114. See Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/CRIM. 395, 407-08 (1999) (citing American Bar Association study comparing violence juveniles face versus violence adults experience in prisons).

115. See Conward, *Where have all the Children Gone?*, *supra* note 15, at 2447-48 (discussing incarcerated juveniles lack of opportunities). Most incarcerated juveniles are functionally illiterate. *Id.* Furthermore, adult prisons do not consider juveniles' special physical health needs. *Id.* For instance, juveniles typically have different nutritional requirements than adults, yet their food allowance is the same. Conward, *Best Interests*, *supra* note 5, at 68. More than half of incarcerated juveniles have an identifiable mental health disorder or disability, including, but not limited to, mental retardation, learning disabilities, and emotional or behavioral disorders. Conward, *Where have all the Children Gone?*, *supra* note 15, at 2248. *But see* JUVENILES IN ADULT

facilities typically do not have employees trained to work with youthful offenders.¹¹⁶ Juveniles, like adult offenders, also face a lack of employment opportunity when released.¹¹⁷

Scholars label adult correctional facilities as “schools for crime” because another consequence of confining juveniles with adults is that their recidivism rate is higher than the rate of recidivism for juveniles incarcerated in juvenile facilities.¹¹⁸ Juveniles incarcerated in adult prisons receive inadequate education and are taught advanced criminal techniques by adult offenders.¹¹⁹ Juveniles make more adult criminal contacts in adult prisons, and these contacts, coupled with the inherent idleness and boredom of prison life, encourage delinquent behavior.¹²⁰ The juvenile re-arrest rate after being released from adult prisons is higher than the re-arrest rate for juveniles incarcerated in youth-only facilities.¹²¹

Not only is the recidivism rate higher for juveniles incarcerated in adult prisons, but the deterrent effect is also ineffective.¹²² Research demonstrates incarcerating juveniles with adults is unlikely to deter crime for two reasons: first, most juveniles are not able to form criminal intent, and second, juveniles generally believe that they can get away with wrongdoing because they are

PRISONS, *supra* note 30, at 19 (listing juvenile educational requirements imposed on correctional facilities). Minors retain civil rights to education and special education under the Individuals with Disabilities Educational Act. *Id.* at 9, 19.

116. See Conward, *Where have all the Children Gone?*, *supra* note 15, at 2245-46 (revealing similarities and differences between adult and juvenile facilities). While both adult and juvenile facilities face problems of overcrowding and financial difficulties, adult correctional facilities lack resources for specialized youth programs and training. *Id.* at 2248.

117. See Hofacket, *supra* note 8, at 174 (noting consequences of confining juveniles with adults). Juveniles who are not transferred and have only juvenile sanctions imposed on them can rejoin society with fewer limitations. *Id.* Juveniles incarcerated with adults are labeled as felons for their entire lives, which makes employers less likely to hire them. *Id.*

118. Office of Juvenile Justice Delinquency Prevention, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, 2-3 (2005) [hereinafter *Alternatives*] (citing high recidivism rates indicating juvenile detention ineffectiveness), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>. The report notes that fifty to seventy percent of previously incarcerated youth will be rearrested within one to two years of their release from prison. *Id.*; see also Christina DeJong & Eve Merrill, *Getting “Tough On Crime”: Juvenile Waiver and the Criminal Court*, 27 OHIO N.U. L. REV. 175, 189 (2001) (arguing juvenile transfer increases recidivism and does not deter). Public safety is often cited as a reason for waiving juveniles into adult criminal court. *Id.* at 190. Research indicates, however, that the recidivism rate of transferred juveniles is higher than those who were not transferred. *Id.* at 189; AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS 26 (2001) [hereinafter YOUTH IN CRIMINAL JUSTICE SYSTEM] (showing high recidivism rates against public interest).

119. See Hofacket, *supra* note 8, at 173 (depicting confinement conditions for juveniles in adult prisons).

120. See Hofacket, *supra* note 8, at 173 (describing reasons for increased juvenile recidivism rate when juvenile incarcerated with adults).

121. See *Alternatives*, *supra* note 118, at 2-3 (comparing recidivism between juveniles incarcerated in juvenile facilities versus adult facilities); see also Hofacket, *supra* note 8, at 173 (explaining punishment theories and contradictions due to higher re-arrest rates for juveniles incarcerated with adults).

122. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005); Fagan, *supra* note 114, at 408; Rose, *supra* note 36, at 979 (illustrating juvenile deterrence ineffective).

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young.¹²³ Deterrence is not the only theory of punishment, however, and many proponents of incarcerating juveniles with adults argue retribution is appropriate.¹²⁴ Transferred juveniles are subjected to harsh prison conditions while the goals of the punishment system are arguably not being met.¹²⁵ It is therefore necessary to determine whether there is an Eighth Amendment violation in incarcerating these amendable juveniles with adults.

III. ANALYSIS: THE SUPREME COURT SHOULD EXAMINE THE CONSTITUTIONALITY OF INCARCERATING JUVENILES WITH ADULTS

The juvenile justice system was created to rehabilitate, not to deter and punish.¹²⁶ Juvenile transfer statutes increasingly subject juveniles to the adult criminal system, imprisonment with adults, and the consequences that stem from that imprisonment.¹²⁷ The Supreme Court recognizes that society's notions of what constitutes "cruel and unusual" punishment are not static, but that society has "evolving standards of decency."¹²⁸ It is therefore necessary to evaluate the constitutionality of incarcerating juveniles with adults.

A. *Objective Indicia of Consensus*

The first step in the analysis, the objective indicia of consensus, measures society's notions of decency.¹²⁹ Just as the objective information in *Roper* and *Atkins* indicated that it was no longer decent to execute juveniles and the

123. See Dejong & Merrill, *supra* note 118, at 189-90 (explaining why deterrence ineffective on juveniles). The fact that juveniles believe their criminal records will be clean when they reach the age of eighteen indicates that waiving juveniles into adult court does little to deter juvenile crime. *Id.* Indeed, this very notion was what led Christopher Simmons to commit the heinous crime for which he was sentenced to death; he told his friends they could "get away with it" because they were minors. *Roper*, 543 U.S. at 556.

124. See Dejong & Merrill, *supra* note 118, at 182 (conveying retributive rationales for incarcerating juveniles with adults). *But see Roper*, 543 U.S. at 569-71 (reasoning juvenile culpability lower than adults). The *Roper* Court rationalized that even psychologists are unwilling to label a juvenile under the age of eighteen as having an anti-social personality disorder and, therefore, states should be barred from condemning a juvenile to death. *Id.* at 573.

125. See *Roper*, 543 U.S. at 571-72 (holding retribution and deterrence goals not met and death penalty disproportionate); see also Hofacket, *supra* note 8, at 173 (arguing death penalty and life imprisonment for juveniles disproportionate to goals of punishment); Fagan, *supra* note 114, at 408 (highlighting disproportionate punishment to goals of retribution and deterrence).

126. See Langemo, *supra* note 100, at 161 (explaining origins and differences of juvenile justice system compared to adult system).

127. See, e.g., FLA. STAT. § 985.227 (2001 & supp. 2006); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2002); VA. CODE ANN. § 16.1-269.1 (2003) (allowing transfer of juveniles into adult court); see also Hofacket, *supra* note 8, at 168 (discussing types of juvenile transfer statutes); *supra* notes 110-114 and accompanying text (illustrating violence against juveniles and harsh prison conditions).

128. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (holding Eighth Amendment analysis constantly changing with society's values); see also *supra* note 66 and accompanying text (explaining Eighth Amendment analysis considers society's changing notions of cruelty).

129. See *supra* note 70 and accompanying text (analyzing Eighth Amendment in light of society's changing notions of decency).

mentally retarded, many states have expressly disapproved of the practice of incarcerating juveniles with adults.¹³⁰ State disapproval of juvenile incarceration with adults is implied by sight and sound separation, other forms of separation, or in some instances incarceration of juveniles in juvenile-only facilities until they reach a specified age.¹³¹

The *Roper* Court determined it was unconstitutional to execute juveniles under eighteen because only five states had done so in eighteen years.¹³² Similarly, only nineteen states allow juvenile incarceration with adults.¹³³ The fact that only a minority of states allow such incarceration reveals the possibility that society's notions of decency require juvenile incarceration to be separate from adults.¹³⁴ Thirty-two states mandate some form of separation between incarcerated juveniles and adults, demonstrating the states' systematic rejection of imprisoning juveniles with adults and suggesting that it may be unconstitutional under the Eighth Amendment to do so.¹³⁵

The Supreme Court considers both international and United Nations trends to support its Eighth Amendment decisions.¹³⁶ The Court has been especially persuaded by these trends in instances in which the United States is alone in

130. See CONN. GEN. STAT. § 46b-126 (2004) (forbidding juvenile confinement in adult facilities under age sixteen); KAN. STAT. ANN. § 38-16,111 (2000) (banning juvenile detention with adults under age sixteen); MASS. GEN. LAWS ch. 119, § 67 (2002) (prohibiting juvenile under seventeen from incarceration with adults); OHIO REV. CODE ANN. § 5120.16 (LexisNexis 2004) (barring juvenile confinement with adults); OR. REV. STAT. § 419B.160 (1999) (forbidding imprisoning juveniles under eighteen with adults). While most states still allow juvenile incarceration with adults, the majority place restrictions on the incarceration either by not permitting juveniles under a certain age to be housed in the same cell with adults, by sight and sound separation, or other restrictions. See, e.g., ARIZ. REV. STAT. ANN. § 8-305 (1999) (permitting convicted juvenile incarceration with adults but requiring sight and sound separation); COLO. REV. STAT. § 19-2-508 (2004) (providing required physical segregation of juveniles when confined with adults); HAW. REV. STAT. § 571-32 (2005) (requiring sight and sound separation of detained juveniles and adults); see also *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005) (signifying state abolition of juvenile death penalty shows objective indicia of consensus); *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002) (noting prohibition by state legislatures "telling" for Eighth Amendment analysis); *supra* notes 73-75 and accompanying text (expressing rationale for holding arising from states systematic rejection of juvenile death penalty).

131. See ARIZ. REV. STAT. ANN. § 8-305 (1999) (calling for sight and sound separation between incarcerated juveniles and adults); KY. REV. STAT. ANN. § 635.020(4) (West 1999) (prohibiting juvenile incarceration with adults until eighteen unless juvenile violates certain restrictions); MASS. GEN. LAWS ch. 119, § 67 (2002) (requiring separate facilities from adults for youth incarcerated under age of seventeen); N.Y. FAM. CT. ACT § 304.1 (McKinney 1999) (allowing juvenile incarceration with adults only upon state youth services approval); see also notes 94-99 and accompanying text (highlighting requirements of JJDPAs applied to states).

132. See *Roper*, 543 U.S. at 564-65 (studying states' rejection of juvenile death penalty in sixteen years since prior examination of issue).

133. See *supra* note 104 (listing states which automatically treat transferred juveniles as adults).

134. See *supra* note 104 (indicating minority of legislatures treat transferred juveniles as adults). Although the numbers in *Roper* were starker (only six states having executed a juvenile in sixteen years between decisions), the fact that only nineteen states allow juvenile incarceration with adults indicates the objective indicia of consensus is for separation of juvenile and adult prisoners. See *Roper*, 543 U.S. at 564-65.

135. See *supra* notes 105 and 106 (setting forth statutes separating juveniles from adults).

136. See *supra* notes 82-85 and accompanying text (relating persuasiveness of United Nations and international laws on issues of cruel and unusual punishment).

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employing a type of punishment.¹³⁷ Since the Supreme Court's decision in *Trop*, the Court has consistently found foreign laws and the United Nations instructive on the issue of cruel and unusual punishment.¹³⁸ This indicates that the Court would similarly be persuaded by the UNCRC's condemnation of juvenile imprisonment with adults and advocacy of the consideration of the juvenile's best interest.¹³⁹ United Nations policy weighs heavily on this analysis because it is clearly not in the juvenile's best interest to be incarcerated with adults where he or she will be subjected to violence and abuse at the hands of adult inmates and staff.¹⁴⁰

Society's notions of cruel and unusual punishment, as reflected by both international trends and the objective indicia of consensus, demand that juveniles be separated from adults when incarcerated until the age of eighteen.¹⁴¹ Most states recognize this necessity by placing, at a minimum, a sight and sound separation between juveniles and adults.¹⁴² Society's evolving notions of decency demand at a minimum sight and sound separation between juveniles and adults in adult prison facilities.

B. Proportionality Test

The next step in determining whether the Eighth Amendment prohibits

137. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.22 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (stating actions of other countries instructive when conducting Eighth Amendment analysis); see also *supra* notes 82-85 and accompanying text (discussing international trends as persuasive authority in determining juvenile death penalty constitutionality).

138. See *Roper*, 543 U.S. at 575-78 (supporting holding with evidence United States was only country implementing death penalty against juveniles); *Atkins*, 536 U.S. at 316 n.21 (rationalizing world consensus against death penalty for mentally retarded); *Thompson*, 487 U.S. at 830-31 (listing, as support for holding, countries where juvenile death penalty abolished); *Enmund*, 458 U.S. at 796 n.22 (bolstering holding with international support indicating death penalty cruel and unusual for felony murder); *Coker*, 433 U.S. at 596 (strengthening argument by showing only three of sixty nations surveyed implemented death penalty for rape); *Trop*, 356 U.S. at 102-03 (noting civilized nations of world do not allow expatriation for desertion during wartime).

139. See *supra* notes 108-109 and accompanying text (urging separate incarceration of juveniles from adults).

140. See *supra* note 109 and accompanying text (requiring countries recognize child's best interests during incarceration); see also *supra* notes 110-114 and accompanying text (describing violence juveniles experience in adult prisons).

141. See *supra* note 109 (mandating best interest of child contemplated when determining sentencing); see also *supra* notes, 105-106 and accompanying text (demonstrating majority of states separating juveniles when incarcerating them).

142. See, e.g., COLO. REV. STAT. § 19-2-508 (2004); GA. CODE ANN. § 15-11-48 (2005); HAW. REV. STAT. § 571-32 (2005) (permitting juvenile imprisonment with adults if separated by sight and sound); see also *supra* notes 105-106 and accompanying text (indicating state acknowledgement of necessity to separate juveniles from adults in prison). The fact that thirty-two states require some separation of incarcerated juveniles from adults suggests that the objective indicia of consensus is for juveniles to have sight and sound separation from adults. *Supra* notes 105-106 and accompanying text.

incarcerating juveniles with adults is the proportionality test.¹⁴³ Under this test, the goals of punishment, retribution, and deterrence are weighed against the severity of the punishment.¹⁴⁴ In *Roper* and *Thompson*, the Court, undertaking an Eighth Amendment death penalty analysis, determined that the death penalty is the most severe form of punishment and disproportionate to the goals of retribution and deterrence of minors.¹⁴⁵ While incarcerating juveniles with adults is not as harsh as the death penalty, it subjects juveniles to high incidences of sexual assault, physical violence, depression, and suicide.¹⁴⁶ The fact that juveniles are twice as likely to be beaten by staff and five times more likely to be victims of sexual assault than juveniles who remain in juvenile facilities demonstrates the extraordinarily severe consequences juveniles face when imprisoned with adults.¹⁴⁷

Juvenile imprisonment with adults is a severe form of punishment.¹⁴⁸ When compared with adult prisoners, juveniles in adult prisons are eight times more likely to commit suicide, 500 times more likely to be sexually assaulted, and 200 times more likely to be beaten by staff.¹⁴⁹ The severity of the punishment is exacerbated by the reality that juveniles in adult prisons not only face brutal physical violence, but their nutritional, health, and educational needs are not met.¹⁵⁰ Therefore, while incarcerating juveniles in adult prisons is not as harsh as the death penalty, it may nonetheless be disproportionately severe.¹⁵¹

Proponents of juvenile incarceration with adults argue there is no Eighth Amendment violation and look to appellate court decisions holding that juvenile life sentences are not subject to an Eighth Amendment review because by definition a sentence cannot be disproportionate.¹⁵² There are important distinctions to be noted with regard to the proportionality test between life

143. *Roper v. Simmons*, 543 U.S. 551, 564-69 (2005) (detailing proportionality analysis for Eighth Amendment).

144. See *supra* notes 76-78, 80-81, 122-124 and accompanying text (noting Supreme Court factors in proportionality test).

145. See *Roper*, 564 U.S. at 568; *Thompson v. Oklahoma*, 487 U.S. 815, 833-38 (1998) (holding unconstitutional to execute juveniles under eighteen and sixteen respectively).

146. See *supra* notes 110-124 and accompanying text (detailing harsh prison conditions faced by juveniles).

147. See Hofacket, *supra* note 8, at 173 (finding higher incidence of violence against juveniles in adult prisons than juveniles in juvenile facilities).

148. See *supra* Part II (D) (detailing severe conditions juveniles face in adult prisons).

149. See Fagan, *supra* note 114, at 407-08 (citing American Bar Association Juvenile Justice Center study comparing juvenile and adult prison violence).

150. See Conward, *Where have all the Children Gone?*, *supra* note 15, at 2447-48 (discussing fewer educational opportunities for juveniles); Conward, *Best Interests*, *supra* note 5, at 68 (noting different nutritional needs of juveniles than adults); Hofacket, *supra* note 8, at 174 (explaining consequences of not remaining label free by staying in juvenile system); see also *supra* notes 115-117 and accompanying text (detailing lack of educational opportunities and nutrition for juveniles in adult prisons).

151. See *supra* Part II.D (discussing dangerous conditions threatening juveniles in adult prisons).

152. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 709 (1998) (discussing proportionality test as applied to juvenile life sentences).

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imprisonment and incarceration of juveniles with adults.¹⁵³ While courts sentence juveniles to life imprisonment as a way of quantifying the punishment for the crime committed, imprisonment with adults subjects juveniles to excessively cruel and severe conditions.¹⁵⁴ Furthermore, there is no viable alternative to life imprisonment when it is the appropriate form of punishment.¹⁵⁵ To address this issue, states could maintain juvenile-only facilities or, at a minimum, require sight and sound separation of juveniles and adults in adult prisons.¹⁵⁶

Juveniles face severe consequences when incarcerated with adults, the next step in the Eighth Amendment analysis is to balance those consequences against the goals of punishment.¹⁵⁷ The *Roper* and *Thompson* Courts concluded that juveniles are less culpable than adults.¹⁵⁸ These Courts explained that juveniles are not as blameworthy due to their immaturity, susceptibility to peer pressure, and underdeveloped character.¹⁵⁹ The *Roper* and *Thompson* Courts further reasoned that these same characteristics made juveniles less likely to be deterred from committing crimes.¹⁶⁰ Therefore, this lack of culpability combined with the severe consequences juveniles face while imprisoned with adults creates a situation where their imprisonment is disproportionately severe in relation to the goals of punishment.

Studies show that recidivism rates for juveniles incarcerated with adults are higher than for juveniles held in juvenile facilities.¹⁶¹ This higher recidivism rate shows that incarcerating juveniles with adults has the opposite effect of the intended goal of deterrence.¹⁶² Because of these high recidivism rates, neither specific deterrence nor protection of the community is served by incarcerating

153. *Id.* (discussing inherent proportionality between life imprisonment and crime committed).

154. *Id.* (depicting proportionality test for juvenile sentencing); *see also* JUVENILES IN ADULT PRISONS, *supra* note 30, at 8 (demonstrating obviousness of penalties juveniles encounter in adult prisons through published governmental reports).

155. *See* Logan, *supra* note 152 (explaining sentencing proportionate by nature because judge weighs sentencing factors).

156. *See supra* notes 105-106 (enumerating statutes with separate juvenile facilities or sight and sound separation requirements).

157. *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005) (explaining method to weigh severity of punishment against goals of punishment).

158. *Roper*, 543 U.S. at 569-72; *Thompson v. Oklahoma*, 487 U.S. 815, 833-38 (1988) (reasoning juvenile's culpability and ability for deterrence diminished).

159. *Roper*, 543 U.S. at 569-71 (discussing juvenile traits making them less blameworthy); *Thompson*, 487 U.S. at 833-38 (describing reasons for diminished juvenile culpability); *see supra* notes 78, 80-81, 122-123 and accompanying text (examining juveniles' unique characteristics which create mitigating circumstances when assessing retribution).

160. *Roper*, 543 U.S. at 571-72 (reasoning juveniles infrequently deterred from crime due to certain traits); *Thompson*, 487 U.S. at 837 (explaining diminished culpability makes deterrence less effective).

161. *See* Dejong & Merrill, *supra* note 118, at 188-89 (arguing against juvenile transfer because it increases recidivism and does not deter future crimes); *see also* YOUTH IN CRIMINAL JUSTICE SYSTEM, *supra* note 118, at 26 (showing high recidivism rates among youths incarcerated with adults against public interest).

162. *See* Dejong & Merrill, *supra* note 118, at 188-89 (explaining recidivism results from juvenile incarceration with adults not deterrence).

juveniles with adults.¹⁶³ Furthermore, the goal of general deterrence is not effective; according to the *Roper* and *Thompson* Courts, it is highly unlikely that even the most mature juvenile will do any sort of cost-benefit analysis to determine the likelihood of capital punishment.¹⁶⁴ It is equally unlikely that the juvenile would consider the possibility of incarceration with adults.¹⁶⁵ The goals of punishment are not being met and the punishment of subjecting juveniles to adult prison realities is extremely severe and disproportional.

C. Punishment

The United States Supreme Court has held that the Eighth Amendment only bars punishment and not mere incidents of imprisonment.¹⁶⁶ It is therefore necessary to explain why incarcerating juveniles with adults is a form of punishment.¹⁶⁷ When the act being complained of is a mere incident of imprisonment, the Eighth Amendment is only violated when the state acts with deliberate indifference to the inmates' constitutional rights.¹⁶⁸ By incarcerating juveniles with adults, both state legislatures and prison officials act with deliberate indifference by consciously disregarding an obvious risk of serious harm to juveniles.¹⁶⁹ The Supreme Court has held that a transsexual inmate was in a substantial risk of harm by being incarcerated with the general inmate population and that prison officials consciously disregarded that risk by failing to protect him.¹⁷⁰ Similarly, the high incidents of violence against juveniles in adult prisons is a well-known and well-published fact that legislatures could only be unaware of by turning a blind eye to the harsh realities juveniles face in these prisons.¹⁷¹ By failing to enact a statute requiring sight and sound

163. See YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 118, at 26 (portraying problem society faces with juvenile recidivism rates).

164. See *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (examining characteristics making juveniles less likely deterred); *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (noting unlikelihood of deterring juveniles from committing crimes due to immaturity).

165. See *Roper*, 543 U.S. at 572 (rationalizing eighteen-year-olds and sixteen-year-olds equally unlikely to consider consequences of actions); *Thompson*, 487 U.S. at 837 (observing juveniles not mature enough to weigh consequences of actions).

166. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding punishment alone barred by Eighth Amendment); see also *supra* notes 86-87 and accompanying text (explaining Eighth Amendment requires actual punishment).

167. See *supra* notes 86-90 and accompanying text (highlighting requirement of punishment as condition precedent to Eighth Amendment violation).

168. *Farmer*, 511 U.S. at 838-40 (requiring deliberate indifference to find punishment); see also *supra* notes 87-90 and accompanying text (explaining deliberate indifference required for Eighth Amendment violation).

169. See *supra* notes 110-114 and accompanying text (summarizing findings of violence juveniles experience in adult prisons).

170. See *Farmer*, 511 U.S. at 847 (holding official deliberately indifferent to inmate's needs by consciously disregarding known risk).

171. See JUVENILES IN ADULT PRISONS, *supra* note 30, at 8 (illustrating violence juveniles experience in adult prisons).

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separation or incarceration of juveniles in separate facilities, legislatures consciously disregard the obvious risk to juveniles of being violently assaulted in adult prisons.¹⁷²

IV. CONCLUSION

States violate the Eighth Amendment by incarcerating juveniles with adults. Society's evolving standards of decency demand either sight and sound separation of juveniles from adults or incarceration of juveniles in entirely separate facilities. The objective indicia of consensus demonstrate that society believes incarcerated juveniles should be separated from adults. Many states have enacted statutes requiring such separation, either in entirely separate facilities until the age of seventeen, or at minimum by way of sight and sound separation. The consequences juveniles face in adult prisons, especially the heightened violence, is disproportionate to the goals of retribution and deterrence. The United States Supreme Court has determined that juveniles are less blameworthy and not as easily deterred from committing crimes. Therefore, the goals of punishment are not being met and juveniles are facing severe, disproportionate punishment.

Legislatures are acting with deliberate indifference by consciously disregarding an obvious risk to juveniles incarcerated with adults. Sentencing juveniles to adult prison facilities without any separation requirements is a form of punishment. If punishment is cruel and unusual it violates the Eighth Amendment. Incarceration of juveniles with adults violates society's notions of decency, and consequently is cruel and unusual punishment.

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172. See *supra* notes 110-114 and accompanying text (demonstrating violence juveniles face in adult prison); see also *supra* notes 87-90 and accompanying text (showing deliberate indifference for obvious risk to inmates' safety violates Eighth Amendment).