

YOU HAVE THE RIGHT TO REMAIN A CHILD: THE RIGHT TO JUVENILE TREATMENT FOR YOUTH IN CONFLICT WITH THE LAW

Cynthia Soohoo*

In 2010, sixteen-year-old Kalief Browder was stopped by the police in the Belmont section of the Bronx. The police claimed he had mugged a tourist and stolen a backpack earlier in the evening. Although a search failed to recover any stolen items and the witness changed his story, Kalief was handcuffed and taken into police custody.¹ New York law treats all sixteen-year-olds charged with criminal offenses as adults, so Kalief was taken to Central Booking at the Bronx County Criminal Court. He was charged with robbery, grand larceny and assault and sent to Rikers Island jail. Kalief spent three years at Rikers waiting for a trial that was repeatedly adjourned.² At Rikers, he was beaten by correctional officials and inmates and spent nearly two years in solitary confinement.³ Kalief

* Associate Professor of Law and Director of the Human Rights and Gender Justice (HRGJ) Clinic, City University of New York Law School. J.D., University of Pennsylvania Law School; I am grateful to Ruthann Robson for her comments and guidance, to Deborah LaBelle, Jeff Kirchmeier, Stephen Loffredo, Connie de la Vega, Bradley Parker, Alan White, Sue Bryant, Camille Massey, Donna Lee, and Babe Howell for their suggestions and feedback and to Katy Naples-Mitchell for her outstanding research assistance. I am also indebted to several generations of interns in the HRGJ (formerly the International Women's Human Rights) Clinic, including Bianca Cappellini, Cassie Fleming, Mik Kinkead, Nell Hirschmann-Levy, Meghan McLoughlin, Tawaka Amusa, Diana Aragundi, Chelsea Guffy, Daniel McCarey, and Carmen Desueza.

1. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

2. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

3. Browder's situation was not unique. A recent Department of Justice investigation of staff violence at Rikers found that sixteen to eighteen-year-olds were 6% of the daily population but were involved in 21% of use of force incidents and that the use of solitary confinement for youth was "excessive and inappropriate." U.S. DEP'T OF JUSTICE, U.S. ATTORNEY, S. DIST. OF N.Y., CRIPA INVESTIGATION OF THE NEW YORK CITY DEP'T OF CORRECTION JAILS ON RIKERS ISLAND 4, 7–8 (2014). On Rikers, Browder was detained at the Robert N. Davoren Center, which provided segregated housing for sixteen to eighteen-year-olds.

tried to commit suicide at Rikers several times. He refused plea deals that would have gotten him released earlier, asserting that he was not guilty. Prosecutors eventually dropped the charges. While Kalief was at Rikers, his friends finished their junior and senior years of high school. After all he experienced in jail, returning home was difficult. Two years after his release, he committed suicide.

Unfortunately, Kalief's tragic situation is not unusual. As a result of state laws requiring or allowing youth in conflict with the law to be tried as adults, an estimated 200,000 youth—defined in this article as individuals under eighteen—in conflict with the law are tried in adult criminal courts each year.⁴ Recent Supreme Court cases have limited the imposition of the most extreme adult sentences on youth. However, as Kalief's experience indicates, changing the sentences that youth may receive after they are tried as adults only addresses one of a series of rights violations that occur when youth are pushed into the adult criminal justice system. Youth's different cognitive capacity, special needs and vulnerabilities and capacity to grow and develop require different treatment and protections in the judicial systems that interact with them. If detention or incarceration is deemed necessary, youth need facilities that are designed and staffed to promote rehabilitation and protect them from harm.

However, youth on Rikers were still supervised by adult correctional officers and subjected to rules for adult detainees. In 2015, New York City ended solitary confinement of inmates under age eighteen at Rikers. See Brian Sonenstein, *New Rules for Solitary Confinement on Rikers Island Attempt to Fix What Must be Replaced*, SHADOWPROOF (Jan. 22, 2015), <https://shadowproof.com/2015/01/22/new-rules-for-solitary-confinement-on-rikers-island-attempt-to-fix-what-must-be-replaced>. In July 2016, the City announced plans to move youth out of Rikers and into a juvenile detention center to address the excessive force used against adolescents and to provide age appropriate programming. See Cindy Rodriguez, *Some Rikers Teens Could be Moved to Bronx Detention Center*, WNYC NEWS (July 21, 2016), <http://www.wnyc.org/story/16-and-17-year-olds-rikers-could-be-moving-bronx-detention-center>.

4. PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 20–21 (2011). This figure combines the estimated number of youth transferred from juvenile to adult criminal court and the estimated number of youth prosecuted as adults in states that exclude sixteen- and seventeen-year-olds from juvenile court jurisdiction. The conservative estimate of youth tried as adults in states that try all sixteen and seventeen-year-olds as adults is 175,000. *Id.* at 21. There were 14,000 reported transfers of youth into the adult system in 2007, but most states do not track or report the data. *Id.* at 20.

In a series of recent cases, the U.S. Supreme Court has recognized that youth are different from adults and that, because of these differences, when they are charged with a crime, protection of their constitutional rights may require different treatment and enhanced protections. The commonsense concept that youth are different from adults is not new to U.S. law. The Supreme Court has recognized that these differences are of legal significance “[t]ime and again.”⁵ State and federal laws routinely distinguish between individuals who are below eighteen and adults in the civil context. In recognition that youth who commit crimes are less culpable than adults and that the state has a responsibility to provide opportunities for them to mature and rehabilitate, every state has a juvenile justice system premised, at least in part, on protection and rehabilitation. These systems separate youth from adult offenders and provide specialized procedures, staff, facilities and programs that are designed to take into account youth’s developmental age and maturity.⁶

Although all states have separate juvenile justice systems, the Supreme Court has never considered whether a youth accused of

5. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011).

6. It must be noted that in practice, juvenile justice systems often fall short of providing age appropriate treatment and violate youth’s human rights. Juvenile detention centers have been criticized for substantial overcrowding, failure to provide food suitable to youth’s dietary needs, failure to provide appropriate education and special education services, and inadequate physical and mental health care. See Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 67–69 (1998); Cynthia M. Conward, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2442–50 (2001). Like adult criminal justice systems, some juvenile justice systems violate basic constitutional rights. In a 2012 report, a DOJ investigation found that the Juvenile Court of Memphis and Shelby County Tennessee failed to provide constitutionally-required due process protections, discriminated against African-American children, and failed to provide reasonably safe conditions of confinement. See Sandra Simkins, *Success in Shelby County: A Roadmap to Systemic Juvenile Reform*, 44 U. MEM. L. REV. 727, 734–35 (2014). Assessments of juvenile justice systems in 21 states have documented insufficient access to “adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile-court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy, and an over-reliance on probation.” *Id.* at 743 n.68. Further, the lack of formality in the juvenile system can be particularly problematic for minority youth because procedural protections can help to address systemic discrimination. See generally Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

a crime has a constitutional right to be treated as a juvenile. Beginning in the 1970s, several federal and state courts came to the opposite conclusion, declaring that youth do not have a constitutional right to juvenile offender treatment.⁷ Until recently, these decisions have been interpreted as giving states carte blanche to enact statutory schemes that exclude certain youth from the juvenile justice system, try them as adults, and impose adult criminal penalties on them. However, these cases failed to consider the full constitutional significance of differences between youth and adults and merit reconsideration in light of recent Supreme Court cases concerning youth in conflict with the law.

For almost 30 years, the Supreme Court has held that the 8th Amendment requires different treatment when the state seeks to impose the death penalty on youth.⁸ In 2005, *Roper v. Simmons* categorically prohibited imposing the death penalty on individuals who committed crimes when they were under eighteen. The *Roper* decision was based in part on evidence of a national consensus against the juvenile death penalty and scientific and sociological evidence about differences in brain development between youth and adults.⁹ But it was also firmly rooted in the Court's historic and common sense recognition of crucial differences in maturity between youth and adults that "any parent knows."¹⁰ In subsequent cases, the Supreme Court repeatedly recognized that youth are different from adults and that in certain circumstances the Constitution requires they be given more constitutional protection.¹¹ Following these cases,

7. See, e.g., *Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978); *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977); *People v. J.S.*, 469 N.E.2d 1090, 1094 (Ill. 1984); *State v. Cain*, 381 So. 2d 1361, 1363 (Fla. 1980); see also *In re Gault*, 387 U.S. 1, 16 (1967) (explaining that in common law there was no right to special protection for juveniles).

8. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (prohibiting the death penalty for individuals who committed offenses when they were under 16).

9. *Roper v. Simmons*, 543 U.S. 551, 567–70 (2005).

10. *Id.* at 569.

11. As Professor Martin Guggenheim states, "*Graham [v. Florida]* makes room for an argument that was out of bounds in the modern children's rights era: Juveniles have a substantive right to be treated differently when states seek to punish them for criminal wrongdoing." Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 457 (2012). See Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 292 (2012) ("[We are in] another period of reform in how we manage and treat juvenile offenders, suggesting a return to the early Twentieth Century view that kids are different . . . while

several scholars have argued that the Eighth Amendment prohibits imposition of any adult criminal sentence without consideration of the mitigating characteristics of youth.¹² However, the Court's recognition of constitutional differences between youth and adults cannot be limited to the sentencing context.¹³

This Article argues the Supreme Court's recognition of differences between youth and adults that make youth less culpable, more vulnerable to harm, and more prone to growth and rehabilitation can reinvigorate due process challenges to the exclusion and transfer of youth from the juvenile justice system to the adult criminal justice system and support the establishment of a substantive right to juvenile treatment for youth in conflict with the law. Although this right has yet to be recognized in the U.S., a substantive right to juvenile treatment is supported by international law and legal systems around the world.

International law defines individuals under eighteen as children and consistently recognizes that they are different from adults. Because of these differences, respect for children's rights requires consideration of their unique needs and evolving capacities. Under international law, children have specific rights to special protection and development,¹⁴ and recognition of differences between children and adults informs the interpretation of what other fundamental rights, such as due process and freedom from torture and ill-treatment, require when children are involved. As a result, procedural protections, sentences, and conditions of confinement that may be acceptable for adults may violate children's human rights.

retaining the constitutional protection that children have had since *Kent* and *Gault*."); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 791 (2011) (noting that the *Roper* line of cases does not seek application of a general rule to juveniles but for "differently situated individuals to be treated differently").

12. See, e.g., Levick et al., *supra* note 11, at 305–06; Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After Miller v. Alabama*, 52 AM. CRIM. L. REV. 293, 294 (2015) ("In *Miller*, the Court established a special right for children, namely, individualized consideration of their age in crafting a sentence.").

13. Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 99 (2010); Guggenheim, *supra* note 11, at 464 ("*Graham* is a case about how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice.").

14. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, arts. 2, 6(2), 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

Part I of this Article examines the current treatment of youth in the U.S. adult criminal justice system. Part II discusses international and comparative law recognizing the child's right to special protection and treatment and its application to youth in conflict with the law. Part III describes the rights of youth in the U.S. Part IV discusses how *Roper* and subsequent cases have developed the Supreme Court's "youth are different" jurisprudence. Finally, Part V discusses procedural and substantive Due Process arguments to challenge current laws that allow or require that youth be tried in the adult criminal justice system and considers how international and comparative law could help the Court shape meaningful constitutional protections.

I. YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES

A. State Laws that Push Youth into the Adult Criminal Justice System

All fifty states and the District of Columbia have separate juvenile justice systems for youth in conflict with the law, but they also allow or require individuals under eighteen to be tried as adults in certain circumstances.¹⁵ Each state statutory scheme is unique. However, most states have adopted one or more of four methods that push youth into the adult criminal justice system: (1) setting upper age limits for juvenile court jurisdiction below seventeen, (2) Prosecutorial Discretion, (3) Statutory Exclusion, and (4) Judicial Waiver.¹⁶

Several states have established an upper age of juvenile court jurisdiction below age seventeen. Seven states exclude seventeen-year-olds from juvenile court jurisdiction, automatically trying them as adults regardless of the offense or the youth's prior history.¹⁷ Two

15. GRIFFIN ET AL., *supra* note 4, at 1–3.

16. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, U.S. DEPT OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2011 1 (2014).

17. GRIFFIN ET AL., *supra* note 4, at 21. Since the report was written, Illinois, Louisiana, Massachusetts, New Hampshire, South Carolina, and Connecticut raised their maximum age of juvenile court jurisdiction to seventeen. The states that currently automatically try seventeen-year-olds as adults are: Georgia, Michigan, Missouri, Texas, and Wisconsin. *See Jurisdictional Boundaries*, U.S. DEPT OF JUSTICE OFFICE JUVENILE JUSTICE &

of the seven, New York and North Carolina, also exclude sixteen-year-olds from juvenile jurisdiction.¹⁸ States do not track how many sixteen- and seventeen-year-olds are routinely tried as adults in this manner. However, the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice (“OJJDP”) estimated that in 2007 as many as 175,000 sixteen- and seventeen-year-olds were tried in adult criminal courts in states that exclude them from juvenile court jurisdiction.¹⁹

In addition, there are three types of provisions that allow youth who fall within the age limit for juvenile court jurisdiction to be tried as adults.²⁰ “Prosecutorial Discretion” laws grant concurrent jurisdiction to juvenile and adult criminal courts for youth who meet certain criteria, typically based on age, offense, prior involvement with the adult criminal justice system, or a combination of these factors. These provisions allow prosecutors to decide whether to bring charges against youth who fall into the categories in juvenile or adult criminal court.²¹ These decisions are viewed as discretionary, and “there is no hearing, no evidentiary record, and no opportunity for defendants to test (or even to know) the basis for the prosecutor’s decision to proceed in criminal court.”²² In Florida alone, over 11,000 youth were transferred to adult court between 2010 and 2014 as a result of Prosecutorial Discretion.²³

“Statutory Exclusion” provisions exclude certain categories of youth from the protections of the juvenile system and grant original jurisdiction to adult criminal courts.²⁴ In addition to exclusions based on a combination of crime and age, the majority of states have “once

DELINQUENCY PREVENTION, [https://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2015&text=\(select “Available Year” from drop down menu, compare data from 2011-2015\)](https://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2015&text=(select%20%22Available%20Year%22%20from%20drop%20down%20menu,%20compare%20data%20from%202011-2015)) (last visited Feb. 26, 2017).

18. *Id.*

19. Given that the number of states setting the maximum age of juvenile court jurisdiction below seventeen has decreased since the OJJDP’s report, if all other population data remains constant the estimate may be lower today. *See* HOCKENBERRY & PUZZANCHERA, *supra* note 16.

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

21. *Id.* at 2, 5; HOCKENBERRY AND PUZZANCHERA, *supra* note 16, at 1.

22. GRIFFIN ET AL., *supra* note 4, at 5.

23. *Florida Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY POL’Y PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries/florida> (last visited Mar. 19, 2017) (explaining that as a result of Prosecutorial Discretion, 2857 youth were transferred in 2010, 2723 in 2011, 2470 in 2012, 1811 in 2013, and 1555 in 2014 for a total of 11,416 transfers in a five year period).

24. GRIFFIN ET AL., *supra* note 4, at 2; HOCKENBERRY & PUZZANCHERA, *supra* note 16, at 1.

an adult/always an adult” Statutory Exclusion provisions which require that youth who have been transferred to the adult system remain there for all subsequent offenses no matter how inconsequential the offense.²⁵ There is no national data set that tracks the number of youth who are charged as adults as a result of Prosecutorial Discretion and Statutory Exclusion provisions.²⁶ In 2007, the OJJDP counted 5,116 non-judicial transfers based on data from seven states, but the count did not include data from an additional twenty-nine states that have Statutory Exclusion or Prosecutorial Discretion provisions.²⁷

Finally, “Judicial Waiver” provisions may authorize or require juvenile court judges to remove certain youth from juvenile court to adult criminal court.²⁸ In 2007, an estimated 8,500 judicial waivers took place.²⁹ There are three types of judicial waiver provisions. Discretionary waiver provisions give judges the option to waive jurisdiction if the case meets certain threshold requirements. Presumptive waiver assumes that waiver is appropriate if the youth meets statutory criteria (e.g. age, offense) although youth may try to rebut the presumption. Finally, mandatory waiver is functionally similar to Statutory Exclusion. In these cases, the juvenile court’s only role is to confirm that statutory requirements for waiver are met. If that court makes such a finding, it must waive the case to adult court.

B. Expansion of Exclusion and Transfer Laws

Before 1970, most youth transfers occurred pursuant to judicial waiver.³⁰ Starting in the 1970s, states began adopting and expanding Statutory Exclusion and Prosecutorial Discretion provisions.³¹ By the 1980s and 1990s, nearly every state had expanded transfer laws.³² The OJJDP writes:

Prompted in part by public concern and media focus
on the rise of violent youth crime that began in 1987

25. GRIFFIN ET AL., *supra* note 4, at 7.

26. *Id.* at 12.

27. *Id.* at 20.

28. *Id.* at 2, 4; HOCKENBERRY & PUZZANCHERA, *supra* note 16, at 1.

29. GRIFFIN ET AL., *supra* note 4, at 20.

30. *Id.* at 8.

31. *Id.*

32. *Id.* at 1.

and peaked in 1994, legislatures in nearly every state revised or rewrote their laws to lower thresholds and broaden eligibility for transfer, shift transfer decisionmaking authority from judges to prosecutors, and replace individualized discretion with automatic and categorical mechanisms.³³

As a result of these changes, more youth were pushed into the adult criminal justice system, often without any individualized hearing or consideration of whether adult treatment was appropriate. Today, state transfer and exclusion laws result in approximately 200,000 children and youth being tried as adults each year.³⁴ The majority of youth who end up in adult court get there as a result of categorical exclusions (age limitations on juvenile court jurisdiction or Statutory Exclusion provisions) and prosecutors' decisions.³⁵

Tougher exclusion and transfer laws were promoted as targeting the most serious offenders, but in reality, they cast a much broader net. The majority of youth tried in the adult criminal justice system are charged with low-level, non-violent offenses.³⁶ Indeed, blanket exclusions of sixteen- and seventeen-year-olds from juvenile court jurisdiction require that they be tried as adults, no matter how trivial the alleged offense or the individual circumstances surrounding the youth and the crime. Although these provisions were justified as a means to deter crime, studies show that they have the opposite effect. Once youth are caught up in the adult criminal justice system, their chances to avoid future criminal behavior become more and more remote.³⁷

33. *Id.* at 9.

34. *Id.* at 20–21. *See supra* note 14.

35. *See* HOCKENBERRY & PUZZANCHERA, *supra* note 16, at 1–2 (noting that the decline in Judicial Waivers in the 1990s is in part attributable to the widespread expansion of non-judicial transfer laws which resulted in cases being directly filed in criminal court and bypassing the juvenile court system altogether).

36. NAT'L JUVENILE JUSTICE AND DELINQUENCY PREVENTION COAL., PROMOTING SAFE COMMUNITIES: RECOMMENDATIONS FOR THE ADMINISTRATION 15 (2013–2014). For example, in Michigan, the majority of children in prison have committed property crimes and an increasing number are sent to prison for probation violations. Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?*, 54 WAYNE L. REV. 1725, 1747 (2008).

37. In 2011, the OJJDP concluded that “research over several decades has generally failed to establish [the] effectiveness [of transfer statutes to deter youth

C. Consequences of Pushing Youth into the Adult Criminal Justice System

As discussed *infra* Part V, trying youth as adults raises profound questions about the fairness of imposing adult criminal procedures and sentences on youth. But it is also important to recognize that pushing youth into the adult criminal justice system imposes severe and distinct harm outside of the courtroom.³⁸ Youth tried as adults who are detained pre-trial or sentenced to prison after trial are placed under the jurisdiction of adult correctional departments and typically are detained in adult jails and prisons. Youth incarcerated in adult facilities that are not designed for them are at much greater risk of harm or abuse.³⁹ Because youth are typically smaller and more vulnerable, they are often targeted for both physical and sexual violence by adult detainees, prisoners, and correctional staff. Youth are also more likely to have difficulties navigating the system and complying with rules or may act out to appear tough, resulting in higher rates of infractions and punishment, including solitary confinement.⁴⁰

Detention and incarceration in adult facilities place tremendous stress on youth. Typically, adult correctional staff are not trained to deal with youth, and facilities lack proper education, programming, and health and psychological services for young people.

crime].” GRIFFIN ET AL., *supra* note 4, at 26. Further, studies have found higher recidivism rates among juveniles prosecuted as adults than among matched youth in the juvenile system. *Id.* According to the OJJDP, “[p]oor outcomes like these could be attributable to a variety of causes, including the direct and indirect effects of a criminal conviction on the life chances of transferred youth, the lack of access to rehabilitative resources in the adult correctional system, and the hazards associated with older criminal ‘mentors.’” *Id.*

38. INT’L WOMEN’S HUMAN RIGHTS CLINIC ET AL., CHILDREN IN ADULT JAILS AND PRISONS: SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Children-in-Adult-Jails-and-Prisons-9-23-14.pdf>.

39. In 2003, Congress recognized that youth are five times more likely to be sexually assaulted in adult rather than juvenile facilities. 42 U.S.C. § 15601(4) (2003). See Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, JUV. & FAM. CT. J., Feb. 1989, at 1, 1 (finding that youth were twice as likely to be physically harmed by staff).

40. In adult jails and prisons, youth are more likely to face disciplinary sanctions, such as solitary confinement, than are incarcerated adults. See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 51–52 (2012).

As a result, youth in adult facilities are much more likely to commit suicide than youth in juvenile facilities.⁴¹ Placing youth in adult jails and prisons also separates them from their families and communities, depriving them of crucial support for their well-being and rehabilitation.

The consequences of charging youth as adults rather than as juveniles continue after youth serve their sentences. Criminal convictions carry a life-long stigma that can prevent youth from accessing higher education or getting a job, further increasing the risk of recidivism.⁴² Criminal convictions can limit access to driver's licenses and prevent youth from voting or holding public office.⁴³

Current state exclusion and transfer laws have a discriminatory impact on youth of color. By far, the vast majority of the children who are criminalized, transferred, and incarcerated in adult facilities are racial and ethnic minorities.⁴⁴ Indeed, while there are troubling racial disparities throughout the U.S. prison system, according to available national data, these disparities are the most extreme among the youngest.⁴⁵ Overall, the imprisonment rate of black males is six times that of white males, but among eighteen to nineteen-year-olds, black males are more than nine times as likely to be in prison as white males the same age.⁴⁶ These disparities may

41. Arya, *supra* note 13, at 10.

42. See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

43. CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 13 (2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf.

44. See JASON J. WASHBURN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DETAINED YOUTH PROCESSED IN JUVENILE AND ADULT COURT: PSYCHIATRIC DISORDERS AND MENTAL HEALTH NEEDS 3 (2015) (collecting studies). *Id.* at 6 ("Males, youth from racial/ethnic minority groups, and older youth still had significantly greater odds of being transferred to adult court than females, non-Hispanic whites, and younger youth."). *Id.* at 11 ("The disproportionate transfer of African American youth to adult court is of particular concern.").

45. The federal government does not provide a racial breakdown of youth under eighteen in adult prisons, but the national data available show that racial disparities are the most extreme among the youngest prisoners.

46. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS

reflect racial bias in the exercise of Prosecutorial Discretion as well as bias in earlier decisions about whom to arrest and charge as adults.

II. INTERNATIONAL AND COMPARATIVE LAW ON CHILDREN IN CONFLICT WITH THE LAW

The right of the child to special protection and treatment is a foundational right under international law that is reflected in major human rights treaties and declarations.⁴⁷ The right is also explicitly recognized and protected in constitutions⁴⁸ and legal systems around

AND RELEASES: 19991–2012 25 (2014), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

47. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 24, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“Every child shall have . . . the right to such measures of special protection as are required by his status as a minor”); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 10.3, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (“Special measures of protection and assistance should be taken on behalf of all children and young persons”); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 19, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter American Convention] (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”); African Charter on Human and People’s Rights, *adopted* June 27, 1981, art. 18.3, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (“The State shall . . . ensure the protection of the rights of . . . the child as stipulated in international declarations and conventions.”). The Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man also recognize a right to special protection, care and assistance. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 10, 1948); *American Declaration of the Rights and Duties of Man*, O.A.S. Res XXX, 9th Int’l Conference of American States, art. 1, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

48. The South African and Ethiopian constitutions incorporate the best interests of the child standard from Article 3 of the CRC. S. AFR. CONST., art. 28(2), 1996; ETH. CONST., art. 36(2), 1995. South Africa’s constitution also recognizes the rights to be “treated in a manner, and kept in conditions, that take account of the child’s age,” to be kept separately from adults, and not to be detained “except as a measure of last resort” and for the “shortest period of time.” S. AFR. CONST., art. 28(1)(g), 1996. Fiji, The Gambia, Uganda, Ethiopia and Ghana also have constitutional provisions that explicitly require the separation of detained children and adults. *See* BEATRICE DUNCAN, UNICEF, CONSTITUTIONAL REFORMS IN FAVOR OF CHILDREN 51 (2008), http://www.unicef.org/policyanalysis/files/Constitutional_Reforms_in_Favour_of_Children.pdf.

the world. This section reviews international human rights standards concerning youth in conflict with the law and considers how the recognition of the right of the child to special protection and treatment is reflected in the legal systems of other countries.

A. Children in Conflict With the Law Have a Right to Different Treatment

1. International Human Rights Law

Through widely ratified human rights treaties and universally adopted rules, human rights law articulates basic standards concerning the treatment of youth in conflict with the law. Most major human rights treaties explicitly recognize the right of the child to special protection and treatment.⁴⁹ Human rights treaties also consider developmental differences and child status to interpret what other fundamental human rights—such as the right to a fair trial or the right to be free from torture and cruel, inhuman, and degrading treatment or punishment—require when applied to children.⁵⁰

The International Covenant on Civil and Political Rights expressly provides that every child has the right to special protection.⁵¹ It also includes specific provisions under articles protecting the rights of persons deprived of liberty and subject to criminal proceedings that require according children treatment appropriate to their age and the promotion of their rehabilitation.⁵² The U.N. Convention on the Rights of the Child (“the Children’s Rights Convention” or “CRC”)⁵³ similarly recognizes that children accused of violating the penal law have a right to be treated in a manner that “takes into account the child’s age and the desirability of promoting the child’s reintegration and . . . constructive role in

49. See *supra* note 47.

50. For instance, the European Convention on Human Rights does not contain a specific children’s rights provision. However, the European Court of Human Rights has interpreted the Convention’s other substantive provisions in light of the CRC. See Ursula Kilkelly, *The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in the Light of the U.N. Convention on the Rights of the Child*, 23 HUM. RTS. Q. 308, 308–09 (2001).

51. ICCPR, *supra* note 47, art. 24.

52. *Id.* arts. 10(3), 14(4).

53. CRC, *supra* note 14.

society”⁵⁴ and that children deprived of liberty should be treated “in a manner which takes into account the needs of persons of his or her age.”⁵⁵ As *lex specialis*, the CRC provides the most in-depth international guidance on children’s rights. The international community has also developed detailed rules concerning youth in conflict with the law, including the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”) and the U.N. Rules for the Protection of Juveniles Deprived of their Liberty (“the Havana Rules”).⁵⁶ The ICCPR, CRC and U.N. rules are widely used to interpret what the child’s right to special protection requires and how other fundamental human rights apply to children in conflict with the law. These standards are discussed below in Part II.B.

2. Treatment of Children in Different Legal Systems

Consistent with international law, the majority of countries treat youth facing judicial proceedings for alleged violation of criminal laws differently than adults. Some countries have adopted legislation specifically to comply with the CRC.⁵⁷ Others have adopted laws premised on the inherent differences between youth and adults. Many countries explicitly prohibit any transfer of youth from their juvenile justice system to the adult criminal system.⁵⁸ In a recent

54. *Id.* art. 40(1).

55. *Id.* arts. 37(c), 40(1).

56. U.N. Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter Beijing Rules]; G.A. Res. 45/113, U.N. Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”), U.N. Doc. A/RES/45/113 (Dec. 14, 1990) [hereinafter Havana Rules].

57. Youth Criminal Justice Act, S.C. 2002, c. 1 (Can.) (“Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms.”); *Salil Bali v. Union of India*, (2013) 7 SCC 705, ¶¶ 28, 40 (India) (noting that the Indian Juvenile Justice (Care and Protection) 2000 Act was passed in part to comply with India’s CRC obligations); The Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, Acts of Parliament, 2000 (India).

58. For instance, in Germany all individuals under eighteen must be tried in youth courts. Anthony N. Doob & Michael Tonry, *Varieties of Youth Justice*, 31 CRIME & JUST. 1, 6, 8–9 (2004). Similarly, the Canadian Youth Criminal Justice Act prohibits transfer of youth under eighteen to the adult criminal justice system. Youth convicted of certain offenses can receive adult sentences. However, the prosecution must inform the youth that an adult sentence will be sought,

survey of 140 countries, USF's Center for Law and Global Justice (CLGJ) found that 44% of countries completely ban transfer of juveniles to adult courts.⁵⁹ Germany not only prohibits transfer of youth, but also allows young adults aged eighteen to twenty-one to be transferred from adult courts to youth courts.⁶⁰

As for countries that do allow youth to be tried in adult criminal courts, the majority provide youth with enhanced protections in the adult system that take their age into account. Fifteen percent of countries surveyed by CLGJ do not have separate juvenile courts "either due to a lack of resources or because so few juveniles pass through the criminal justice system to receive sanctions that a separate court is impractical."⁶¹ These countries provide special protections to youth in adult criminal court.⁶² An additional 25% of

triggering additional procedural protections during the trial. The prosecution must also prove that an adult sentence is appropriate in the specific case. Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 67, 71 (Can.); *R. v. S.J.L.-G.*, [2009] 1 S.C.R. 426, ¶¶ 30–31 (Can.) (citing NICHOLAS BALA, *YOUTH CRIMINAL JUSTICE LAW* 356 (2003)). Up until December of 2015, India required that all individuals under eighteen be tried in youth courts. An amendment allowing transfer of sixteen- and seventeen-year-olds for heinous crimes is currently being challenged. *See infra* note 342.

59. CONNIE DE LA VEGA ET AL., *UNIV. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT* 56 (2012).

60. Hans-Jörg Albrecht, *Youth Justice in Germany*, 31 *CRIME & JUST.* 443, 452, 474 (2004).

61. DE LA VEGA ET AL., *supra* note 59, at 55. Sweden's lack of a separate juvenile justice system can be explained by the small number of youth passing through the criminal justice system whereas Vietnam may lack the resources to create a separate system. *Id.* at 55 n.392.

62. *Id.* at 56; *see also* Dr. Swamy v. Raju, (2014) 2 *Crim LJ* (SC) 477, ¶ 36 (Mar. 28, 2014) (India) (describing other jurisdictions). Bhutan does not have juvenile courts but the criminal procedure code has special provisions, including proportionately reduced sentences, for individuals under eighteen. Several jurisdictions have no juvenile justice system because their minimum age of criminal responsibility (MCR) is high, making it less efficient to create a separate system for a small number of offenders. Argentina's MCR is sixteen. Sixteen- and seventeen-year-olds are tried as adults, but courts have discretion to either not impose a sentence or impose the sentence an adult would receive for attempting (rather than committing) the crime at issue. Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas*, Inter-Am. Comm'n H.R., ¶ 42, OEA/Ser.L/V/II Doc. 78 (July 13, 2011) [hereinafter *IACHR Juvenile Justice in the Americas Report*]. Similarly, Denmark and Sweden have no juvenile justice system. Youth can be tried in adult courts starting at 15, but prison sentences for individuals below eighteen require "extraordinary" justification and "special" justification for eighteen to twenty-year-olds. All individuals under twenty-one serve their sentences separately from adults. Doob & Tonry, *supra* note 58, at 6, 10.

countries have juvenile courts but allow youth to be transferred to adult court for heinous crimes or when a youth is being tried with an adult accomplice. However, these jurisdictions also impose protections for youth in adult courts, including requirements that the juvenile code apply, that youth be transferred back to juvenile court for sentencing, or that juveniles receive different sentences than adults.⁶³ Only 16% of 140 countries surveyed allow youth to be tried and sentenced in adult courts without any special protections.⁶⁴

In a recent publication on youth justice in European countries, Canada, and New Zealand, Anthony N. Doob and Michael Tonry conclude that Western countries typically “have laws or policies reflecting the belief that youth should be treated differently from adult offenders” although the specifics of their treatment vary.⁶⁵ This different treatment is based on a general assumption that “youthfulness of an offender mitigates the punishment that youth should receive and that youth should be kept separate from adult offenders.”⁶⁶

The Supreme Court of Canada has specifically recognized that youth accused of a crime are entitled to different treatment based on a presumption of diminished moral culpability.⁶⁷ Canada’s Youth Criminal Justice Act (YCJA) requires that all youth be tried in youth courts, although it allows youth courts to impose adult sentences for certain crimes.⁶⁸ Prior to 2008, there was a presumption that youth would receive an adult sentence for certain serious offenses.⁶⁹ The Canadian Supreme Court struck down the presumption, finding that it violated the right to liberty under Article

63. DE LA VEGA ET AL., *supra* note 59, at 55.

64. *Id.* at 56.

65. Doob & Tonry, *supra* note 58, at 3.

66. *Id.* at 5.

67. R. v. D.B., [2008] 2 S.C.R. 3, ¶ 68 (Can.); *see* R. v. S.J.L.-G., [2009] 1 S.C.R. 426, ¶ 21 (Can.).

68. Youth Criminal Justice Act, S.C. 2002, c. 1, s. 3(1)(b) (Can.) (“[T]he criminal justice system for young persons must be separate from that of adults”)

69. The YCJA provided that if a youth 14 years or older is convicted of a “presumptive” offense, he or she “shall” be sentenced as an adult. The law placed the onus on the youth to make an application to the court and prove that a youth sentence would be of “sufficient length to hold the young person accountable.” R. v. D.B., [2008] 2 S.C.R. 3, ¶¶ 25–27 (Can.).

7 of the Canadian Charter of Rights and Freedoms (“Canadian Charter”).⁷⁰

In reaching its holding, the Canadian high court found that the presumption of youth’s diminished moral culpability is an established legal principle and that “special rules based on reduced maturity and moral capacity have governed young persons in conflict with the law from ‘the beginning of legal history.’”⁷¹ The court noted that English common law and Canadian law have “consistently acknowledged the diminished responsibility and distinctive vulnerability of young persons”⁷² and that CRC Art. 40(1) requires that children accused of violation of the penal law be treated in a manner that takes their age and reintegration into society into account.⁷³

The Canadian Supreme Court also found global consensus that the presumption is fundamental to notions of how a fair legal system ought to operate.⁷⁴ The Court noted that the distinction between youth and adults is recognized internationally, as “[e]very legal system recognizes that children and youth are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults.”⁷⁵

B. What Does Different Treatment Require?

This section provides an in-depth analysis of international standards concerning the appropriate treatment of children in conflict with the law. Many of these standards are consistently reflected in legal systems around the world.

70. Article 7 provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). In order to determine whether a principle of fundamental justice exists, the Canadian Supreme Court requires that: (1) the principle is a legal principle, (2) “[t]here [is] consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate” and (3) the principle is sufficiently precise to result in a manageable standard. *R. v. D.B.*, [2008] 2 S.C.R. 3, ¶ 46 (Can.).

71. *R. v. D.B.*, [2008] 2 S.C.R. 3, ¶ 47 (Can.).

72. *Id.* ¶¶ 47–48.

73. *Id.* ¶ 60.

74. *Id.* ¶ 61.

75. *Id.* ¶ 67 (citing Doob & Tonry, *supra* note 58, at 1).

The Children's Rights Convention recognizes children as rights holders, but also recognizes that children may have different rights than adults. The treaty "rests on the need to recognize rights specific to children and adapt the mode of granting other rights to the unique characteristics of childhood, including the child's evolving capacities."⁷⁶ The CRC emphasizes five overarching principles concerning children in conflict with the law: non-discrimination; primacy of the best interests of the child; the right to life, survival, and development; the right to participate and be heard; and the right to be treated with dignity.⁷⁷ As discussed below, these principles require that laws and systems that deal with children (1) be specialized, by adopting age-appropriate systems and procedures and by emphasizing rehabilitation, and (2) protect children from harm and violence. Although this Article focuses on the treatment of youth following the decision to bring formal charges for an offense or crime in a judicial proceeding, it should be emphasized that international law prioritizes the prevention of juvenile delinquency and development of alternatives to criminal/juvenile justice processing such as diversion to alternative service programs.⁷⁸

76. Tamar Morag, *The Principles of the U.N. Convention on the Rights of the Child and Their Influence on Israeli Law*, 22 MICH. ST. INT'L. L. REV. 531, 534 (2014); *Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 145 (May 14, 2013) ("Even though children have the same human rights as adults during legal proceedings, the way in which these rights are exercised varies according to their level of development.").

77. CRC, *supra* note 14, arts. 2, 3, 6, 12, 37(c), 40(1); Comm. on the Rights of the Child, General Comment 10 (2007): *Children's Rights in Juvenile Justice*, ¶¶ 5–14, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter General Comment 10]; see *Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 142 (May 14, 2013) (stating that the best interest of the child is the regulating principle on laws relating to children based on the "dignity of the human being, on the inherent characteristics of children, and on the need to foster their development making full use of their potential").

78. CRC, *supra* note 14, arts. 37(b), 40.3(b); General Comment 10, *supra* note 77, ¶¶ 15–27; see Youth Criminal Justice Act, S.C. 2002, c. 1, s. 10 (Can.) (prioritizing extrajudicial measures instead of court interventions); see also MINISTER OF JUSTICE & ATT'Y GEN. OF CAN., THE YOUTH CRIMINAL JUSTICE ACT: SUMMARY AND BACKGROUND 3 (2013), <http://justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/pdf/back-hist.pdf> ("One of the key objectives of the YCJA is to increase the use of effective and timely non-court responses to less serious offences by youth. These extrajudicial measures provide meaningful consequences, such as requiring the young person to repair the harm done to the victim.").

1. All Individuals Under Eighteen Are Entitled to Special Protection and Treatment

Under human rights law, protections for children in conflict with the law apply to all individuals under eighteen. Although the CRC recognizes that in some cases children can reach the age of majority before eighteen, the Committee on the Rights of the Child requires that “every person under the age of eighteen at the time of the alleged commission of an offense must be treated in accordance with the rules of juvenile justice.”⁷⁹ No exceptions are made for older youth, e.g. sixteen- or seventeen-year-olds, or for stripping rights to juvenile protection from children accused of serious offenses. U.N. rules and the Inter-American Court of Human Rights (IA Court) also have explicitly indicated that special protection and treatment is required for individuals under eighteen.⁸⁰

Consistent with international law, many countries around the world have adopted eighteen as the dividing line between children and adults for criminal justice purposes. In a 2009 case, the Indian Supreme Court rejected a challenge to the Indian Juvenile Justice (Care and Protection of Children) Act of 2000, which barred the prosecution of youth under eighteen as adults⁸¹ based on scientific data indicating that the brain continues to develop until “at least the age of eighteen years and that it is at that point . . . that [an individual] can be held fully responsible for his actions.”⁸² In a 2014 decision, the court again recognized that “studies of adolescent brain anatomy clearly indicate that regions of the brain that regulate such things as foresight, impulse control and *résistance* [sic] to peer

79. General Comment 10, *supra* note 77, ¶ 37; CAROLYN HAMILTON, UNICEF, GUIDANCE FOR LEGISLATIVE REFORM ON JUVENILE JUSTICE 11, 15 (2011), http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf (“[The CRC Committee] has emphasized that all children under the age of eighteen who are in conflict with the law must be provided with the protection of the CRC and the Standards and Norms.”); *see also* S. AFR. CONST., art. 28(3), 1996 (recognizing that all individuals under eighteen are children).

80. Havana Rules, *supra* note 56, r. 11(a) (“A juvenile is every person under the age of 18.”); Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 40, 42, 109 (Aug. 28, 2002) [hereinafter *Advisory Opinion*].

81. A 2015 amendment to the Act allowing sixteen- and seventeen-year-olds to be tried as adults under certain circumstances is currently being challenged as unconstitutional. *See infra* note 342.

82. Hari Ram v. State of Rajasthan, (2009) 13 S.C.C. 211, ¶ 44 (India).

pressure are in a developing stage up to the age of eighteen.”⁸³ The court recognized that brain development is not uniform and that some sixteen- and seventeen-year-olds may have the maturity to be treated as adults,⁸⁴ but concluded that adopting eighteen as a bright line was justified to promote the rehabilitation and reintegration of youth.⁸⁵

2. The Obligation of Specialized and Rehabilitative Treatment

The ICCPR and CRC provide that every child accused of violating the penal law has the right to be treated in a manner that “takes into account the child’s age and the desirability of promoting the child’s reintegration and [assumption of] a constructive role in society.”⁸⁶ International law recognizes that the best interests of the child and “the lesser culpability of children in conflict with the law”⁸⁷ require a rehabilitative rather than punitive approach. Developmental differences require specialized laws and policies. Given the child’s right to development and dignitary interests, these

83. Dr. Swamy v. Raju, (2014) 2 Crim LJ (SC) 477, ¶ 36 (Mar. 28, 2014) (India).

84. *Id.*

85. *Id.* ¶ 46.

86. CRC, *supra* note 14, arts. 40(1), 37(c) (requiring that a child deprived of their liberty must be treated “in a manner which takes into account the needs of persons of his or her age”); ICCPR, *supra* note 47, arts. 10(3) (stating that juvenile offenders should be “accorded treatment appropriate to their age and legal status”), 14(4) (establishing that court proceedings involving juveniles should “take account of their age and the desirability of promoting their rehabilitation”); *see also* American Convention, *supra* note 47, art. 5(5) (“Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.”); Advisory Opinion, *supra* note 80, ¶ 109 (“[C]hildren under 18 who are accused of conduct defined as crimes by penal law must be subject . . . only to specific jurisdictional bodies different from those for adults.”).

87. The best interests of the child and differences between adults and children “are the reasons for a separate juvenile justice system and require different treatment for children” and “traditional objectives of criminal justice, such as repression/retribution must give way to rehabilitation and restorative justice objectives.” General Comment 10, *supra* note 77, ¶ 10. The Canadian Supreme Court has recognized that developmental differences between adults and youth result in diminished culpability and heightened vulnerability. *R. v. D.B.*, [2008] 2 S.C.R. 3, ¶¶ 41, 62 (Can.).

specialized laws and policies must support rehabilitation and reintegration into society.⁸⁸

The CRC specifically requires that states establish “laws, procedures, authorities and institutions specifically applicable to children [who have or who are alleged to have violated the penal law].”⁸⁹ Specialization and rehabilitation must be “applied, observed and respected throughout the entire process of dealing with the child.”⁹⁰ Specialization and rehabilitation also support international law provisions requiring different laws and procedures for children⁹¹ and personnel who are specially trained to work with them.⁹²

88. General Comment 10, *supra* note 77, ¶¶ 11, 13.

89. CRC, *supra* note 14, art. 40(3).

90. General Comment 10, *supra* note 77, ¶ 13; *see* Youth Criminal Justice Act, S.C. 2002, c. 1, s. 3(1)(b) (Can.) (“[T]he criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

- (i) rehabilitation and reintegration,
- (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
- (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
- (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
- (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time[.]”).

91. ICCPR, *supra* note 47, art. 14(4) (“In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”); CRC, *supra* note 14, art. 40(3) (requiring that governments establish “laws, procedures, authorities and institutions specifically applicable to children [in conflict with the law]”); General Comment 10, *supra* note 77, ¶¶ 90, 92.

92. General Comment 10, *supra* note 77, ¶¶ 10, 13 (requiring “all professionals involved in the administration of juvenile justice” to be knowledgeable about children and child development). The German Youth Courts Law requires that judges and prosecutors “handling matters involving youths should have appropriate education and training as well as experience in the education and upbringing of youths.” Jugendgerichtsgesetz [Youth Courts Law], Dec. 11, 1974, Bundesgesetzblatt [BGBL.] I at 3427, last amended by Gesetzes [G], Dec. 6, 2011, BGBL. I at 2554, § 37 (Ger.).

a. Enhanced Fair Trial Protections

Under international law, if judicial proceedings are initiated against children, they are entitled to the same fair trial protections as adults, but the protections must be implemented in a manner that takes into account the child's age and development.⁹³ Children have the right to be meaningfully heard in judicial proceedings.⁹⁴ They must be able to understand charges against them, including possible consequences and penalties, and meaningfully participate in their defense. This may require modified courtroom procedures and practices to take into account the child's age and maturity as well as "translation" of formal charges to a language the child can understand.⁹⁵ Lawyers representing the child must be trained to work with children.⁹⁶

Decisions from the European Court of Human Rights (ECHR) recognize that children cannot be subjected to adult criminal procedures without modification to take into account their age.⁹⁷ The ECHR has held that the right to a fair trial protected under Article 6 of the European Convention on Human Rights⁹⁸ is violated when children are subjected to adult criminal trial procedures.⁹⁹ The ECHR first found that subjecting children to adult criminal procedures violated the right to a fair trial in a 1999 landmark pair of cases,

93. General Comment 10, *supra* note 77, ¶ 40; *see* Youth Criminal Justice Act, S.C. 2002, c. 1, s. 3(1)(b) (Can.) (stating that the criminal justice system for young persons must emphasize "enhanced procedural protection to ensure that young persons are treated fairly").

94. CRC, *supra* note 14, art. 12(2); General Comment 10, *supra* note 77, ¶¶ 43–45.

95. General Comment 10, *supra* note 77, ¶¶ 46–47.

96. *Id.* ¶ 49.

97. The Canadian Supreme Court has also noted that youth "generally lack the judgment and knowledge to participate effectively in the court process and may be more vulnerable than adults." *R. v. D.B.*, [2008] 2 S.C.R. 3, ¶ 64 (Can.) (citing *BALA*, *supra* note 58, at 5).

98. Art. 6 (1) provides: "In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 6, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

99. *T. v. United Kingdom*, App. No. 24724/94, 30 Eur. H.R. Rep. 121, ¶ 89 (1999) (Eur. Ct. H.R.); *V. v. United Kingdom*, 1999-IX Eur. Ct. H.R. 111, 149 ¶ 91 (1999); *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281, 294–97, ¶¶ 28–37.

*T. v. United Kingdom*¹⁰⁰ and *V. v. United Kingdom*.¹⁰¹ The cases involved two boys who were tried and convicted in the U.K.'s Crown Court for the murder of a two-year-old child.¹⁰² The boys were ten years old at the time of the murder.

Even though some modifications had been made to the courtroom,¹⁰³ the ECHR found that T. and V. were unable to effectively participate in their trials in violation of Art. 6(1).¹⁰⁴ The court stated that "it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity, and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in proceedings."¹⁰⁵ The court found that T. and V.'s "immaturity and [their] disturbed emotional state" made it highly unlikely "[they] would have been capable outside the courtroom of cooperating with [their] lawyers and giving the information for the purposes of [their] defence."¹⁰⁶

Five years later, in *S.C. v. United Kingdom*,¹⁰⁷ the ECHR considered another U.K. case involving an eleven-year-old charged with attempted robbery.¹⁰⁸ The ECHR reiterated that Article 6(1)'s right to effective participation includes the right to procedures that take age, maturity, and intellectual and emotional capacities into account.¹⁰⁹ Although the U.K. had adopted courtroom and practice modifications to comply with the ECHR's earlier *T.* and *V.* decisions,¹¹⁰ the ECHR found them insufficient and emphasized the

100. *T. v. United Kingdom*, App. No. 24724/94, 30 Eur. H.R. Rep. 121, ¶ 89 (1999).

101. *V. v. United Kingdom*, 1999-IX Eur. Ct. H.R. 111, ¶ 91.

102. *T.* ¶¶ 19, 28; *V.* ¶¶ 20, 30.

103. T. and V. were seated on a raised dock next to social workers with lawyers and parents nearby. Hearing times were shortened and 10-minute breaks were taken every hour. During adjournments, they were allowed to spend time with their parents and social workers. *T.* ¶ 9; *V.* ¶ 9.

104. *T.* ¶ 89; *V.* ¶ 91.

105. *T.* ¶ 84; *V.* ¶ 86.

106. *T.* ¶ 88; *V.* ¶ 90.

107. 2004-IV Eur. Ct. H.R. 281.

108. *Id.* ¶ 9.

109. *Id.* ¶ 28. The court stated that the accused must have "a broad understanding of the nature of the trial process and of what is at stake . . . including the significance of any penalty which may be imposed." *Id.* ¶ 29. In particular, s/he should be able to follow statements made by witnesses, explain his or her own version of events, point out statements s/he disagrees with, and put forward a defense. *Id.*

110. *Id.* ¶¶ 22, 25.

need for a specialized tribunal to protect the child's fair trial rights rather than modifications of adult procedures. The court stated:

[W]hen the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.¹¹¹

The IA Court has also emphasized that all persons have procedural rights in judicial proceedings, but because of developmental differences, emotional and educational needs, and the special status of children "the exercise of those rights requires the adoption of certain specific measures [for children] so that they may truly enjoy those rights and guarantees."¹¹² The court has stressed that the principle of specialization requires the establishment of a separate justice system for children in order to protect children accused or convicted of an offense.¹¹³

b. Age Appropriate Assessment of Whether Statements are Reliable and Voluntary

Child development and behavior must be considered in determining children's guilt or innocence¹¹⁴ and whether or not

111. *Id.* ¶ 35.

112. *Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶¶ 145–46 (May 14, 2013).

113. *Id.* ¶ 146. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 35, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) [hereinafter *Report of the Special Rapporteur*] ("States have an international obligation to put in place a dedicated legal system and law enforcement processes for children. All too often, criminal justice systems are designed for adults and incorporate none of the specific procedural safeguards required for children.")

114. General Comment 10, *supra* note 77, ¶ 42 ("Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may

confessions are voluntary. In assessing whether or not a statement is voluntary, courts must take into account the age of the child, length of custody and interrogation, and presence of counsel, parents or independent representatives.¹¹⁵

In *R. v. L.T.H.*, the Canadian Supreme Court found that the right to counsel under Section 10 of the Canadian Charter required greater protections for youth in determining the admissibility of a confession. The case involved a statement taken from a young person, without counsel or a parent present, following his signature of a rights waiver form.¹¹⁶ The Canadian YCJA requires that rights be “clearly explained to [a] young person, in [a] language appropriate to his or her age and understanding” in order for a statement to be admissible.¹¹⁷ The court held that reading a standardized form would not normally meet the statutory requirements without some individualized inquiry and insight about the youth.¹¹⁸

In interpreting the YCJA, the court found that it gives “statutory expression to common law rules and constitutional rights,” including the right to counsel in the Canadian Charter.¹¹⁹ It noted that Parliament created enhanced procedural safeguards for youth because “procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators.”¹²⁰

behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.”).

115. *Id.* ¶ 58; Advisory Opinion, *supra* note 80, ¶¶ 129–30 (“[A]ny statement by a minor . . . must be subject to the procedural protection measures that apply to minors [I]t is necessary to take into account that due to his or her age or other circumstances, the child may not be able to critically judge or to reproduce the facts . . . and the consequences of his or her statement.”); see Youth Criminal Justice Act, S.C. 2002, c. 1, s. 146 (Can.) (requiring that no statement by a young person to a person in authority will be admissible into evidence unless it is voluntary).

116. *R. v. L.T.H.*, [2008] 2 S.C.R. 739, ¶¶ 12–13 (Can.).

117. *Id.* ¶ 4 (emphasis omitted).

118. *Id.* ¶ 27.

119. *Id.* ¶ 2.

120. *Id.* ¶ 3.

c. Strict Limits on Pre-Trial Detention

Human rights law strongly discourages detention and imprisonment of children under any circumstance. According to the CRC, “detention or imprisonment of a child . . . shall be used only as a measure of last resort” and if detention or imprisonment must be imposed it should be “for the shortest appropriate period of time.”¹²¹ In the pre-trial context, the ICCPR requires that “accused juvenile persons shall be . . . brought as speedily as possible for adjudication.”¹²² The CRC Committee emphasizes that children should not be subjected to lengthy pre-trial detention and recommends that states establish strict time limits for pre-trial detention and impose regular reviews.¹²³

d. Age Appropriate Dispositions and Sentencing

At the conclusion of judicial proceedings, if a child is found guilty, the child’s best interest and right to development and rehabilitation must be considered when imposing a disposition or sentence. Sentencing authorities should have the ability to provide “[a] variety of dispositions,” including probation, counseling, and other alternatives to institutional care.¹²⁴ As discussed above, there is a presumption against custodial sentences under international law.¹²⁵

In general, dispositions should be appropriate for the child’s well-being, as well as proportionate to their circumstances and offense.¹²⁶ In particular, the “age, lesser culpability, circumstances and needs of the child, as well as . . . the various and particularly long-term needs of society” must be part of the sentencing decision.¹²⁷

121. CRC, *supra* note 14, art. 37(b).

122. ICCPR, *supra* note 47, art. 10(b).

123. General Comment 10, *supra* note 77, ¶ 80.

124. CRC, *supra* note 14, art. 40(4).

125. *Id.* art. 37(b). The Beijing Rules provide that children should not be deprived of liberty unless they are guilty of a violent offense or are persistent serious offenders and there is no other appropriate response. *See* Beijing Rules, *supra* note 56, r. 17(1)(c). The Canadian YCJA prohibits sentencing a youth offender to a custodial sentence unless the court has considered “all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative.” Youth Criminal Justice Act, S.C. 2002, c. 1, s. 39(2) (Can.). The German Youth Courts Law also makes clear that incarceration should be considered a measure of last resort for youth. Albrecht, *supra* note 60, at 447.

126. CRC, *supra* note 14, art. 40(4).

127. General Comment 10, *supra* note 77, ¶ 71.

To the extent that other countries allow youth to serve adult sentences, they typically require individualized consideration of the appropriateness of the sentence for the individual given their age and circumstances.¹²⁸ Under international law, the most severe sentences—the death penalty and life without parole, which by their nature preclude the possibility of rehabilitation and reintegration into society—are strictly prohibited for children.¹²⁹

e. Privacy and Confidentiality Protections

Under international law, children alleged to have violated the penal law have the right to have their privacy “fully respected at all stages of the proceedings.”¹³⁰ Privacy protections are intended to guard the child from stigmatization and the impact that quasi-criminal proceedings may have on his or her access to education, work, housing, and safety.¹³¹ Hearings involving children should be closed with very limited exceptions, clearly defined by law and open to appeal by the child.¹³² Records should be kept confidential and should not be used in future adult criminal proceedings and provisions should be made for removal of criminal records when the child turns eighteen.¹³³

128. See Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 71–72 (Can.) (requiring under Canadian law that, before an adult sentence is imposed on a youth, a hearing be held to determine if the “the presumption of diminished moral blameworthiness or culpability of the young person is rebutted” and that a youth sentence would not be sufficient to “hold the young person accountable for his or her offending behavior”).

129. CRC, *supra* note 14, art. 37(a); General Comment 10, *supra* note 77, ¶ 11; see also ICCPR, *supra* note 47, art. 6(5) (prohibiting death sentence for persons under eighteen); American Convention, *supra* note 47, art. 4(5) (prohibiting death sentence for persons under eighteen); *Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶¶ 165–67 (May 14, 2013) (holding that life sentences for juveniles violate Article 5(6) of the American Convention because such sentences are inconsistent with the objective of the child’s reintegration into society).

130. CRC, *supra* note 14, art. 40(2)(b)(vii).

131. General Comment 10, *supra* note 77, ¶ 64.

132. *Id.* ¶ 66.

133. *Id.* ¶¶ 66–67.

3. The Obligation to Protect Children from Harm

Under international law, the child has the right to be free from torture and cruel, inhuman, and degrading treatment.¹³⁴ In determining whether a situation rises to the level of torture or cruel, inhuman, or degrading treatment, international law recognizes that children experience pain and suffering differently and requires that age be taken into account.¹³⁵ This may mean that treatment or conditions that are acceptable for adults are not acceptable for children.¹³⁶ Human rights law also imposes an obligation on governments to provide protection and care that is necessary for children's well-being.¹³⁷ Governments have an obligation to prohibit and prevent all forms of violence against children in conflict with the law.¹³⁸

Consistent with findings from the BJS and other U.S. studies, human rights law recognizes that incarcerated children are highly vulnerable to physical and sexual violence when housed in adult facilities. Human rights treaties specifically require that detained or incarcerated children be separated from adults except in the rare situation that it is not in the child's interest to do so.¹³⁹ To the limited extent that other countries allow youth to be sentenced as adults, they typically house them in youth facilities until age eighteen.¹⁴⁰

134. See ICCPR, *supra* note 47, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); see also Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, arts. 2, 16, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT] (imposing a duty on States to prevent torture and cruel, inhuman or degrading treatment or punishment).

135. *Report of the Special Rapporteur*, *supra* note 113, ¶¶ 32–33.

136. *Id.* ¶ 33 ("The threshold at which treatment or punishment may be classified as torture or ill-treatment is . . . lower in the case of children, and in particular the case of children deprived of liberty.").

137. CRC, *supra* note 14, art. 3(2).

138. General Comment 10, *supra* note 77, ¶ 13.

139. CRC, *supra* note 14, art. 37(c) ("[E]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so . . ."); ICCPR, *supra* note 47, art. 10(2)(b) ("Accused juvenile persons shall be separated from adults . . ."), art. 10(3) ("Juvenile offenders shall be segregated from adults . . ."); American Convention, *supra* note 47, art. 5(5).

140. Youth Criminal Justice Act, S.C. 2002, c. 1, s. 76(1)–(2) (Can.); see also Doob & Tonry, *supra* note 58, at 10 (stating that in Denmark and Sweden, youth under age 21 "serve their time separately from adults"); The Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, §§ 8(4), 9(4), Acts of Parliament, 2000 (India) (describing separating juveniles in the state's custody on the basis of age); Juvenile Justice (Care and Protection of Children)

Because of children's unique vulnerability, human rights law also prohibits punishments or disciplinary procedures that may be permissible for adults. As discussed above, international law specifically prohibits the imposition of the extreme sentences of the death penalty and life without the possibility of parole.¹⁴¹ International law also prohibits disciplinary measures such as solitary confinement that "may compromise the physical or mental health or well-being of the child concerned."¹⁴² Special limitations are placed on the use of restraints or use of force, which can only be used "when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted."¹⁴³

Conditions of confinement implicate both the state's obligation to protect the child and to provide a specialized and rehabilitative environment. As discussed above, when children are detained, human rights law requires that they be confined in separate, specialized facilities.¹⁴⁴ In addition, the child's right to rehabilitation requires that institutions housing youth be designed to further the child's development and successful reintegration into society. To that end, detained and incarcerated children have the right to education, programming and adequate medical care.¹⁴⁵ Children should be placed in facilities as close as possible to their families' residence to enable them to have continuing connections with their families and communities.¹⁴⁶

4. The Obligation of Non-Discrimination

International law recognizes that all children in conflict with the law must be treated equally. The Committee on the Rights of the

Act, 2015, No. 2, § 47(4), Acts of Parliament, 2016 (India) (describing separating juveniles in the state's custody on the basis of age).

141. CRC, *supra* note 14, art. 37(a); ICCPR, *supra* note 47, art. 6(5).

142. *Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 29, U.N. Doc. A/66/268 (Aug. 5, 2011); General Comment 10, *supra* note 77, ¶ 89; Havana Rules, *supra* note 56, r. 67; *see also* G.A. Res. 70/175, annex, U.N. Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), r. 45 (Dec. 17, 2015) [hereinafter Mandela Rules].

143. General Comment 10, *supra* note 77, ¶ 89; *see also* Havana Rules, *supra* note 56, rr. 63–64.

144. General Comment 10, *supra* note 77, ¶¶ 85, 89.

145. *Id.*

146. *Id.* ¶ 87.

Child emphasizes that “[p]articular attention must be paid to de facto discrimination and disparities” concerning vulnerable groups of children including racial minorities, girls, children with disabilities, and children who are “repeatedly in conflict with the law.”¹⁴⁷

C. U.S. Human Rights Obligations and Compliance

This article focuses on how international and foreign law can be a helpful comparative and empirical tool in the development of U.S. constitutional law concerning youth in conflict with the law. However, it is important to note that the U.S. does have obligations under international law to respect, protect, and ensure the child’s right to special protection and treatment. Although the U.S. has not ratified the Children’s Rights Convention, it has ratified three major human rights treaties that impose international law obligations that implicate its treatment of youth in conflict with the law: The International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture (CAT). Further, the American Declaration has been interpreted as a source of international obligations for the U.S. as a member of the Organization of American States.¹⁴⁸ As discussed above, Article 24 of the ICCPR specifically recognizes the right of the child to special protection, and the treaty contains specific requirements for the separation of youth and adults in detention and incarceration and specialized procedures and treatment for youth in conflict with the law that take into account their age.¹⁴⁹ U.S. treaty obligations to

147. *Id.* ¶ 6.

148. Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 42–45 (July 14, 1989).

149. ICCPR, *supra* note 47, arts. 10, 24. Upon ratifying the ICCPR, the U.S. included a number of reservations, understandings, and declarations, including the following reservation:

That the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.

refrain from discrimination and torture and cruel, inhuman, and degrading treatment or punishment are also implicated by U.S. treatment of youth in conflict with the law.

U.N. treaty bodies overseeing U.S. compliance with the ICCPR, CERD, and CAT have criticized U.S. policies criminalizing youth. They have emphasized that youth should not be transferred to adult criminal courts¹⁵⁰ and should be separated from adults during pre-trial detention and after sentencing.¹⁵¹ They have also stated that the United States should completely abolish life without parole sentences and solitary confinement for youth.¹⁵² The CERD Committee has expressed concern about “racial disparities at all levels of the juvenile justice system, including the disproportionate

S. Treaty Doc. No. 95-20; 1676 U.N.T.S. 543–44. Even if the U.S. reservation is consistent with the ICCPR’s object and purpose, current laws that allow youth to be routinely prosecuted as adults clearly exceed the scope of the U.S. reservation.

150. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 23, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter HRC Concluding Observations 2014] (stating that the U.S. must ensure “that juveniles are not transferred to adult courts” and that the federal government should encourage “states that automatically exclude 16 and 17 year olds from juvenile court jurisdiction to change their laws”); Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 21, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Concluding Observations 2014] (recommending that the U.S. “ensure that juveniles are not transferred to adult courts”); Comm. against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, ¶ 23, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) [hereinafter CAT Concluding Observations 2014].

151. HRC Concluding Observations 2014, *supra* note 150, ¶ 20 (stating that the U.S. should “ensure that juveniles are separated from adults during pretrial detention and after sentencing”); CERD Concluding Observations 2014, *supra* note 150, ¶ 21 (stating that the U.S. should ensure that juveniles “are separate from adults during pretrial detention and after sentencing”); CAT Concluding Observations 2014, *supra* note 150, ¶ 23 (stating that the U.S. should ensure that “juvenile detainees and prisoners under 18 are held separately from adults”).

152. HRC Concluding Observations 2014, *supra* note 150, ¶¶ 20, 23 (stating that the U.S. should “prohibit and abolish the sentence of life imprisonment without parole for juveniles” and abolish the use of solitary confinement for anyone under eighteen); CERD Concluding Observations 2014, *supra* note 150, ¶ 21 (recommending that the U.S. “prohibit and abolish life imprisonment without parole for those under 18 and the time of the crime”); CAT Concluding Observations 2014, *supra* note 150, ¶¶ 20(b), 23(c), 24 (stating that the U.S. should prohibit the use of solitary confinement for juveniles and should “abolish the sentence of life imprisonment without parole for offenses committed by children under 18 years of age, irrespective of the crime committed”).

rate at which youth from racial and ethnic minorities are arrested in schools and are referred to the criminal justice system, prosecuted as adults, incarcerated in adult prisons, and sentenced to life imprisonment without parole.”¹⁵³

III. THE RIGHTS OF CHILDREN AND YOUTH IN THE UNITED STATES

A. Rights of Youth Outside of the Criminal Context

Outside the criminal context, U.S. law consistently reflects different treatment of youth compared to adults based upon their evolving cognitive capacities, vulnerability to harm, and their capacity to grow and develop. Youth are not able to vote¹⁵⁴ or legally drink alcohol.¹⁵⁵ Limitations are placed on their ability to “alienate property, enter into a binding contract enforceable against them and marry without parental consent.”¹⁵⁶ State laws and policies on education and child labor reflect the state’s interest in, and obligation to, protect youth and promote their education and development.

The Supreme Court has consistently recognized that respect for the constitutional rights of youth may require different treatment than for adults.¹⁵⁷ Many commentators have interpreted these cases

153. CERD Concluding Observations 2014, *supra* note 150, ¶ 21. For a description of racial disparities between white and minority youth who are tried and imprisoned as adults, see INT’L WOMEN’S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. LAW SCH. ET AL., CRIMINALIZATION OF MINORITY YOUTH: YOUTH CRIMINALLY TRIED AND INCARCERATED AS ADULTS, SHADOW REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/CERD-Criminalization-of-Youth.pdf>.

154. U.S. CONST., amend. XXVI (establishing the voting age at eighteen).

155. 23 U.S.C. § 158 (2012) (enabling the reduction of states’ federal highway funding if the state allows persons below twenty-one years old to purchase and publicly possess alcoholic beverages); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (“Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.”).

156. *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

157. The Supreme Court has noted that “the experience of mankind, as well as the long history of our law, recogniz[e] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.” *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (citing *Goss v. Lopez*, 419 U.S. 565, 590–91 (1975)).

to mean that youth have *fewer* rights protections than adults. However, a closer look shows that the cases are premised on the need to provide different protection (not necessarily lesser and sometimes more) to youth given differences in maturity and development¹⁵⁸ and support the state's role in protecting youth and promoting their growth and development.

In the 1979 case *Bellotti v. Baird*, the Supreme Court reviewed its jurisprudence on the constitutional rights of children,¹⁵⁹ emphasizing that while children usually have the same constitutional rights as adults, the way in which those rights are protected may play out differently given children's vulnerability and continuing development:

Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'¹⁶⁰

The Court recognized three reasons that children's constitutional rights are not always equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."¹⁶¹ In *Bellotti* and other cases, the

(Powell, J., dissenting)). See *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.").

158. Anne C. Dailey, Professor of Law at the University of Connecticut School of Law, articulates a developmental theory of children's rights that "serv[e] first and foremost to foster the social conditions under which children are most likely to develop the skills of adult autonomy." Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2103 (2011). She argues that the developmental rights paradigm "better describes children's existing constitutional rights and provides a more robust normative framework for thinking about what rights children should or should not have." *Id.* at 2103–04.

159. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

160. *Id.* at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

161. *Id.* at 634.

Court has emphasized that the parental role reflects, in part, the parent's duty to further the child's growth and development.¹⁶²

Laws requiring that youth go to school and restricting child labor¹⁶³ have been justified based on the state's interest in building the citizenry of a strong democracy.¹⁶⁴ However, the laws also reflect state protection of the child's interest in his or her welfare and development. In *Prince v. Massachusetts*, the Supreme Court emphasized that: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."¹⁶⁵

Although the Constitution does not explicitly recognize youth's right to education, education, which is crucial to a youth's development, occupies a special place in U.S. law. Every state constitution includes a clause addressing education.¹⁶⁶ Providing education is recognized as one of the state's most important functions.¹⁶⁷ All states provide free public education, and several

162. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (recognizing that parents have "the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations"); see also *Bellotti*, 443 U.S. at 638–39 ("Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding.").

163. *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to . . . require that all children of proper age attend some school . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor[,] and in many other ways."); *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913) ("It cannot be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations.").

164. *Prince*, 321 U.S. at 168 ("[D]emocratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.").

165. *Id.* at 165.

166. Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1465 (2010); Dailey, *supra* note 158, at 2146 ("[C]hildren's rights to education [are] already protected under all fifty state constitutions as well as the Equal Protection Clause of the Federal Constitution . . .").

167. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (stating that the state has "a high responsibility for education of its citizens" and that "[p]roviding public schools ranks at the very apex of the function of a State"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

explicitly recognize a right to education.¹⁶⁸ The Supreme Court has recognized a special status for education both because of the importance of creating educated citizens in a democratic society¹⁶⁹ and the important role it plays in child development:

Public education is not . . . merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”¹⁷⁰

In *Plyler v. Doe*, the Court recognized that children of undocumented immigrants have a right to public education.¹⁷¹ The Court noted “[t]he inestimable toll of [the deprivation of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement.”¹⁷² Denial of education “imposes a lifetime hardship The stigma of illiteracy will mark [children] for the rest of their lives. By denying . . . children a basic education, we deny them the ability to

168. Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 189 (2006) (noting that 49 out of 50 states impose some duty on the state legislature to maintain or provide for public education, at the very least requiring free public elementary and secondary schools); see, e.g., *Levine v. State Dep’t. of Insts. and Agencies*, 418 A.2d 229, 248 (N.J. 1980) (stating that the N.J. Constitution’s free public education clause was intended to be expansive in its application) *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 91 (Wash. 1978) (“[A]ll children residing within the State’s borders have a ‘right’ to be amply provided with an education.”); *State v. Stecher*, 390 A.2d 408, 410 (Conn. 1977) (“[T]he right to free public elementary and secondary education is recognized by [Connecticut State] constitution.” (footnote omitted)); *In re G.H.*, 218 N.W.2d 441, 446 (N.D. 1974) (“[A]ll children in North Dakota have the right, under the State Constitution, to public school education.”).

169. *Brown*, 347 U.S. at 493 (“[Education] is the very foundation of good citizenship.”); see also *Yoder*, 406 U.S. at 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”).

170. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (alteration in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

171. *Id.* at 230.

172. *Id.* at 222.

live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”¹⁷³

B. Rights of Youth in the Juvenile Justice Context

The origins and impulses that led to the creation of juvenile justice systems in the United States reflect differences between youth and adults that make them less culpable, more vulnerable, and more capable of rehabilitation as well as state obligations to promote their development and protect them from harm. These principles are similar to those underlying the treatment of youth in other areas of U.S. law and in international law protections for youth in conflict with the law.

The move to create juvenile courts in the U.S. began in Cook County, Illinois in 1899, and by the 1920s, all but two states had established juvenile courts.¹⁷⁴ By the 1960s, all fifty states, the District of Columbia, and Puerto Rico had juvenile justice systems.¹⁷⁵

The Supreme Court describes the historic reasons for the juvenile justice system as follows:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was “guilty” or “innocent,” but “What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.” . . . The idea of crime and punishment was to be abandoned. The child was to be “treated” and “rehabilitated” and the procedures, from apprehension

173. *Id.* at 223.

174. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86, 88 (1999), <https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html>.

175. *In re Gault*, 387 U.S. 1, 14 (1967).

through institutionalization, were to be “clinical” rather than punitive.¹⁷⁶

The juvenile justice system as conceived in the Progressive era, consistent with present international law, recognized that youth are different from adults and should be treated as such. In particular, creation of juvenile justice systems in the U.S. recognized that: (1) youth should not be prosecuted in the adult criminal justice system, (2) youth should be processed and treated in a system that is specialized for youth, (3) the system should take into account youth’s needs and best interests, and (4) the goal of the system should be rehabilitation and not punishment.¹⁷⁷

However, by the 1960s, it was becoming obvious that many juvenile justice systems failed to live up to these principles. Particularly problematic was the notion that in order to fulfill its rehabilitative purpose, the juvenile justice system had to forsake the procedural protections and formalities that were required in the adult criminal justice system. By the late 1960s, the Supreme Court recognized that “[t]he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment.”¹⁷⁸

Starting with the 1966 case *Kent v. United States*,¹⁷⁹ the Supreme Court issued a series of decisions establishing that children in conflict with the law are entitled to certain due process protections. Although *Kent* involved a judicial waiver hearing, the other cases decided during this period considered the procedural protections that youth are entitled to in the juvenile justice system¹⁸⁰ but did not address what rights youth have once removed to the adult criminal system.

In the juvenile justice context, the Court granted youth many of the same procedural due process protections granted to adults in the criminal context, but it has made clear that “[t]hese rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults.”¹⁸¹

176. *Id.* at 15–16.

177. Guggenheim, *supra* note 11, at 464–65.

178. *Gault*, 387 U.S. at 18.

179. *Kent v. United States*, 383 U.S. 541 (1966). *Kent* is described in greater depth *infra* Part III.C.1.

180. *See infra* notes 182–89 and accompanying text.

181. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

Rather than fully incorporating the Bill of Rights into juvenile court proceedings, as it did for adult state criminal cases, the Supreme Court relied on the requirement of fundamental fairness under the Fourteenth Amendment to impose procedural protections for youth in juvenile proceedings.¹⁸² This has allowed the Court to consider the different goals of the juvenile justice system and factor in youth's vulnerability and interest in growth and rehabilitation in evaluating whether a specific procedural protection is constitutionally-required.

In *Gault*, the Court held that youth in juvenile proceedings must be given the right to counsel, timely notice of charges, the right to remain silent, and the right to cross-examine witnesses.¹⁸³ After *Gault*, the Supreme Court held that prosecutors in juvenile justice proceedings must prove guilt beyond a reasonable doubt¹⁸⁴ and that youth cannot be subjected to double jeopardy.¹⁸⁵ But the Court has refused to adopt a blanket rule imposing identical adult criminal protections in juvenile proceedings in recognition that different procedural rules may be more consistent with the rehabilitative purpose of juvenile proceedings and that not all rules required in adult criminal proceedings are essential to fundamental fairness.¹⁸⁶ In *Schall v. Martin*, the Court noted the state's "*parens patriae* interest in preserving and promoting the welfare of the child,' . . . makes a juvenile proceeding fundamentally different from an adult criminal trial."¹⁸⁷ As a result, the Court sought to "strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings . . . and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause."¹⁸⁸ Thus, different protections were viewed as justified because of distinctions between the purpose and function of the juvenile and adult systems and the state's interest in promoting the welfare of youth.¹⁸⁹

182. See *Gault*, 387 U.S. at 30–31.

183. *Id.* at 41–59.

184. *In re Winship*, 397 U.S. 358, 368 (1970).

185. *Breed v. Jones*, 421 U.S. 519, 537 (1975).

186. See *Schall v. Martin*, 467 U.S. 253, 263, 281 (1984) (upholding preventative pretrial detention of accused juvenile delinquents that would be unconstitutional for adults); *McKeiver v. Pennsylvania*, 403 U.S. 528, 549–51 (1971) (denying the right to a jury in juvenile proceedings).

187. *Schall*, 467 U.S. at 263 (citations omitted).

188. *Id.* (citations omitted).

189. *Id.* at 265 ("In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest

Cases in which the Court declined to impose the same requirements for juvenile proceedings as adult criminal proceedings have been criticized by some commentators for granting youth fewer rights than adults.¹⁹⁰ These criticisms misunderstand the Court's decisions in two ways. First, the Court has never held that youth who are tried in adult criminal proceedings are not entitled to the same constitutional protections as adults. In fact, as discussed below, when youth are tried as adults in adult criminal court, the Court has found that they may have *more* rights than adults. When the Court determines what constitutional protections are appropriate in juvenile proceedings, it takes into account the nature of the proceedings and the characteristics of youth to determine what fundamental fairness requires. Thus, the Court and commentators have suggested that the procedural protections recognized in *Gault* were granted not because youth in juvenile proceedings must be treated the same as adults in criminal court but because fundamental fairness for youth in juvenile proceedings required those protections.¹⁹¹ Although the *Gault* court criticized juvenile justice proceedings for failing to live up to their goals and for arbitrary procedures,¹⁹² it did not disavow the idea of a separate juvenile justice

in preserving and promoting the welfare of the child.” (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982))).

190. Indeed, many children's rights cases aim to establish that children have the same rights as adults rather than establishing that they have different or in some cases greater constitutional rights. In examining juvenile justice cases from 1967–2009, Professor Guggenheim notes “[t]hroughout this entire period, no one ever claimed in any Supreme Court case involving juvenile justice that juveniles have a substantive right of any kind outside of the death penalty” and “until *Graham*, the Court never held that juveniles have a constitutional right to something that adults do not also possess.” Guggenheim, *supra* note 11, at 471.

191. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivation as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for ‘concern . . . sympathy, and . . . paternal attention.’”); see also Dailey, *supra* note 158, at 2130 (stating that *Gault* was primarily concerned with “the child's vulnerability to state overreaching”). For instance the Court recognized that protections against self-incrimination were needed because the “admissions and confessions of juveniles require special caution” and “distrust of confessions made in certain situations’ . . . is imperative in the case of children” *In re Gault*, 387 U.S. 1, 45, 48 (1967).

192. *Gault*, 387 U.S. at 17–21.

system.¹⁹³ Instead, it imposed procedural requirements consistent with the goals of the juvenile system to ensure fundamental fairness.¹⁹⁴ In this way, *Gault* is consistent with international law which recognizes that youth in conflict with the law are entitled to the same basic procedural protections as adults within the context of a specialized age-appropriate system.¹⁹⁵

Second, and also consistent with international law, the Court has long recognized that meaningful protection of the rights of children and youth may require different treatment and enhanced protections in the adult criminal law context given the special characteristics of youth. In *Haley v. State of Ohio*,¹⁹⁶ the Court held that the confession of a 15-year-old boy was inadmissible in a state criminal court proceeding. In reaching its holding, the Court took the defendant's age into account, stating that "special care" must be taken in "scrutinizing the record" because youth "cannot be judged by the more exacting standards of maturity."¹⁹⁷

In the context of the death penalty, the Court has long recognized that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."¹⁹⁸ In 1988 in *Thompson v. Oklahoma*, the Supreme Court prohibited the death penalty for a 15-year-old offender. In doing so, the Court noted that the differences between youth and adults that lead to different

193. *Bellotti*, 443 U.S. at 635 ("[O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.").

194. The Court noted that imposing certain due process protections in *Gault* would "not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Gault*, 387 U.S. at 21.

195. The CRC both requires that children accused of infringing the penal law be treated in a manner that takes age into account and be afforded basic due process protections required by international law, including prohibition of ex post facto prosecutions, presumption of innocence, prompt and direct notice of charges, assistance in preparing a defense, fair hearing before an independent authority, right not to be compelled to give testimony or confess guilt, and the ability to examine adverse witnesses and present witnesses, appeal judicial decisions, and have an interpreter. CRC, *supra* note 14, art. 40(1), (2).

196. 332 U.S. 596, 599 (1948).

197. *Id.* at 599; *see supra* Part II.B.2.b (discussing enhanced international law requirements for the admissibility of children's confessions).

198. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); *see supra* Part II.B.2.d and II.B.3 (discussing international law prohibitions on the juvenile death penalty).

legal rules in other contexts also apply in the criminal context.¹⁹⁹ The Court emphasized “the lesser culpability of the juvenile offender,” but also identified “the teenager’s capacity for growth, and society’s fiduciary obligations to its children” as reasons to impose different constitutional rules.²⁰⁰ As discussed in Part IV below, the Supreme Court continued to expand on its “youth are different” jurisprudence in *Roper v. Simmons* and subsequent cases.

C. Rights of Youth Transferred to the Adult System Pre-*Roper*

In the 1966 case *Kent v. United States*, the Supreme Court held that judicial waiver hearings require certain procedural due process protections. However, *Kent*’s impact has been limited by lower federal court and state court decisions holding that procedural protections are not required when prosecutors make waiver decisions or when legislatures create categorical rules excluding certain youth from the juvenile system. These cases also rejected substantive due process and equal protection challenges to Prosecutorial Discretion and Statutory Exclusion provisions, applying a rational basis standard of review. These cases assumed that youth do not have a fundamental right to be treated differently than adults and that states have the authority to determine who will be treated as a juvenile, irrespective of age, individual culpability, or prospects for rehabilitation. This section provides a brief overview of cases challenging exclusion or transfer from the juvenile justice system pre-*Roper*.

1. *Kent* and Judicial Waiver

In *Kent v. United States*,²⁰¹ the Supreme Court considered whether procedural due process protections are required for Judicial Waiver proceedings. *Kent* involved a challenge to the D.C. Juvenile Court Act which gave the Juvenile Court discretion to waive jurisdiction over a child of sixteen years or older who is charged with a felony or an offense punishable by death or life imprisonment “after

199. *Thompson*, 487 U.S. at 825 n.23 (1988) (“It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.”).

200. *Id.* at 836–37.

201. *Kent v. United States*, 383 U.S. 541 (1966).

full investigation.”²⁰² The juvenile court judge waived jurisdiction over Kent without a hearing, findings of fact, consultation with Kent’s counsel, or recital of the reasons for the waiver.²⁰³ Because the waiver decision is a “critically important” decision, the Supreme Court held that the juvenile court’s decision must comport with “procedural regularity sufficient . . . to satisfy the basic requirements of due process and fairness” and comply with the requirement of “full investigation” set forth in the statute.²⁰⁴ In particular, the Court held that the petitioner was entitled to a hearing, right to representation by counsel,²⁰⁵ access by his counsel to records and reports, and a statement of reasons for the decision.²⁰⁶

Although *Kent* established that the “basic requirements of due process and fairness”²⁰⁷ be satisfied in judicial waiver proceedings, its overall impact on curbing the criminalization of youth has been limited.²⁰⁸ *Kent* did not reach the issue of whether youth have an inherent right to juvenile treatment.²⁰⁹ Instead, the Court held that Kent was entitled to due process and fairness in

202. *Id.* at 547–48.

203. *Id.* at 546.

204. *Id.* at 553.

205. Although Kent was represented by counsel, the Court cited with approval a prior decision from the D.C. Circuit Court of Appeals, holding that assistance of counsel is required for Judicial Waiver proceedings. *Id.* at 558 (citing *Black v. United States*, 355 F.2d 104, 106 (D.C. Cir. 1965)).

206. *Id.* at 553, 557, 560.

207. *In re Gault*, 387 U.S. 1, 12 (1967).

208. *Kent*’s holding has also been limited in the context of Judicial Waiver. Subsequent cases have held that not all of *Kent*’s procedural requirements are constitutionally required and have tied the scope of due process protections to the rights created by the statutory scheme. See *Breed v. Jones*, 421 U.S. 519, 537 (1975) (“[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.”); *Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) (holding that municipal court’s failure to articulate the reasons for a Judicial Waiver did not violate due process because “the procedural protections . . . afforded to a juvenile . . . vary in terms of the particular statutory scheme which entitles him to juvenile status in the first place”).

209. The Court recognized the profound consequences that waiving juvenile court jurisdiction would have on Kent, who would be deprived of the “special protections and provisions of the Juvenile Court Act” and subjected to criminal processes. *Kent*, 383 U.S. at 553. The Court noted that juvenile treatment “confers special rights and immunities,” including a shield from publicity; confinement in juvenile facilities with peers, rather than adults; detention for treatment purposes up to age 21 as opposed to a potential life sentence in the adult system; and protection against the collateral consequences of an adult conviction. *Id.* at 553–54, 556–57.

determination of his rights under the D.C. Juvenile Court Act, which vested the decision of whether a youth should be waived with the juvenile court.²¹⁰ As discussed below, the Court's reliance on Kent's statutory rights to a judicial waiver decision enabled later courts to distinguish legislative schemes creating Statutory Exclusion and Prosecutorial Discretion provisions because those statutes did not create a right to judicial consideration or process.²¹¹

2. Non-Judicial Transfer and Exclusion from Juvenile Court Jurisdiction

After *Kent*, several cases challenged non-judicial transfer and exclusion provisions in federal appellate courts and in state courts, arguing that these provisions violated due process and equal protection and that, at a minimum, whenever youth are transferred or excluded from the juvenile court system, they are entitled to a hearing and procedural due process protections. As discussed below, these challenges failed because courts declined to recognize youth as a suspect class or recognize a fundamental right to juvenile treatment. Instead, courts held that any right to juvenile treatment is a state legislative creation that can be modified or limited by statute. Without heightened scrutiny, courts have rubber-stamped Statutory Exclusion and Prosecutorial Discretion provisions under rational basis scrutiny.

a. Unsuccessful Procedural Due Process Claims

Following *Kent*, Congress adopted a Prosecutorial Discretion provision²¹² that allowed prosecutors to do an end run around the procedural protections the Supreme Court required for D.C. judicial waiver hearings.²¹³ Specifically, it amended the D.C. statutory

210. *Id.* at 557 (“[Petitioner] was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the ‘exclusive’ jurisdiction of the Juvenile Court.”).

211. *See, e.g.,* *People v. Conat*, 605 N.W.2d 49, 62 (Mich. 1999) (“[T]he Court in *Kent* did not hold that a hearing was required under an automatic waiver system[.]”); *State v. Angel C.*, 715 A.2d 652, 662 (Conn. 1998) (“The applicability of *Kent* cannot be expanded . . . to mandatory transfer statutes.”).

212. *See* D.C. CODE § 16-2301(3)(a) (1971).

213. *See* *United States v. Bland*, 472 F.2d 1329, 1341 (D.C. Cir. 1972), *cert. denied*, *Bland v. United States*, 412 U.S. 909 (1973). In dissent, Judge Wright quoted the House Committee report, which explained that the new provision was created “because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult

definition of a “child” to exclude an individual who is sixteen or older and is charged by the Attorney General with certain offenses.²¹⁴ In *United States v. Bland*, the D.C. Circuit held that Congress had the power to change the definition of child and that procedural due process did not require a hearing when the Attorney General is given the discretion to try a youth as a juvenile or adult.²¹⁵ The court found that the charging decision was an unreviewable exercise of Prosecutorial Discretion: “We cannot accept the hitherto unaccepted argument that due process requires an adversarial hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom.”²¹⁶

Following *Bland*, federal and state courts have held that due process rights to a hearing do not apply where Prosecutorial Discretion provisions vest prosecutors with the decision of whether to try youth as juveniles or adults.²¹⁷ Courts have also rejected procedural due process challenges to Statutory Exclusion provisions based on *Bland*'s reasoning that if legislatures do not require individualized judicial determinations in order to transfer youth to

court under present law.” *Id.* (Wright, J., dissenting) (quoting H.R. REP. NO. 91-907, at 50 (1970)). *Bland*, 412 U.S. at 911 (Douglas, J., dissenting) (“The ‘substantial difficulties’ are obviously the constitutional rights explicated in *Kent* and in *Gault*.”)

214. See *Bland*, 472 F.2d at 1330, *cert. denied*, 412 U.S. 909 (1973).

215. *Id.* at 1336.

216. *Id.* at 1337.

217. *Cox v. United States*, 473 F.2d 334, 335 (4th Cir. 1973), *cert. denied* 414 U.S. 869 (1973) (“[A] prosecutorial decision [was] beyond the reach of the due process rights of counsel and a hearing.”); *Russel v. Parratt*, 543 F.2d 1214, 1216 (8th Cir. 1976) (agreeing with the Fourth Circuit’s decision in *Cox* and the First Circuit’s decision in *Quinones*); *United States v. Quinones*, 516 F.2d 1309, 1311 (1st Cir. 1975), *cert. denied*, 423 U.S. 852 (1975) (holding that when the legislature vests a prosecutor with discretion to decide whether to try a juvenile as an adult a due process hearing is not required); *Manduley v. Superior Court*, 41 P.3d 3, 21 (Cal. 2002) (distinguishing *Kent* because discretionary direct file provision involved executive charging function and does not implicate procedural due process rights); *State v. Cain*, 381 So.2d 1361, 1366 (Fla. 1980) (distinguishing due process required for judicial proceedings and the exercise of Prosecutorial Discretion). *But see Bland*, 472 F.2d at 1344 (Wright, J., dissenting) (arguing that *Bland* had a statutory right to youth treatment because the juvenile court is not divested of jurisdiction until charged by the Attorney General in criminal court and the prosecutor’s decision should be subject to procedural due process protections).

the adult system, a hearing and Procedural Protections are not required.²¹⁸

b. Unsuccessful Substantive Due Process Claims

Substantive due process claims challenging non-judicial transfer and exclusion also have been unsuccessful. Courts considering these claims have asserted that there is no fundamental right to be treated as a juvenile.²¹⁹ As a result, these courts have held that any “right” to juvenile treatment is a creation of state law that can be redefined by the state without triggering heightened scrutiny. Thus, courts have held that states are free to amend statutory schemes to add Prosecutorial Discretion or Statutory Exclusion provisions.²²⁰

Courts that have considered substantive due process challenges to non-judicial waiver or exclusion provisions have applied a rational basis test.²²¹ Statutory Exclusion provisions typically exclude youth from the juvenile system based on a combination of age and offense. Courts have held that legislatures can rationally conclude that youth charged with certain crimes are less deserving or amenable to the rehabilitative goals of the juvenile justice system and exclude them from the system.²²² In *People v. J.S.*,²²³ the Illinois

218. See *People v. J.S.*, 469 N.E.2d 1090, 1095 (Ill. 1984) (holding that, because automatic transfer statute treats all fifteen- and sixteen-year-olds accused of certain crimes the same, “[t]here is no discretionary decision to be made by the juvenile court, and therefore we do not believe that the holding in *Kent* is dispositive herein”).

219. *Manduley*, 41 P.3d at 21, 23 (holding that youth do not have a constitutionally protected liberty interest in remaining in the juvenile court system); *State v. Matos*, 694 A.2d 775, 786 (Conn. 1997) (“[D]efendant does not claim that he has been deprived of a fundamental right by the youthful offender statute.”).

220. Courts have held that legislative amendments that allow prosecutors to directly charge youth as adults where a judicial hearing had been required did not violate due process because pre-amendment procedures were not constitutionally required. *Manduley*, 41 P.3d at 20; *People v. Conat*, 605 N.W.2d 49, 63 (Mich. 1999).

221. See *J.S.*, 469 N.E.2d at 1094 (applying a rational basis test because there is no constitutional right to be treated as a juvenile); *State v. Berard*, 401 A.2d 448, 450, 453 (R.I. 1979) (rejecting argument that the right to juvenile treatment has ripened into a constitutional right and applying rational basis scrutiny to a Statutory Exclusion provision); *In re Boot*, 925 P.2d 964, 971–74 (Wash. 1996) (rejecting substantive due process claim).

222. See *Matos*, 694 A.2d at 784 (finding it rational for the legislature to exclude youth charged with murder from youthful offender status).

Supreme Court stated that “the legislature has the authority to create statutory classifications provided they bear a rational relationship to a legitimate State interest” and upheld the state’s Statutory Exclusion provision despite arguments that the designated offenses were not the most severe.²²⁴ Four years later, in a case challenging an amendment adding the unlawful use of weapons on school grounds to the Statutory Exclusion provision, the court found that the new statutory classification satisfied substantive due process and that the legislature did not act arbitrarily or irrationally in adding the offense given the stated legislative purpose of reducing crime in school and decreasing gang activity.²²⁵

c. Unsuccessful Equal Protection Claims

Courts have also rejected equal protection arguments challenging non-judicial transfer and exclusion, holding that age is not a suspect class requiring strict scrutiny and that challenged age classifications satisfy the rational basis test.²²⁶ Courts have held that the different treatment that may result when prosecutors determine whether to file cases in adult or juvenile court under Prosecutorial Discretion provisions reasonably fall under a prosecutor’s charging discretion. As a result, claims of unequal treatment by prosecutors require a showing that defendants were singled out based on invidious criteria.²²⁷ Courts have also held that legislative decisions to exclude youth from the juvenile system or give prosecutors discretion to exclude them based on age or the offense charged bear a rational relationship to a legitimate state interest and do not violate equal protection.²²⁸

223. 469 N.E.2d 1090, 1094 (Ill. 1984).

224. The court held that the legislature could rationally exclude juveniles fifteen and older who are charged with murder, rape, deviate sexual assault, and armed robbery with a firearm from the definition of delinquent minor based on age and the threat posed by the offenses. *Id.* at 1094–95.

225. *People v. M.A.*, 529 N.E.2d 492, 496 (Ill. 1988).

226. *Id.* at 494 (“[A]ge is not a suspect class for purposes of equal protection analysis, and thus the rational basis standard applies[.]”); *People v. Conat*, 605 N.W.2d 49, 61 (Mich. 1999) (applying rational basis scrutiny because no suspect classification or exercise of a fundamental right was at issue); *Boot*, 925 P.2d at 974 (“Juveniles are neither a suspect class nor a semi-suspect class.”).

227. *Manduley v. Superior Court*, 41 P.3d 3, 24 (Cal. 2002); *People v. Thorpe*, 641 P.2d 935, 940 (Colo. 1982).

228. *M.A.*, 529 N.E.2d at 496 (holding that legislature could rationally conclude that juveniles charged with unlawful use of a weapon on school grounds “posed the greatest threat to the school environment”); *State v. Leach*, 425 So.2d

IV. RECENT SUPREME COURT RECOGNITION THAT YOUTH ARE DIFFERENT IN THE CRIMINAL JUSTICE CONTEXT

The Supreme Court has long recognized differences between youth and adults, and in the 2005 case *Roper v. Simmons*²²⁹ and decisions that have followed, the Court has made it clear that youth under eighteen are entitled to unique constitutional protections in the criminal justice context as compared to adults. The majority of the Supreme Court's recent cases have involved determinations of whether severe adult sentences imposed on youth violate the Eighth Amendment's prohibition on cruel and unusual punishment. However, the decisions relied on earlier cases recognizing that youth are different for purposes of determining constitutional requirements in a variety of contexts. In determining that a different constitutional standard is required for youth sentencing, the Court repeatedly held that youth are different from adults based upon commonsense conclusions about youth's behavior and perceptions;²³⁰ recent research in adolescent brain development recognizing that youth are distinguishable from adults in "independent functioning, decision-making, emotional regulation, and general cognitive processing[;]"²³¹ and international and comparative law prohibiting the juvenile death penalty and juvenile life without parole sentences.

A. The *Roper* Line of Cases

Before discussing the Supreme Court's recent jurisprudence recognizing constitutionally significant differences between youth and adults (see Part IV.B), this section summarizes the Court's holding in five recent cases referred to as the *Roper* line of cases.

In *Roper v. Simmons* (2005), the Supreme Court held that the Eighth Amendment prohibited the death penalty for individuals based on crimes committed as youth.²³² In *Graham v. Florida*

1232, 1236–37 (La. 1983). But see *State v. Mohi*, 901 P.2d 991, 1004 (Utah 1995) (striking down Prosecutorial Discretion provision under the Utah state constitution's Equal Protection standard).

229. 543 U.S. 551 (2005).

230. *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

231. For an in-depth overview of recent research regarding adolescent development, see Levick et al., *supra* note 12, at 293–99.

232. 543 U.S. at 552. In *Thompson v. Oklahoma*, 487 U.S. 815, 817 (1988), the Supreme Court prohibited the death penalty for youth under sixteen. *Roper* extended the prohibition to sixteen- and seventeen-year-olds.

(2010),²³³ the Court prohibited life without parole sentences for individuals convicted of non-homicide crimes committed as youth. Following *Graham*, youth could still receive a life without parole sentence if they were convicted of a homicide crime, and many states required life without parole sentences for youth tried as adults convicted of certain homicide crimes. In *Miller v. Alabama* (2012),²³⁴ the Court held that the sentence of life without parole could not be imposed on youth convicted of homicide crimes absent an individualized sentencing determination in which the sentencer considers mitigating factors such as age, age-related characteristics, and the nature of the crime. In *Montgomery v. Alabama* (2016),²³⁵ the Court held that *Miller*'s prohibition on mandatory life without parole sentences for youth applied retroactively. In addition to its sentencing cases, the Court relied heavily on *Roper*, *Graham*, and older constitutional cases in *J.D.B. v. North Carolina* (2011)²³⁶ to hold that a youth's age must inform the analysis of whether he or she is in custody to determine if *Miranda* warnings are required prior to interrogation.

B. The Court's Reasoning as to Why Youth Are Different

In the *Roper* line of cases, the Court identified three key differences between youth and adults based on scientific and social science studies, its prior decision, and common sense: (1) youth are immature and have an underdeveloped sense of responsibility, which make them more likely to engage in ill-considered and reckless behavior; (2) they are more vulnerable to outside influences and peer pressure; and (3) they are still growing and developing, making their personality traits more transitory and less fixed.²³⁷ In *Graham*, the

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

234. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

235. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

236. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

237. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In *Montgomery*, the Court summarized its prior findings about youth as follows:

First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are

Court emphasized that these differences are supported by psychology and brain science, which establish that “parts of the brain involved in behavior control continue to mature through late adolescence.”²³⁸ The *Roper* Court cited earlier cases recognizing that youth is a mitigating factor because “the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”²³⁹

According to the Court, the differences between youth and adults undercut the traditional penological justifications for criminal punishment: retribution, deterrence, incapacitation and rehabilitation. The Court reasoned that because of youth’s immaturity and vulnerability to outside influences, they are less blameworthy, diminishing the case for retribution.²⁴⁰ Infliction of severe adult punishments is less likely to result in deterrence because “the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness and impetuosity—make them less likely to consider potential punishment.”²⁴¹ Because ordinary adolescent development diminishes the likelihood that a youth convicted of a crime will continue to be a risk to society, there is less justification for incapacitation.²⁴² Finally, the Court determined that life without parole sentences are inconsistent with the idea of rehabilitation.²⁴³

In *Roper* and *Graham*, the Supreme Court also considered international and comparative law in finding that the sentences at issue violated the Eighth Amendment. The *Roper* Court found the laws of other countries and international authorities “instructive” in determining whether the death penalty is a disproportionate punishment for offenders under eighteen.²⁴⁴ In addition to noting the

‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’

Montgomery, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569–70)).

238. *Graham*, 560 U.S. at 68.

239. *Roper*, 543 U.S. at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

240. *Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 71.

241. *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. at 2465).

242. *Id.*

243. *Id.*

244. *Roper*, 543 U.S. at 575; see also *Graham*, 560 U.S. at 81 (“[T]he overwhelming weight of international opinion against’ life without parole for

broad international consensus against the juvenile death penalty, the Court noted that the consensus was based on common understandings of the incomplete emotional and cognitive development of youth.²⁴⁵

C. A New Eighth Amendment Sentencing Standard

The Court's recognition that youth are different has resulted in decisions holding that the Eighth Amendment requires different sentencing rules for youth. Historically, outside of the death penalty context, it is extremely difficult for defendants to establish that a sentence is unconstitutionally excessive. The Court has applied a "narrow proportionality principle" that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime."²⁴⁶ Rather than consider a specific type of sentence or class of offenders, under the "grossly disproportionate" line of cases, the Court looks at the circumstances of the individual case and compares the gravity of the offense to the sentence.²⁴⁷ The Court rarely finds a sentence unconstitutional under the standard.

However, the Court has historically applied a different standard in the death penalty context. In the death penalty context, the Court has applied a "categorical approach" that considers whether a death sentence is appropriate for a certain class of offenders, often based on shared characteristics that make such offenders

nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation of our own conclusions.'" (quoting *Roper*, 543 U.S. at 572)).

245. See *Roper*, 543 U.S. at 578.

246. *Graham*, 560 U.S. at 59–60.

247. *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01 (1991) (Kennedy, J., concurring in part and concurring in the judgment). If a defendant is able to establish that a sentence is grossly disproportionate, the inquiry does not end:

[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Graham, 560 U.S. at 60 (2010), as modified (July 6, 2010) (citations omitted).

categorically less culpable.²⁴⁸ Before *Graham*, the Court limited use of the categorical approach to death penalty cases. *Graham* extended the categorical approach outside of death penalty cases and barred life without parole sentences for youth convicted of non-homicide offenses.²⁴⁹

Similarly, based upon the Court's recognition that differences between youth and adults matter in determining whether a sentence violates the Eighth Amendment, the *Miller* Court prohibited mandatory life without parole (LWOP) sentences for youth.²⁵⁰ The Court found that the unique characteristics of youth require a different approach, stating that "if . . . 'death is different,' children are different, too."²⁵¹ The *Miller* Court stopped short of prohibiting life without parole sentences for youth. Instead, it required that LWOP sentences can only be imposed on youth convicted of a homicide crime after an individual sentencing determination, which considers the differences between youth and adults as a mitigating factor.²⁵² The Court noted that its holding implicated "two strands" of its precedent: (1) its "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty" and (2) its prohibition on mandatory sentencing in the death penalty context "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."²⁵³

248. See, e.g., *Roper*, 543 U.S. at 568 ("The death penalty may not be imposed on certain classes of offenders, such as juveniles [under a certain age], the insane, and the mentally retarded, no matter how heinous the crime.").

249. The Court distinguished *Graham* from typical non-categorical cases because the case did not challenge a particular defendant's sentence and instead "implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 U.S. at 60–62. Because a comparison between "the severity of the penalty and the gravity of the crime does not advance the analysis," a categorical approach was more appropriate. *Id.* at 61.

250. *Miller v. Alabama*, 132 S. Ct. 2455, 2455, 2464–66 (2012).

251. *Id.* at 2470.

252. *Id.* at 2469.

253. *Id.* at 2463–64. Prior to *Miller*, the Court never required individualized sentencing outside of the death penalty context and explicitly rejected imposing an individualized sentencing requirement for life without parole sentences in *Harmelin v. Michigan*. The Court distinguished *Harmelin*, noting "a sentencing rule permissible for adults may not be so for children." *Id.*

V. U.S. COURTS SHOULD IMPOSE CONSTITUTIONAL
PROTECTIONS TO PREVENT OR LIMIT PUSHING YOUTH INTO
THE ADULT CRIMINAL JUSTICE SYSTEM

Prior to the *Roper* line of cases, older state and federal court cases held that youth do not have a right to juvenile treatment.²⁵⁴ This allowed legislatures to exclude individuals under eighteen from juvenile court jurisdiction without any individualized determination or hearing. Once in the adult criminal justice system, no constitutional limitations were imposed to take age or individual circumstances into account in criminal procedures or sentencing. Following *Roper* and growing awareness about youth development and the harms that youth face in the adult system, many states passed laws reforming transfer²⁵⁵ and sentencing schemes.²⁵⁶ While this trend is positive, legislative reforms that can be perceived as “soft on crime” are difficult to pass. Therefore, imposing nationwide reform may require constitutional recognition that youth have a right to different treatment in the criminal justice context.

254. See *supra* Part III.B.3.

255. See, e.g., COLO. REV. STAT. § 19-2-517 (2014) (transfer reform); CONN. GEN. STAT. § 46b-127 (2015) (requiring review of children’s treatment in juvenile court prior to transfer to adult criminal docket, raising the age for transfer to fifteen, and raising the legal age of a child to eighteen); 705 ILL. COMP. STAT. 405 / 6-12 (West 2016) (raising age of automatic transfer from fifteen to sixteen, allowing transfer only for most severe crimes, requiring demographic reporting on transferred youth, and enumerating specific criteria for transfer decision); N.H. REV. STAT. ANN. § 169-B:4 (2015) (raising the age of minority for juvenile delinquency proceedings from seventeen to eighteen years of age); N.J. STAT. ANN. § 2A:4A-26.1 (West 2016) (raising minimum age of adult prosecution from fourteen to fifteen, limiting transfer to most serious and violent crimes, and requiring prosecutors to submit written analysis of reason for transfer to judge); TEX. FAM. CODE ANN. § 56.01 (West 2015) (allowing juvenile to appeal court’s waiver decision before trial occurs). State courts that have rejected challenges to transfer statutes have encouraged their state legislatures to review the statutes in view of current evidence about the differences between adults and youth. See, e.g., *People v. Patterson*, 25 N.E.3d 526, 553 (Ill. 2014); *State v. Houston-Sconiers*, 365 P.3d 177, 181 (Wash. Ct. App. 2015).

256. See, e.g., COLO. REV. STAT. § 19-2-908 (2013) (limiting mandatory minimum sentences for juveniles); DEL. CODE ANN. tit. 11, § 630A(c) (2007) (eliminating mandatory minimum for vehicular homicide for juveniles); N.M. STAT. ANN. § 31-18-13(B) (West 2014) (allowing juvenile offenders to be sentenced to less than the mandatory minimum); OR. REV. STAT. § 161.620 (2003) (limiting applicability of mandatory minimum sentences for juveniles tried as adults to certain offenses); WASH. REV. CODE § 9.94A.540(3)(a) (2010) (limiting applicability of mandatory minimum sentences for juveniles to aggravated first-degree murder).

There is no textual provision in the U.S. Constitution that recognizes the child's right to special protection or treatment. However, the Supreme Court's recognition of constitutional differences between individuals under eighteen and adults in the *Roper* line of cases paves the way for due process and Eighth Amendment challenges to transferring youth to the adult criminal justice system, trying youth in adult criminal courts, and imposing adult criminal sentences and conditions of confinement. These challenges, based on recognized differences between adults and youth, are supported by international and comparative law.

Because the *Miller* Court recognized that "children are constitutionally different from adults for purposes of sentencing,"²⁵⁷ the Supreme Court's recent jurisprudence should have the most immediate impact on Eighth Amendment cases challenging the sentencing of youth in the adult system. Several scholars have argued that the Eighth Amendment prohibits imposition of any adult sentence without consideration of the mitigating characteristics of youth.²⁵⁸ And at least one state court has agreed. In *State v. Lyle*, the Supreme Court of Iowa held that imposing adult mandatory minimum sentences on youth tried as adults violates the state's Eighth Amendment analogue.²⁵⁹ Eighth Amendment cases could also be brought challenging conditions of confinement, arguing that

257. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). *Id.* at 2470 ("We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.").

258. See, e.g., Levick et al., *supra* note 12, at 305–06; Breen & Mills, *supra* note 12, at 294 ("In *Miller*, the Court established a special right for children, namely, individualized consideration of their age in crafting a sentence."). Some scholars have argued that youth are better protected by a categorical rule rather than individualized sentencing. Barry Feld has proposed a "youth discount" that imposes "a proportional reduction of adult sentence lengths" to take into account the "mitigating qualities of youth." Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 264 (2013). Some countries have adopted this approach. See *supra* note 62.

259. *State v. Lyle*, 854 N.W.2d 378, 390–403 (Iowa 2014). Other state courts have declined to expand *Miller* to prohibit mandatory sentences for a term of years based on the qualitative difference between life without parole and other mandatory sentences. See *State v. Taylor G.*, 110 A.3d 338, 345–47 (Conn. 2015); *Commonwealth v. Okoro*, 26 N.E.3d 1092, 1099 (Mass. 2015); *Walle v. State*, 99 So.3d 967, 971 (Fla. Dist. Ct. App. 2012); *State v. Anderson*, No. 26525, 2016 WL 197122, at ¶10 (Ohio Ct. App. Jan. 15, 2016); *State v. Imel*, No. 2 CA–CR 2015–0112, 2015 WL 7373800, at *3 (Ariz. Ct. App. Nov. 20, 2015).

conditions that are constitutional for adults may constitute cruel and unusual punishment for youth.²⁶⁰

Sentencing reform and reform of the conditions of confinement of youth are steps in the right direction, but giving youth the possibility of a reduced adult criminal sentence and ameliorating the conditions under which they serve adult criminal sentences does not address the full range of harm that results from transferring youth from the quasi-rehabilitative juvenile system to the punitive criminal justice system. Adult sentencing reform will not allow adult criminal courts to impose juvenile dispositions.²⁶¹ And as a general matter, adult criminal convictions will still require that youth be incarcerated in adult facilities,²⁶² which do not provide the same rehabilitative programming as juvenile facilities and impose unique harms on youth. Youth in adult facilities are subjected to conditions and rules designed for adults, resulting in higher rates of psychological problems, suicide attempts, and infractions.²⁶³ Finally, as the federal government and the international community have recognized, placing youth in jails and prisons with adults places them at significantly higher risk of physical and sexual abuse.²⁶⁴ Making

260. Levick et al., *supra* note 12, at 306–07; *see also* Part II.B.3 (discussing international law standards recognizing that treatment acceptable for adults may constitute torture or cruel, inhuman and degrading treatment for youth).

261. Some states have tried to ameliorate the impact of trying youth as adults by allowing criminal courts to impose juvenile and adult sentencing dispositions. *See* FRED CHEESMAN, NAT'L CTR. FOR STATE COURTS, A DECADE OF NCSC RESEARCH ON BLENDED SENTENCING OF JUVENILE OFFENDERS: WHAT HAVE WE LEARNED ABOUT "WHO GETS A SECOND CHANCE?" 113 (2011), <http://www.ncsc.org/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Cheesman.ashx>.

262. Some states allow or require that youth tried as adults be detained and serve sentences in juvenile facilities until they turn eighteen or older. CARMEN E. DAUGHERTY, CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA'S YOUTHFUL INMATE STANDARD 18–56 (2015), http://www.campaignforyouthjustice.org/images/pdf/Zero_Tolerance_Report.pdf (compiling state laws that restrict incarceration of youth in adult prisons).

263. *See supra* Part I.C.

264. *Id.* Spurred by the Prison Rape Elimination Act, which requires sight and sound separation of youth detained in adult jails, prisons and lock ups, some states have created segregated units for youth within adult facilities. NAT'L PREA RES. CTR., PROTECTING JUVENILES IN ADULT FACILITIES FROM SEXUAL ABUSE: BEST PRACTICES FOR IMPLEMENTING THE YOUTHFUL INMATE STANDARD 11 n.33, 18–19 (2016), https://www.wcl.american.edu/endsilence/documents/implementing_youth_inmate_std.pdf. However, segregated youth have limited access to programming and risk isolation. *Id.* at 19. Typically, they also continue to live

adjustments to the length of sentences after the adjudication of guilt also fails to address (1) the unfairness of deciding a youth's guilt in an adult criminal court that does not provide additional processes or procedures to ensure that the youth defendant can fully participate and (2) the stigma of adult criminal processing and conviction.

In order to address this broad range of harms and to take the differences between youth and adults seriously, this section considers possible procedural and substantive due process challenges to the transfer of youth to the adult criminal justice system,²⁶⁵ looking at the *Roper* line of cases and international and comparative law to support these claims.²⁶⁶

A. Procedural Due Process Claims

The Supreme Court has emphasized that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.”²⁶⁷ When a protected liberty or property interest is at stake, procedural due process requires notice and an opportunity to be heard. In the context of criminal and juvenile proceedings that deprive individuals of important liberty interests, due process requires “fundamental fairness.”²⁶⁸ When youth are tried as adults procedural due process requires (1) that they be provided a hearing prior to exclusion and transfer from the juvenile system to the adult criminal justice system and (2) if youth are tried in the adult criminal

under rules designed for adults and are supervised by correctional officials who are not trained to deal with youth.

265. This article considers due process claims and does not address possible Eighth Amendment transfer challenges, which would require establishing transfer as a form of punishment. Some state courts have held that the transfer decision is procedural and not punitive. *See, e.g.,* *People v. Patterson*, 25 N.E.3d 526, 551 (Ill. 2014). However, as discussed *infra* notes 281–92 and accompanying text, there is a strong argument that transfer is punitive. *See id.* at 557 (Theis, J., dissenting).

266. Following *Miller*, a few state courts considered and rejected due process challenges to automatic transfer statutes. The courts' cursory analysis distinguished the *Roper* line of cases because they involved Eighth Amendment rather than Due Process claims. *See, e.g., Patterson*, 25 N.E.3d at 548–49; *State v. Houston-Sconiers*, 365 P.3d 177, 180–81 (Wash. Ct. App. 2015).

267. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

268. *See Dowling v. United States*, 493 U.S. 342, 352 (1990) (noting that the Due Process clause requires “fundamental fairness,” although in the criminal context the Court has defined fundamental fairness violations beyond the guarantees in the Bill of Rights very narrowly).

justice system, that they be provided additional procedural protections. This section considers both claims in turn.

1. Due Process Requires an Individualized Hearing Before Youth Are Pushed Into the Adult Criminal Justice System

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment[s].”²⁶⁹ When protected liberty interests are at stake, due process requires notice and a hearing appropriate for the circumstances, involving a neutral decision maker.²⁷⁰ Despite this clear constitutional requirement, courts have uniformly upheld Statutory Exclusion and Prosecutorial Discretion provisions, which do not provide a hearing or opportunity for a youth to challenge his or her transfer to the adult criminal justice system. Indeed, in the case of Prosecutorial Discretion, not only are transferred youth denied a hearing, they will not even know the reasons why the prosecutor decided to charge them as an adult.

Protected liberty interests can arise from the Constitution itself based upon guarantees implicit in the word “liberty” or from an expectation or interest created by state or federal law.²⁷¹ Historically, courts have upheld transfer and exclusion provisions based on a finding that there is no constitutional right to juvenile treatment.²⁷²

269. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

270. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); see Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 8 (2006) (“[I]n civil settings . . . notice and a hearing must ordinarily precede any governmental deprivation of a liberty or property interest.”); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” (internal citations omitted)); *Mathews*, 424 U.S. at 333 (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” (citations and internal quotations omitted)).

271. Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

272. Some commentators have argued that by creating a “juvenile court system and adult court transfer schemes aimed only at the most serious and violent offenders,” states create a statutory interest in adjudication in juvenile court. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles Into Adult Court Without a Fitness*

As discussed below, recent Supreme Court jurisprudence supports a constitutional right to juvenile treatment in the criminal justice context, which may give rise to substantive and procedural due process protections. However, even absent the recognition of a constitutional right to juvenile treatment, an important liberty interest is implicated when the decision is made to try a youth as an adult that, at a minimum, requires procedural due process.

In its prior decisions, the Supreme Court has made it clear that youth have a right to liberty that is protected by the Due Process Clause.²⁷³ Because the restrictions on liberty that result from criminal rather than juvenile treatment are both quantitatively and qualitatively more severe, youth are entitled to due process protections before being moved from one system to the other. In *Vitek v. Jones*,²⁷⁴ the Supreme Court recognized that a prisoner has protected liberty interests requiring due process protections prior to being involuntarily transferred from a prison to a mental hospital.²⁷⁵ The Court noted that although the petitioner did not have the right to freedom from confinement, the different nature of the confinement in a mental hospital, including the “stigmatizing consequences” and the major change to the conditions of confinement in the mental hospital amounted to a “grievous loss” that implicated a liberty interest protected by the Due Process Clause.²⁷⁶ Youth are deprived of the same type of liberty interest when they are moved from juvenile to adult proceedings.

Although it may be argued that a youth does not lose any liberty interests until after he or she is convicted and that full

Hearing is a Denial of Their Basic Due Process Rights, 14 WYO. L. REV. 775, 808–09 (2014).

273. *In re Gault*, 387 U.S. 1 (1967) (holding that a child in juvenile proceedings is entitled to due process protections because the proceedings may result in institutional confinement); *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring) (“[C]hildren have a constitutionally protected interest in freedom from institutional confinement. That interest lies within the core of the Due Process clause”); *see also Addington v. Texas*, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”).

274. 445 U.S. 480 (1980).

275. *Id.* at 487–88, 494.

276. *Id.* at 488, 493–94; *see Hamack, supra* note 272, at 809 (stating that youth’s liberty interest implicated in adjudication in adult courts is similar to the liberty interest of prisoners transferred to mental illness facilities); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (recognizing student’s liberty interest in reputation required due process protections prior to school suspension).

constitutional protections are provided in subsequent criminal proceedings,²⁷⁷ those proceedings will not address the deprivation of liberty at issue. Once a youth is charged in adult criminal court, he or she has already sustained a substantial loss of liberty rights flowing from the differences in likelihood, length, and nature of detention and other penalties resulting from the transfer from a civil rehabilitative system to a punitive criminal justice system.²⁷⁸ Included among the liberty restrictions that he or she may face are possible pre-trial detention in adult jails, the loss of the specialized procedures of the juvenile justice system, the possibility of adult criminal sentences rather than juvenile dispositions and the loss of the ability to serve detention in youth rather than adult facilities.²⁷⁹

Another way to quantify the loss suffered by youth is to analogize their treatment to pre-trial detainees, who also have not yet been convicted of any crime. The Court has recognized that pre-trial detainees have a liberty interest in being free from arbitrary punishment.²⁸⁰ Moving youth out of the “civil” rehabilitative juvenile system to a criminal justice system also can be viewed as punitive.²⁸¹ Indeed, courts have recognized that transfer of youth to the adult criminal justice system is punitive for purposes of the ex post facto clause.²⁸² Scholars and jurists have noted that legislative decisions to

277. See, e.g., *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997) (holding that youth do not lose any liberty interests until after they are convicted at a criminal proceeding).

278. *Kent v. United States*, 383 U.S. 541, 554 (1966).

279. But see, e.g., *Behl*, 564 N.W.2d at 566.

280. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[Pretrial] detainee[s] may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

281. In some states the interaction between transfer and mandatory sentencing laws can result in the mandatory imposition of adult sentences on transferred youth without any individualized consideration anywhere in the process. *Breen & Mills*, *supra* note 12, at 309–12. Eighteen states have automatic exclusion or mandatory transfer provisions and mandatory adult sentences. *Id.* at 311.

282. In *United States v. Juvenile Adult Male*, 819 F.2d 468 (4th Cir. 1987), the Fourth Circuit held that retroactive application of an amendment to the federal Juvenile Delinquency Act allowing judicial transfer of a fifteen-year-old violated the ex post facto clause’s prohibition on changes in punishments. The court emphasized that the transfer amendment was not a “mere change in venue,” and must be understood as “a means by which to impose on certain juveniles the harsher sentences applicable to adults.” *Id.* at 471. See *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991) (holding that retroactive application of a change in standard for Judicial Waiver hearings violated due process because it functioned as an ex post facto law); see also *Saucedo v. Superior Court*, 946 P.2d 908, 911 (Ariz. Ct.

facilitate transfer of youth to the adult system are often motivated by the punitive desire to impose the harsher adult sentencing scheme on them.²⁸³

Whether youth's interest in juvenile rather than adult treatment is viewed as the type of liberty interest traditionally protected by the Due Process clause or as an arbitrary punishment, it is clear that youth suffer a grievous loss by transfer to the adult criminal justice system.²⁸⁴ In the adult system, youth are more likely to be detained pre-trial and face much longer criminal sentences if convicted. Irrespective of the length of the sentence imposed, the nature and consequences of an adult criminal conviction are fundamentally different than those of a juvenile delinquency determination. As discussed, the adult correctional system does not have the same rehabilitative purposes and was not designed for youth. Adult criminal courts do not have the same range of services and sentencing options that juvenile courts have. If a youth is detained or sentenced, adult jails and prisons are much more restrictive environments than juvenile detention and do not have the same educational and rehabilitative services. Further, as discussed in Part I.C, *supra*, detaining youth in adult, rather than juvenile, facilities creates much greater risk of physical, sexual, and

App. 1997) (holding that retroactive application of automatic transfer provision violates state prohibition on ex post facto laws because it would "deprive Petitioner of *eligibility* to be retained in the juvenile court and to receive the lesser punitive consequences applicable there.").

283. In a case rejecting an Eighth Amendment challenge to automatic transfer, the dissenting justice noted that comments in the legislative history about being tough on crime "leave little doubt that legislators—both supporters of the bill and supporters of the amendments—considered the statute to be punitive." *People v. Patterson*, 25 N.E.3d 526, 557 (Ill. 2014) (Theis, J., dissenting).

284. Dissenting in *United States v. Bland*, Judge Wright distinguished the decision to try a juvenile as an adult from typical exercises of Prosecutorial Discretion in which prosecutors can decide whether to charge a person and what offenses to charge the person with. A prosecutor's charging decision typically begins a process of adjudication that provides procedural due process protections to determine whether the defendant is actually guilty of the offenses charged, whereas "the waiver decision marks not only the beginning but also the end of adjudication as to the child's suitability for juvenile treatment." *United States v. Bland*, 472 F.2d 1329, 1348 (D.C. Cir. 1972) (Wright, J., dissenting). A child, irrespective of guilt or innocence, may have a right to be charged as a juvenile based on his or her maturity and amenability to rehabilitation. *Id.* Because "[t]hese factors, unlike the question of guilt, drop out of the case once the initial waiver decision is made," it is essential that the child is afforded fair procedures when the transfer decision is made. *Id.*

psychological harm. These differences result in major change in the conditions of confinement when youth are transferred to adult facilities.

Finally, subjecting youth to the adult criminal justice system has a significant stigmatizing effect, which is relevant to determining youth's liberty interests.²⁸⁵ Stigma experienced by youth in the adult system begins even before conviction. Juvenile proceedings are typically closed to the public and juvenile dispositions are sealed.²⁸⁶ In contrast, adult criminal proceedings are typically open to the public and dispositions are a matter of public record. Criminal convictions carry a life-long stigma and major collateral consequences including difficulty finding a job or getting an education.²⁸⁷ Criminal convictions can limit access to driver's licenses and prevent youth from voting or holding public office.²⁸⁸

2. Due Process Requires that Youth Subject to Adult Criminal Proceedings Are Guaranteed Additional Protections

The Fourteenth Amendment's Due Process Clause requires fundamental fairness in criminal trials and in juvenile delinquency proceedings. In adult criminal proceedings, the Court has selectively incorporated almost all of the criminal procedural protections in the

285. See *Addington v. Texas*, 441 U.S. 418, 425–26 (1979) (considering the stigma of involuntary commitment to a mental hospital in finding that indefinite civil commitment constituted a substantial deprivation of liberty interests).

286. Most states have statutory provisions or court rules that presumptively close juvenile proceedings to the public. For example, some states allow judges to grant access on a case-by-case basis only to parties having a "direct," "legitimate," or "proper" interest in the case. See, e.g., CAL. WELF. & INST. CODE § 346 (West 2016); HAW. REV. STAT. § 571-41(b) (2015); KY. REV. STAT. ANN. § 610.070(3) (LexisNexis 2014); MO. REV. STAT. § 211.171(6) (West 2010); N.Y. FAM. CT. ACT § 1043 (McKinney 2010); N.D. CENT. CODE § 27-20-24(5) (2016); 42 PA. CONS. STAT. § 6336(d) (West 2013); R.I. GEN. LAWS § 14-1-30 (2002); S.C. CODE ANN. § 20-7-755 (2014); WIS. STAT. ANN. § 48.299(1)(a) (West 2011); WYO. STAT. ANN. § 14-6-224(b) (2015). Others will hold a closed hearing provided that the judge determines excluding the public is in the best interest of the child or the community. See, e.g., ALASKA STAT. § 47.10.070(c) (2014); COLO. REV. STAT. § 19-1-106(2) (West 2016); IOWA CODE § 232.39 (2014); N.J. STAT. ANN. § 2A:4A-60(i) (West 2010); TEX. FAM. CODE ANN. § 54.08(c) (West 2014); WASH. REV. CODE ANN. § 13.34.115 (West 2013). See also Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 373 nn.109–10 (1995).

287. See generally Chin, *supra* note 42; Pinard & Thompson, *supra* note 42.

288. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 43, at 13.

Bill of Rights into the Due Process Clause.²⁸⁹ However, the Bill of Rights does not occupy the entire field. The Court has found that fundamental fairness may require or prohibit conduct and procedures not specifically articulated in the Bill of Rights.²⁹⁰ In a separate series of cases, the Court has recognized that fundamental fairness requires certain procedural guarantees provided in criminal cases in juvenile proceedings.²⁹¹ However, the Court has not considered whether fundamental fairness requires additional procedural protections for youth when they are tried in *adult criminal proceedings*.²⁹²

a. The Supreme Court's Recognition that Youth
May Require Additional Protections in Adult
Criminal Court

J.D.B. and the Supreme Court's analysis in *Graham* and *Miller* support the view that developmental differences between youth and adults may require additional criminal procedural protections for youth who are tried as adults.²⁹³ In *Graham*, the Court noted that youth are "at a significant disadvantage in criminal proceedings."²⁹⁴ The Court specifically recognized that criminal

289. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 385 (2001) (listing Bill of Rights provisions incorporated into the Due Process Clause).

290. *Id.* at 389–95.

291. *See, e.g.*, *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

292. Scholars have criticized focusing on whether youth in juvenile proceedings have the same rights that adults have in criminal proceedings instead of considering what rights are required to make the proceedings fundamentally fair for children. *See* Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 49 (2003) ("[A] commitment to the due process principles of accuracy, dignity, and participation suggests that the Constitution requires some modification of the adult procedures to make due process rights meaningful for children."); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 299 (2003) ("[A] strong argument can be made . . . that children's immaturity should entitle them to more rather than less constitutional protection." (emphasis omitted)).

293. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (noting that a youth's inability to deal with police and prosecutors can affect plea agreements and his or her incapacity to assist attorneys can impair his or her defense); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Graham v. Florida*, 560 U.S. 48, 76 (2010) (recognizing that the characteristics of youth can impact their ability to meaningfully participate in adult proceedings).

294. *Graham*, 560 U.S. at 78.

procedures must take youthfulness into account, stating that an “offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”²⁹⁵

In particular, the Court noted that youth have “limited understandings of the criminal justice system and the roles of the institutional actors within it.”²⁹⁶ Because of the unique characteristics of youth, the Court noted that they are less able to work effectively with their lawyers to aid in their defense. Specifically, reluctance to trust counsel, difficulties in weighing long term consequences, and impulsiveness lead to poor decision-making that negatively impact youth’s ability to participate in adult criminal proceedings.²⁹⁷

The Court has also recognized that differences between youth and adults must be considered in determining the voluntariness of confessions under the Due Process clause and the Fifth Amendment’s self-incrimination clause. In *J.D.B.*, the majority and dissent agreed that the voluntariness test must take a youth’s age into account.²⁹⁸ The majority also found that age must be taken into account in determining whether a thirteen-year-old was in custody and entitled to *Miranda* warnings prior to interrogation.²⁹⁹

b. International and Comparative Law Recognition That
Youth Subject to Criminal Proceedings Are Entitled
to Additional Protections

As discussed in Part II.B.2, *supra*, international law and decisions from the European Court of Human Rights (ECHR) and the Canadian Supreme Court recognize that youth cannot be subjected to adult criminal procedures without modification to take into account their age. International law recognizes that youth in conflict with the law are entitled to the same fair trial protections as adults, but that those protections must be implemented in a manner that takes into

295. *Id.* at 76.

296. *Id.* at 78.

297. *Id.*

298. *J.D.B.*, 564 U.S. at 278, 284; *see also* *Gallegos v. Colorado*, 370 U.S. 49 (1962) (considering age of fourteen-year-old in concluding that confession violated due process); *Haley v. Ohio*, 332 U.S. 596 (1948) (considering age and maturity of fifteen-year-old to determine that the Fourteenth Amendment prohibited use of confession).

299. *J.D.B.*, 564 U.S. at 271–72.

account the individual's age and development. Thus, the question is not whether youth have the same rights as adults (they do), but what additional protections are required to ensure that a youth tried as an adult is able to understand and meaningfully participate in the proceedings. International law also emphasizes the importance of taking differences between youth and adults into account in determining issues like whether confessions are voluntary.³⁰⁰

B. Substantive Due Process Right to Juvenile Treatment

In addition to supporting enhanced procedural due process rights for youth, the *Roper* line of cases suggests that the Supreme Court should recognize a substantive right to juvenile treatment for youth in the criminal context.³⁰¹ As discussed below, the reasoning in the *Roper* line of cases and the Supreme Court's historic recognition that differences between youth and adults justify different treatment in a variety of contexts support recognition of the right. The fundamental and universal nature of this right finds confirmation in international and comparative law. Although there is no text in the Constitution that explicitly supports a right to juvenile treatment, the Court should recognize it as a fundamental right protected by the Due Process Clause.

In all substantive due process inquiries, the Court must evaluate whether the fundamental right at issue is "implicit in the concept of ordered liberty." In *Obergefell v. Hodges*, the Supreme Court recently reiterated that the Due Process Clause protects fundamental rights that extend beyond the Bill of Rights.³⁰² It emphasized that identifying and protecting fundamental rights is part of the judicial duty to interpret the Constitution and "has not been reduced to any formula."³⁰³ In determining whether a fundamental right protected by the Due Process clause exists, the Court must exercise "reasoned judgment" to identify whether a case

300. See *supra* Part II.B.2.b.

301. Some scholars have argued that the Court has recognized a substantive right to rehabilitation or a narrower right to different treatment in criminal sentencing. See Arya, *supra* note 13, at 124; Guggenheim, *supra* note 11, at 490.

302. 135 S. Ct. 2584, 2597 (2015).

303. *Id.* at 2598 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

involves “interests of the person so fundamental that the State must accord them its respect.”³⁰⁴

The *Obergefell* Court noted the importance of history and tradition as a guide to identify fundamental rights but emphasized that they do not set the “outer boundaries” of rights.³⁰⁵ Instead, the Court adopted a standard that is rooted in history and tradition but evolves to reflect contemporary understandings of rights.³⁰⁶ In finding that the right to marry encompassed protections for same-sex couples even though historically the law had not extended the right to them, the Court considered the right to marry in its “comprehensive sense,” looking at marriage’s fundamental attributes and the principles underlying marriage’s recognition as a fundamental right, rather than looking at whether it was historically recognized as applying to same-sex couples.³⁰⁷ Similarly, differences between youth and adults and the state’s interest in promoting the development and welfare of youth have traditionally been recognized by the Court, and based on an evolving understanding of the nature of the differences between youth and adults and now near universal recognition of the right of the child to special protection and treatment, the Court should recognize a substantive right to juvenile treatment for individuals under eighteen in conflict with the law.

1. The Court’s Reasoned Judgment Supports Recognition of a Right to Juvenile Treatment

The unique characteristics of youth, including their (1) diminished culpability, (2) cognitive and developmental differences from adults, and (3) unique capacity to grow and change recognized in the *Roper* line of cases support recognition that youth have a fundamental right to juvenile treatment in the criminal justice context. As discussed in Part IV *supra*, the Supreme Court has recognized that differences between youth and adults establish that they are less morally blameworthy, creating a strong fairness argument that they should not be subject to the same adult criminal

304. *Id.* (emphasizing that the Court’s determination of whether a fundamental right exists “respects our history and learns from it without allowing the past alone to rule the present”).

305. *Id.*

306. *Id.* at 2589 (“When new insight reveals discord” between existing law and “the Constitution’s central protections” the “claim to liberty must be addressed.”).

307. *Id.* at 2602.

justice system and punishments. Because of recognized cognitive differences, the *Roper* line of cases also casts doubt on the fairness of subjecting youth to adult criminal procedures, which do not provide adequate fair trial protections for youth.³⁰⁸

In addition to the strong fairness concerns, a substantive right to juvenile treatment is supported by youth's interests in individual autonomy and development. In its substantive due process cases, the Supreme Court has repeatedly recognized that individuals have a protected autonomy and dignity interest in self-definition and expression.³⁰⁹ The Court has stated that the ability to decide and realize one's own life path is "central to personal dignity and autonomy" and includes the "right to define one's own concept of existence."³¹⁰ The Court has recognized the right to marriage for same-sex couples and the right to decide whether or not to terminate a pregnancy as part of one's right to shape his or her own identity and destiny.³¹¹

The *Roper* line of cases and the Court's prior education and child labor cases suggest that youth have a substantive due process right to develop, mature, and rehabilitate into an adult that is central to their autonomy and personal identity. In *Roper* and *Graham*, the Court limited the imposition of adult criminal sentences on youth based in part upon findings that a youth's character is "more transitory, less fixed" than an adult's, resulting in greater potential for change.³¹² Indeed, the *Roper* Court cited studies finding that

[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual

308. See *supra* notes 294–300 and accompanying text.

309. See *Obergefell*, 135 S. Ct. at 2593 ("The Constitution promises . . . a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").

310. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (stating that *Casey* recognizes a fundamental right to "choices central to personal dignity and autonomy" (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992))).

311. *Obergefell*, 135 S. Ct. at 2594, 2599 (stating that the right to marriage is fundamental because it "is essential to our most profound hopes and aspirations" and decisions about "marriage shape an individual's destiny" and constitute an act of "self-definition"); *Lawrence*, 539 U.S. at 565 (describing *Roe v. Wade* as recognizing a woman's right "to make certain fundamental decisions affecting her destiny").

312. *Roper v. Simmons*, 543 U.S. 551, 570 (2005); *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (stating that youth have "greater prospects for reform").

identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood[.]³¹³

Implicit in the Court's reasoning in *Graham* is the idea that the state cannot take away youth's inherent ability to grow and change,³¹⁴ and that youth have a right to rehabilitation. This is supported by the Supreme Court's cases that stress the interests of youth and the state in education in order to support the development of youth into healthy, well-rounded adult citizens.³¹⁵

In *Graham*, the Court repeatedly emphasizes that youthful offenders should be given a chance to mature and reform: "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."³¹⁶ The *Graham* Court deems it inappropriate to impose a life without parole sentence because such a sentence "forswears altogether the rehabilitative ideal," which is inappropriate given youth's "capacity to change and limited moral culpability."³¹⁷ The Court goes on to say that the State is not required to free petitioners, but must give them "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."³¹⁸

It is unclear whether the Court deems it inappropriate for the state to take away youth's inherent ability to grow and mature given her or his autonomy interests in personal development or if it recognizes some affirmative duty to provide rehabilitative opportunities.³¹⁹ However, the Court does criticize the denial of

313. *Roper*, 543 U.S. at 570 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

314. *Graham*, 560 U.S. at 75 (stating that the Eighth Amendment prohibits the state from making a judgment at conviction that a youth who has committed a crime "never will be fit to reenter society"); *id.* at 79 (discussing the need to provide Graham an opportunity to "demonstrate that the bad acts he committed as a teenager are not representative of his true character").

315. *See supra* Part III.A.

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

317. *Id.* at 74.

318. *Id.* at 75.

319. Arya, *supra* note 13, at 127–28 ("While it seems clear that the Court believes youth are entitled to rehabilitation, the Court provides mixed messages about what rehabilitation means.").

counseling, education, and rehabilitation programming for youth serving LWOP sentences, noting the “perverse consequence” that the sentence imposed on the youth would reinforce and cement the lack of maturity that led to the crime.³²⁰

2. The Right to Juvenile Treatment is Rooted in this Nation’s History and Traditions and Applies to All Youth Under Eighteen

The Supreme Court’s recognition of the “fundamental differences between juvenile and adult minds”³²¹ is rooted in a long tradition of treating youth differently both in criminal and delinquency proceedings and in many other legal contexts.³²² Indeed, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.”³²³ And “[t]ime and again, [the] Court has drawn [the] commonsense conclusions” that children are less mature and responsible than adults and differ in perception and behavior.³²⁴ The *Roper* Court noted that “[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.”³²⁵ Common law considers childhood status in determining the “reasonable person” standard in negligence suits.³²⁶ The recognition that children “characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” is reflected in legal history and tradition dating back to British common law.³²⁷ In *J.D.B.*, the Court discussed the law’s historic reflection that children lack the capacity to exercise mature judgment and concluded that “settled

320. *Graham*, 560 U.S. at 79; *id.* at 74 (“[T]he absence of rehabilitative opportunities or treatment makes the disproportionality of the [life without parole] sentence all the more evident.”).

321. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Graham*, 560 U.S. at 68).

322. *See supra* Parts III.A, III.B.

323. *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (alteration in original) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)); *Miller*, 132 S. Ct. at 2470.

324. *J.D.B.*, 564 U.S. at 272.

325. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

326. *J.D.B.*, 564 U.S. at 274.

327. *Id.* at 273.

understanding [is] that the differentiating characteristics of youth are universal.”³²⁸

Although U.S. laws and the Supreme Court have long recognized that youth are different from adults and should be treated differently under the law, *Roper* is the first Supreme Court case to articulate that for criminal justice purposes, the line between youth and adulthood should be drawn at eighteen. This is significant because many state laws allow youth to be tried as adults by defining “child” to exclude older youth (e.g. sixteen- or seventeen-year-olds) or to take away childhood status from youth under eighteen based on age and offense.³²⁹

In *Roper*, the Court found three critical differences between youth under eighteen and adults that require different treatment (immaturity, susceptibility to negative influence, and capacity for change).³³⁰ In *Roper* and *Graham*, the Court recognized that below age eighteen, “[t]he differences between juvenile and adult offenders are too marked and well understood” to risk allowing the imposition of the death penalty or LWOP sentences on youth “despite insufficient culpability.”³³¹ The *Roper* Court considered current scientific knowledge about adolescent brain development and also notes that eighteen is traditionally the age at which society distinguishes between youth and adulthood for other important matters including voting, serving on juries, and marrying without parental consent.³³² Although, there may still be individual variations in maturity among seventeen- and eighteen-year-olds, the Court emphasized the importance of drawing a clear line.³³³ Based on developmental differences and the fact that eighteen is the “point

328. *Id.*

329. *See, e.g.*, N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2010) (defining “juvenile delinquent” as a person who commits a crime under sixteen years of age); *United States v. Bland*, 472 F.2d 1329, 1330, 1334–35 (D.C. Cir. 1972) (referring to a D.C. statute that defines “child” as “an individual who is under 18 years of age,” but excludes from that category individuals who are sixteen years of age or older and charged by the U.S. Attorney with an enumerated crime), *cert. denied*, 412 U.S. 909 (1973); *State v. Cornejo (In re Boot)*, 925 P.2d 964, 969 (Wash. 1996) (citing a Washington statute defining “juvenile,” “youth,” and “child” as any individual “under the chronological age of eighteen years and who has not been previously transferred to adult court”).

330. *Roper*, 543 U.S. at 569–70.

331. *Id.* at 572–73; *Graham v. Florida*, 560 U.S. 48, 78 (2010).

332. *Roper*, 543 U.S. at 569.

333. *Id.* at 574.

where society draws the line for many purposes between childhood and adulthood,” the *Roper* Court drew the line at eighteen.³³⁴

The Supreme Court has made clear that history and tradition are the starting point in the substantive due process inquiry, but the Court is not rigidly bound by historic contours of fundamental rights.³³⁵ As scholars have noted, recognizing that rights evolve is important because an overreliance on tradition would permanently freeze conceptions of liberty to a specific historical moment and shut out the differences and experiences of groups who came late to the constitutional party, including blacks, Native Americans, women, and children.³³⁶

In recognizing a substantive due process right to same sex marriage, the Court noted that the right to marry is fundamental as a matter of history and tradition, but that current understandings of marriage must take into account how the institution has evolved over time.³³⁷ Similarly, the right to juvenile treatment in the criminal justice context is a fundamental right that is rooted in U.S. history and traditions, and our understanding of the right has evolved over time to include all individuals accused of committing crimes when they were under eighteen.

334. *Id.*; see also *Graham*, 560 U.S. at 74 (quoting *Roper*, 543 U.S. at 574).

335. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“When new insight reveals discord between the Constitution’s central protections and [existing law], a claim to liberty must be addressed.”); *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (alteration in original) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

336. Barbara Bennett Woodhouse, *The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 29 (1999) (“To this day, history and ‘tradition’—which too easily translates into the powers historically and traditionally enjoyed by free white men—has provided the benchmark under substantive due process theory for defining those personal ‘liberties’ upon which the state may not infringe. Emerging claims to new rights, by definition, will fail the test of deeply rooted tradition.”).

337. *Obergefell*, 135 S. Ct. at 2596 (“[C]hanged understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.”). The Court also noted that rights can rise “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” *Id.* at 2602.

3. International and Comparative Recognition that Youth Under Eighteen Are Entitled to Different Treatment

The modern Court frequently considers whether a substantive due process right rests on values shared with the wider civilization, looking to international and foreign law for confirmation and guidance.³³⁸ The Court has repeatedly recognized that the reasoning of international and foreign comparative law may be instructive³³⁹ in its evolving understanding of rights protected by the Constitution. International and comparative law support a right to juvenile treatment for individuals alleged to have committed crimes before their eighteenth birthday, rooted in the recognition of differences between youth and adulthood, the child's right to development, and state obligations to protect and promote the best interests of the child.³⁴⁰ The Supreme Court of Canada has found that there is global consensus that the "presumption of diminished moral culpability in young persons is fundamental to . . . notions of how a fair legal system ought to operate."³⁴¹ The Supreme Court of India has also recognized that differences between adult and youth brain development require different treatment of youth.³⁴²

338. See, e.g., *id.* at 2598 (acknowledging that the identification of protected fundamental interests under the Due Process Clause is "guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements"); *Lawrence*, 539 U.S. at 577 (recognizing that the right petitioners sought in that case was "accepted as an integral part of human freedom in many other countries," and there was no showing that the government's interest in "circumscribing personal choice is somehow more legitimate or urgent" in the U.S.); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (recognizing that "almost every western democracy" criminalizes assisted suicide, the right at issue in that case). The Court has also considered foreign and international law in holding that the Eighth Amendment prohibits extreme criminal sentences for youth. See *supra* notes 244–45 and accompanying text.

339. *Lawrence*, 539 U.S. at 576–77 (acknowledging decisions of the European Court of Human Rights and other nations); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (stating that the experiences of other countries help to "cast an empirical light on the consequences of different solutions to a common legal problem").

340. See *supra* Part II.

341. *R. v. D.B.*, [2008] 2 S.C.R. 3, ¶¶ 67–68 (Can.).

342. See cases cited *supra* notes 82–83. A 2015 amendment that allows sixteen- and seventeen-year-olds to be tried as adults under certain circumstances is currently being challenged as unconstitutional. See *Poonawalla v. Union of India*, (2016) W.P.(C) No. 94/2016 (India).

The ICCPR and CRC both require that every child accused of violating the penal law be treated in a manner that takes into account his or her age.³⁴³ These requirements are reflected and elaborated on in universally adopted U.N. rules.³⁴⁴ The right is also reflected in countries' constitutions and in legislation that often specifically refers to the CRC.³⁴⁵ Although the ways in which countries' legal systems implement the right to juvenile treatment may vary,³⁴⁶ only 16% of countries out of 140 surveyed by the USF's Center for Law and Global Justice both try and sentence youth as adults without any special juvenile protections.³⁴⁷

International law also recognizes a bright line, defining all individuals under eighteen as children entitled to juvenile treatment.³⁴⁸ Although some countries do allow youth to be tried in the adult system, either because juvenile court jurisdiction does not go to seventeen (or there is no juvenile court) or because exceptions allow or require that youth under juvenile court jurisdiction be transferred to adult criminal court for certain offenses, it is rare for systems to fail to take youth into account in some way, either by modifying adult criminal procedures and sentences³⁴⁹ or, in the case of transfers based on offense, to provide some individualized determination as to whether transfer is appropriate.³⁵⁰ Like the U.S.

343. ICCPR, *supra* note 47, arts. 10(3), 14(4); CRC, *supra* note 14, art. 40(1)–(3).

344. See Beijing Rules, *supra* note 56; see also Havana Rules, *supra* note 56; General Comment 10, *supra* note 77, ¶¶ 30–39.

345. See *supra* note 48; Youth Criminal Justice Act, S.C. 2002, c. 1, Preamble (Can.) (“Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms . . .”); *Salil Bali v. Union of India*, (2013) 7 S.C.C. 705, ¶ 42 (India) (noting that the Indian Juvenile Justice (Care and Protection) 2000 Act was passed in part to comply with India’s obligations under the CRC); DUNCAN, *supra* note 48, at 50–51 (listing countries that have applied the principals of the CRC in constitutional provisions concerning juvenile justice administration).

346. See *supra* Part II.A.2.

347. DE LA VEGA ET AL., *supra* note 59, at 8–9, 56.

348. CRC, *supra* note 14, art. 1; General Comment 10, *supra* note 77, ¶¶ 36–38; Havana Rules, *supra* note 54, r. 11(a); see generally *supra* Part II.C (discussing the United States’ obligations concerning children’s rights under international agreements).

349. DE LA VEGA ET AL., *supra* note 59, at 55.

350. A 2015 amendment to India’s Juvenile Justice (Care and Protection for Children) Act allows sixteen- and seventeen-year-olds to be tried as adults for “heinous” crimes but requires an individualized determination by a Juvenile Justice Board regarding the youth’s maturity and circumstances before transfer.

Supreme Court, the Indian high court recognized that brain development is not uniform and that there could be sixteen- and seventeen-year-olds who may not be amenable to rehabilitation.³⁵¹ However, like the U.S. Supreme Court, it concluded that adopting eighteen as a bright line made sense since these exceptions were likely rare and that it was better to adopt a rule that supported the rehabilitation and re-integration of youth.³⁵²

4. Substantive Due Process Arguments Based on the Right to Different Treatment

The right to juvenile treatment could be argued as an absolute right to juvenile processes, procedures and punishment for all youth under eighteen. This would require that the State try all youth in the juvenile justice system and bar any transfers to the adult criminal court. An absolute rule would be consistent with the Committee on the Rights of the Child's position that every person under eighteen at the time an offense was committed must be treated in accordance with the rules of juvenile justice,³⁵³ but currently does not appear to reflect actual practice in the majority of countries around the world.

Alternatively, the Court, like the Canadian Supreme Court, could recognize a more limited right that all youth who commit an offense under the age of eighteen have a right to a presumption of juvenile treatment based on their lesser culpability, maturity, and potential for rehabilitation that requires an individualized determination of whether adult treatment would be appropriate. Recognition of such a right would alter the current practice of deferring to state legislatures to define who has a right to juvenile treatment and enable courts to apply a heightened level of scrutiny to statutory schemes that automatically exclude or give prosecutors unfettered discretion to exclude youth from juvenile court jurisdiction. Recognition of this more limited right would not preclude adult treatment for youth but would require states to make an individualized determination as to the fairness of treating a youth as

Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, PEN. CODE (2016).

351. Dr. Swamy v. Raju, (2014) 2 Crim. L.J. S.C. 477, ¶ 28 (Mar. 28, 2014) (India).

352. *Id.* ¶ 48.

353. General Comment 10, *supra* note 77, ¶ 37.

an adult.³⁵⁴ Such determinations also would have to comply with procedural due process protections.

CONCLUSION

The U.S. Constitution does not include an explicit provision protecting the right of children and youth to special protection and treatment. However, claims challenging the transfer of individuals under eighteen to the adult criminal justice system, trying them in adult criminal courts without additional procedural protections, and subjecting them to adult criminal sentences and conditions of confinement fall squarely within fundamental rights protected by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Old state and lower federal court cases that failed to require procedural due process protections when a youth is transferred to the adult system erroneously ignored the grievous loss suffered when a youth is removed from the juvenile justice system to the adult criminal justice system. Because of the fundamental differences between the orientation, goals, and penalties imposed by the two systems, moving a youth from one system to another without procedural due process protections constitutes an arbitrary punishment and impermissible deprivation of his or her liberty rights.

Further, U.S. history and tradition and the reasoned judgment of the U.S. Supreme Court support recognition of a substantive right to juvenile treatment for youth in conflict with the law. The United States has traditionally recognized that youth are not miniature adults in civil contexts—relating to restrictions on marriage, voting, owning property, drinking—and in the criminal and juvenile delinquency contexts. Since the early 1900s, all fifty states and the District of Columbia have maintained separate juvenile justice systems, and the Supreme Court has recognized that differences between youth and adults may justify different procedures for youth in juvenile delinquency proceedings and require enhanced

354. Judicial waiver statutes might satisfy the individual determination requirement. However, many Judicial Waiver schemes are problematic because judges lack guidelines to weigh statutory factors and decision-making is inconsistent. *See Arya, supra* note 13, at 147; Rachel Jacobs, Note, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 1010 (2013). Further, as recognized in *Graham*, it is difficult for courts to determine a youth's treatment potential. *See Arya, supra* note 13, at 147–48.

protections for youth in the adult criminal justice context. Based on “common sense” and unique characteristics of youth that “any parent knows,” the *Roper* line of cases reaffirmed that youth are constitutionally different from adults,³⁵⁵ and drew a clear line defining youth as individuals under eighteen.

Comparative and international human rights law support recognition that youth in conflict with the law have a right to juvenile treatment. The vast majority of legal systems around the world provide procedural and other protections that take age and maturity into account when youth are accused of violating the penal law. This reflects wide consensus that accounting for differences between youth and adults is fundamental to notions of how a fair legal system ought to operate and that the differentiating characteristics of youth are universal. While the U.S. Supreme Court is not bound to enforce international law in its decisions, international law and the experience of other countries can confirm and inform its holdings.³⁵⁶

355. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

356. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).