YOU MUST BE 'THIS' TALL: AN ANALYSIS OF VERMONT'S INITIATIVE RAISING THE AGE OF DELINQUENCY BEYOND EIGHTEEN

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In 1899, the first juvenile court system was established in Cook County, Illinois. The newly founded court recognized that crimes committed by children should be adjudicated differently than those committed by adults. Over the next twelve decades, state legislatures and Congress have gradually diminished the autonomy of juvenile courts, undermining their purpose by manipulating the age of delinquency and initiating transfer procedures to adult criminal court. However, in 2022, Vermont became the first state in the nation to pass legislation raising the age of delinquency above 18 in recognition of scientific studies and judicial opinions challenging the belief that children appreciate criminal culpability in a similar way to adults. This Note focuses on Vermont's statutory approach to increasing the age of delinquency above 18 and the logistical issues the State encountered while implementing the new laws. Additionally, this Note discusses the probability of other states adopting similar changes, using Texas as an example. Texas is very different from Vermont in its demographics, approaches to incarceration, and political affiliation. Ultimately, the combination of demographics and political persuasion inherent to the criminal penal policy will likely prove too overwhelming for the approach adopted by Vermont to apply nationally.

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INTRODUCTION

In 1996, juvenile delinquency rates were at the highest level ever recorded in American history.[1] For every 100,000 persons, 8,476 juveniles between 10 and 17 years old were arrested.[2] Since then the juvenile arrest rate has steadily decreased, hitting an all-time low of 2,044 juveniles for every 100,000 persons in 2019.[3] However, not all these children are tried, sentenced, and incarcerated as juveniles.[4] The state deems some of these offenders to be beyond the scope of juvenile status, falling instead within the realm and subject to the retribution of the adult criminal system.[5] In the mid-1990s when the juvenile arrest rate peaked, an estimated

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1. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Statistical Briefing Book: Juvenile Arrest Rate Trends*, U.S. DEP'T OF JUST., https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 [https://perma.cc/489W-XPQ3] (last visited Jan. 27, 2023).

2. *Id.*

3. *Id.* The arrest rate in 2020 was significantly lower than in 2019 at 1,269/100,000. However, due to COVID-19 and the national "stay-at-home" orders, it is unclear how reliable this figure is.

4. *See* CHARLES PUZZANCHERA ET AL., NAT'L CTR. FOR JUV. JUST., YOUTH AND THE JUVENILE JUSTICE SYSTEM: 2022 NATIONAL REPORT 87–100 (Dec. 2022) ("In 2019, there were an estimated 53,000 youth younger than 18 tried in criminal court. That figure was down 64% from the 2005 estimate.").

5. *See, e.g.*, *Commonwealth v. Torres*, 303 A.3d 1058, 1060–61 (Pa. Super. Ct. 2023) (charging 23-year-old defendant as an adult for the rape of a child, among other things, even though the defendant was between the ages of 13 and 15 years old at the time the offenses occurred).

250,000 youths were charged as adults.[6] In 2019, the estimated number of youths charged as adults dropped 80% from that peak to approximately 53,000.[7]

Although the number of children exposed to adult criminal court has decreased, 53,000 is too high, especially considering the consequences of treatment as an adult. For example, "the rate of suicide for juveniles in adult jails is eight times higher than in juvenile detention centers."[8] Furthermore, the likelihood of a juvenile incarcerated in an adult facility being raped or sexually assaulted is five times higher than if the youth were detained in a juvenile facility.[9] One method states have used to combat the trend of trying juveniles as adults is to raise the age of delinquency to at least 18.[10] Some states, such as Vermont, have pushed this strategy to its extreme by passing legislation in 2021 that raised the age of delinquency to 19 and proposed extending the age up into the early 20s by 2024.[11]

This Note examines the juvenile justice system, transfer provisions, and the potential viability of legislation similar to that passed in Vermont. Part I outlines the history of the juvenile system as a separate entity from the adult criminal court and describes the various methods by which juvenile offenders are transferred to the adult system.[12] Part II focuses on "statutory transfer" provisions specifically and considers their impact as the minimum transfer age fluctuated first in response to the "super-predator" pandemonium of the 90s and more recently to "raise the age" initiatives.[13] Part III introduces the Vermont legislation that raises the age of delinquency beyond 18 and addresses the State's response to the initiative as well as potential weaknesses in the new statute's ability to make lasting changes to the treatment of juvenile offenders.[14] Finally, Part IV examines the potential national applications of a statute that raises the age of delinquency beyond 18 by comparing

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6. John Kelly, *Estimate Shows Adults Court is Increasingly Rare Destination for Youth*, IMPRINT (Nov. 9, 2021, 12:26 PM), https://imprintnews.org/youth-services-insider/estimate-shows-adult-court-is-increasingly-rare-destination-for-youth/60281 [https://perma.cc/P85W-VHB9].

7. *Id.* This number is an "estimate" because there is no uniform method for states to collect and report this data. *See id.*

8. Kimberly Burke, *All Grown Up: Juveniles Incarcerated in Adult Facilities*, 25 J. JUV. L. 69, 72–73 (2005).

9. *Id.* at 73.

10. *See infra* Section II.B.

11. *See* VT. STAT. ANN. tit. 33, § 5103. Although legislation was expected to be fully implemented by 2024, this date has been "paused" twice and is in jeopardy of being halted indefinitely. *See infra* Subsection III.A.2; Calvin Cutler, *Vermont's 'Raise the Age' Juvenile Offender Law to Remain on Pause*, WCAX (Dec. 6, 2023, 4:31 PM), https://www.wcax.com/2023/12/06/vermonts-raise-age-juvenile-offender-law-remain-pause/ [https://perma.cc/DE5D-PJ6L]; Liam Elder-Connors, *'Raise the Age' Didn't Overwhelm Juvenile Court, But DCF Says Lawmakers Need to Pause Its Expansion*, VT. PUB. (Feb. 16, 2024, 5:00 AM), https://www.vermontpublic.org/local-news/2024-02-16/raise-the-age-didnt-overwhelm-juvenile-court-but-dcf-says-lawmakers-need-to-pause-its-expansion [https://perma.cc/AMM4-8Y7V].

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

the racial demographics, incarcerated populations, and political affiliations of Vermont and Texas.[15]

Although the number of children exposed to the adult criminal system is declining, that number should be zero except in extreme circumstances. In *Graham v. Florida*, Justice Kennedy expressed his reservations regarding whether a juvenile offender could be exposed to the most serious of sentences:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.[16]

As Justice Kennedy indicated, the law has acknowledged the special status that children should have regarding crime and punishment. Further, scientific research supports this contention by concluding that children's brains are still developing and therefore, they are physically incapable of appreciating criminal culpability similarly to adults.[17] The Vermont statute demonstrates how society can accept scientific notions as truth and take Justice Kennedy's words to heart: no child should be deemed incapable or undeserving of rehabilitation.

I. HISTORY: JUVENILE STATUS AND "DELINQUENCY"

A. Creation and Constitutional Conformity of Juvenile Courts

It is difficult to imagine by today's standards that children were, at any point, considered anything but children. However, "before the past two or three centuries, age was neither the basis for a separate legal status nor for social segregation."[18] Children were seen as younger, smaller versions of their parents with the same legal responsibilities.[19] Not until the end of the nineteenth century did society begin to embrace the idea that children were innocent, vulnerable, and dependent individuals requiring extended "preparation for life."[20] In 1899, Illinois passed the Juvenile Court Act, which established the first juvenile system that was "widely acknowledged at the time as the model for other states to follow."[21] Within 20 years, all but three states had established juvenile courts.[22]

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15. *See infra* Part IV.
16. 560 U.S. 48, 79 (2010).
17. *See infra* Section II.B.
18. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693–94 (1991).
19. *Id.* at 694.
20. *Id.*
21. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1096 (1991) (citing ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 4 (2d ed. 1977)).
22. *Id.*

Social progressives described the newly formed juvenile courts as "benign, nonpunitive, and therapeutic."[23] The legal doctrine of *parens patriae* legitimized the state's intervention as a de facto parent.[24] Juvenile court proceedings were relatively informal. Judges used "discretionary procedures to diagnose the causes of and prescribe the cures for delinquency."[25] The juvenile process eschewed many of the procedural safeguards of the criminal courts.[26] Adjudication proceeded more as it would in civil court, rather than criminal, and decisions were theoretically based on the child's best interests.[27]

However, juvenile and criminal courts gradually began to address the distinction between the procedural safeguards afforded to adults and juveniles. One of the first significant Supreme Court decisions in this area, *Kent v. United States*, addressed the application of the Due Process Clause in transferring juvenile defendants from juvenile court to district court where they would be tried as adults.[28] The Supreme Court held that a hearing is required before transfer; the hearing "must measure up to the essentials of due process and fair treatment."[29] Following *Kent*, before transfer, every juvenile offender was "entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably [were] considered by the court, and to a statement of reasons for the Juvenile Court's decision."[30]

One year after *Kent*, authorities placed 15-year-old Gerald Francis Gault into custody, without informing his parents, for allegedly making an offensive phone call to a neighbor.[31] The trial judge concluded that Gault made lewd remarks and sentenced him to commitment in the State Industrial School as a juvenile delinquent until he turned 21.[32] Gault's parents filed a writ of habeas corpus with the Arizona Supreme Court requesting their son's release from the Industrial School because his due process rights were violated.[33] The petition was denied.[34] The Supreme Court granted certiorari to address whether a court violates the Due Process Clause when it commits a juvenile to a juvenile facility without notice of the charges; access to counsel; or the right to confrontation, cross-examination, and without a right to appellate review.[35] The Supreme Court strongly disagreed with the Arizona Supreme Court's decision denying habeas relief, stating that "the condition of being

23. Feld, *supra* note 18, at 695.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. 383 U.S. 541, 553–55 (1966).
29. *Id.* at 562.
30. *Id.* at 554, 557 (emphasizing that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons").
31. *In re* Gault, 387 U.S. 1, 4–5 (1967).
32. *Id.* at 7.
33. *In re* Gault, 407 P.2d 760, 762–66 (Ariz. 1965) (en banc).
34. *Id.* at 768–70.
35. *In re* Gault, 387 U.S. at 9–10.

a [child] does not justify a kangaroo court."[36] The Court acknowledged that "a Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. . . . '[T]he admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.'"[37] In the years following, the Court decided several cases that continued to define the applicable procedural safeguards required in juvenile court.[38]

While the Court upheld the application of many procedural protections in juvenile courts, others were explicitly excluded. For example, in *McKeiver v. Pennsylvania*, the Court denied juveniles the constitutional right to jury trials, thereby halting the extension of the juvenile courts' full procedural parity with adult criminal prosecutions.[39] The Court resisted extending procedural rights, fearing that jury trials would adversely affect the traditional informality of the proceedings, rendering juvenile courts procedurally indistinguishable from criminal courts and ultimately calling into question the need for a separate juvenile court system.[40] At this point, the Court seemed to draw a line between juvenile courts and "adult" criminal courts, preferring to preserve the former's unique identity and purpose in lieu of more comprehensive procedural protections.[41]

B. Legislative Support

In the wake of *Kent*, *Gault*, and *McKeiver*, the stability and autonomy of the juvenile justice system seemed stronger and more apparent than ever. On the federal level, Congress continued developing the juvenile justice system by enacting the Juvenile Justice and Delinquency Prevention Act ("JJDPA") in 1974.[42] The JJDPA established the Office of Juvenile Justice and Delinquency Prevention ("JJDP") to support local efforts to prevent delinquency and improve juvenile justice systems.[43] Congress recently reaffirmed its commitment to improving the juvenile system by enacting the Juvenile Justice Reform Act ("JJRA") of 2018.[44] The JJRA reauthorized the JJDPA and stated that "problems should be addressed through a 2-track common sense approach that addresses the needs of individual juveniles and

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36. *Id.* at 28.

37. *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 555 (1966)).

38. *See, e.g.*, *In re* Winship, 397 U.S. 358, 368 (1970) (requiring delinquency to be proved by the criminal standard "beyond a reasonable doubt" rather than by lower civil standards of proof); Breed v. Jones, 421 U.S. 519, 541 (1975) (applying double jeopardy to delinquency convictions).

39. 403 U.S. 528, 540 (1971) (stating that "[some] procedural rights held applicable to the juvenile process 'will give the juveniles sufficient protection' and the addition of the trial by jury 'might well destroy the traditional character of juvenile proceedings'") (quoting *In re* Terry, 438 Pa. 339, 349–50 (1970)).

40. *Id.* at 550–51.

41. *See also* Feld, *supra* note 18, at 696 (stating that criminal courts "justified procedural differences between juvenile and criminal courts on the basis of the former's treatment rationale and the latter's punitive purposes").

42. OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Authorizing Legislation*, U.S. DEP'T OF JUST., https://ojjdp.ojp.gov/about/legislation [https://perma.cc/C3UK-8LWF] (last visited Sept. 25, 2022).

43. *Id.*

44. *Id.*

society at large."[45] The first track involves helping states establish "quality prevention programs . . . designed to reduce risks and develop competencies in at-risk juveniles that will prevent, and reduce the rate of, violent delinquent behavior."[46] The second track involves programs that "assist in holding juveniles accountable for their actions and in developing the competencies necessary to become a responsible and productive member of their communities."[47]

Additionally, state legislatures have made alterations to juvenile delinquency laws. One major reform includes status jurisdiction. Status jurisdiction "allowed intervention to prevent *predelinquent* misconduct such as disobedience or immorality from escalating into full-blown criminality."[48] Status offenses were a form of delinquency where "status delinquents were detained and incarcerated in the same institutions as criminal delinquents even though they had committed no crimes."[49] Judges had broad discretion "to prevent unruliness or immorality from ripening into crime," which often reflected their values and prejudices.[50] As a result, judges' broad discretion often disproportionately impacted poor, minority, and female juveniles.[51] Therefore, status jurisdiction was often challenged as "void for vagueness," as an equal protection violation or on procedural grounds.[52] Today, almost every state has redefined status jurisdiction through programs such as diversion, deinstitutionalization, or decriminalization.[53]

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45. 34 U.S.C. § 11101(a)(10).

46. § 11101(a)(10)(A)(ii). Programs focus on working with juveniles, their families, local agencies, and community-based organizations and take into consideration factors such as family violence. § 11101(a)(10)(A)(i).

47. § 11101(a)(10)(B). This track includes a system of graduated sanctions, restitution requirements, community service, and methods for "increasing victim satisfaction with respect to the penalties imposed on the juvenile for their acts." *Id.*

48. Feld, *supra* note 18, at 696 (emphasis added).

49. *Id.* at 697.

50. *Id.*

51. *Id.* (citing M. Chesney-Lind, *Girls and Status Offenses: Is Juvenile Justice Still Sexist?*, 20 CRIM. JUST. ABSTRACTS 144, 151–53 (1988)).

52. *Id.* at 697; *e.g.*, S.S. v. State, 299 A.2d 560, 568 (Me. 1973) (holding that a Maine statute providing juvenile court jurisdiction over youths "living in circumstances of manifest danger of falling into habits of vice or immorality" was unconstitutionally vague).

53. Feld, *supra* note 18, at 698–700. Examples of diversion programs offered include stet agreements, community service, education-based programs, deferred prosecution agreements, deferred sentencing agreements, and intervention programs such as mental health and drug programs. U.S. ATT'Y'S OFF., D.C., *Diversion Programs*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/diversion-programs [https://perma.cc/8YT2-MPNB] (last visited Mar. 4, 2023). Deinstitutionalization "refers to three procedures for reducing the number of incarcerated juveniles: (1) removal of inmates from secure institutions at a rate clearly greater than has normally occurred, (2) removal of juveniles from secure detention and temporary custody at a rate clearly greater than has normally occurred, and (3) preventing the placement in secure institutions, detention, and temporary custody of juveniles who normally would have been placed there in the past." Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST. 145, 150 (1979), https://www.jstor.org/stable/1147451 [https://perma.cc/E9T9-BATY]. The primary example of decriminalization in the juvenile justice system is the

While states reacted to court decisions in ways that expanded and improved the juvenile justice system, there were also some unintended consequences. Legislative, judicial, and administrative responses have modified the juvenile courts' jurisdiction, purpose, and procedures in the past two decades.[54] These modifications have produced a juvenile court system that "converge[s] procedurally and substantively with adult criminal courts."[55] One of the most notable and detrimental developments was the expansion of transfer processes, resulting in juvenile offenders being tried as adults. While *Kent*, *Gault*, and *McKeiver* established procedural guidelines that would keep many of these juvenile offenders firmly within the jurisdiction of the juvenile courts, state legislatures began establishing transfer provisions by statute.[56] These statutory provisions blatantly circumvented the protections established by the Court. For the most part, this exercise of legislative power went unchallenged.[57] The legislatures reasoned that because they created the juvenile courts in the first place, they could modify the juvenile court's jurisdiction as they pleased.[58]

C. Juvenile Transfer

One purpose of creating a separate system was to treat juvenile offenders differently than adult offenders by placing juveniles within the original jurisdiction of the juvenile courts. However, juveniles could be transferred from juvenile court to "adult" criminal courts if the presiding judge gave the accused some level of due process. The development of transfer provisions illustrates the "exceptions to the age boundaries of delinquency that permit or require jurisdiction of the criminal court, depending on the minor's age, history, or circumstances of the offense."[59] Methods of transferring cases between juvenile and criminal courts fall into two categories: juvenile court petitions and criminal court petitions.[60]

1. Juvenile Court Petitions

Juvenile court petitions are governed by statutes that specify when the juvenile court *may* or *must* waive its jurisdiction at a hearing before a minor can be tried as an adult.[61] Discretionary waiver specifies when the prosecutor can request a hearing to "prove that a particular matter should be prosecuted in (adult) criminal

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removal of status offenses from the definitions of delinquency. *See generally* Feld, *supra* note 18.

54. Feld, *supra* note 18, at 691.

55. *Id.* at 691–92.

56. *See* PUZZANCHERA ET AL., *supra* note 4, at 80.

57. For example, between 1992 and 1997, all but three states changed laws regarding juvenile transfer provisions, sentencing authority, and confidentiality. *See id.*

58. Feld, *supra* note 18, at 706.

59. *Jurisdictional Boundaries: Transfer Provisions*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/jurisdictional-boundaries#compare-transfer-provisions [https://perma.cc/47J6-5M6C] (last visited Sept. 10, 2022). Reverse waivers specify how and when the criminal court judge may or must waive its jurisdiction to send a minor's entire case to juvenile court for adjudication and or disposition. *Id.* As of 2016, there were 28 states that had statutes in place to determine principles of reverse waiver. *Id.*

60. *Id.*

61. *Id.*

court instead of the juvenile court."[62] Presumptive waivers specify age and offense combinations that the legislature considers appropriate for an adult criminal court trial or adult-level punishment.[63] However, these statutes allow the accused to present arguments that the matter should remain under the juvenile court's jurisdiction.[64] Direct or "mandatory" waiver statutes specify when the juvenile court must formally waive its jurisdiction and have the matter adjudicated in criminal court after qualifying conditions are met.[65] The prosecutor holds tremendous power in presumptive and direct waivers because the offense charged often dictates whether the statutes apply.[66]

2. Criminal Court Petitions

Criminal court petitions are governed by statutes permitting minors to face charges in criminal court without an initial filing in juvenile court or a decision from a juvenile court judge.[67] Concurrent jurisdiction or "direct file" statutes give juvenile and criminal courts "concurrent" jurisdiction over offenders within specific age and offense combinations.[68] Prosecutors have the sole discretion to file charges either in juvenile court or directly in criminal court.[69] The most severe transfer statutes are those in which the legislature has set conditions based on age and offense combinations that place a juvenile within the exclusive jurisdiction of the criminal

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62. *Id.* As of 2016, 46 states had a statute in place. *See, e.g.*, TEX. FAM. CODE ANN. § 54.02(a)(3) (explaining that discretionary transfer occurs "after a full investigation and a hearing, [and] the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings").

63. *Jurisdictional Boundaries: Transfer Provisions*, *supra* note 59. As of 2016, 12 states have a statute in place. *See, e.g.*, MINN. R. JUV. DELINQ. PROC. 18.06(A)–(C) (stating that "it is presumed that a child will be certified for action under the laws and court procedures controlling adult criminal violations if: (A) the child was sixteen (16) or seventeen (17) years old at the time of the offense; (B) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes, or a felony offense in which the child allegedly used a firearm; and (C) probable cause has been determined").

64. *Jurisdictional Boundaries: Transfer Provisions*, *supra* note 59.

65. *Id.* As of 2016, 13 states had statutes in place. *See, e.g.*, FLA. STAT. ANN. § 985.556(3)(a) (requiring involuntary mandatory waiver "if the child was 14 years of age or older, and if the child has been previously adjudicated delinquent for an act classified as a felony . . . and the child is currently charged with a second or subsequent violent crime against a person").

66. *See infra* Section III.A.

67. *Jurisdictional Boundaries: Transfer Provisions*, *supra* note 59. These statutes essentially place the matter within the original jurisdiction of the criminal court, and the accused is never seen by a juvenile court judge.

68. *See id.*

69. *Id.* As of 2016, 14 states have these statutes in place. *See, e.g.*, COLO. REV. STAT. ANN. § 19-2.5-801(1)(a)–(b) (allowing a juvenile to "be charged by the direct filing of an information in the district court or by indictment only if the juvenile is sixteen years of age or older at the time of the commission of the alleged offense and: (a) Is alleged to have committed a class 1 or class 2 felony; or (b) Is alleged to have committed a sexual assault that is a crime of violence").

court.[70] There are two common forms of these age/offense combination statues. First are "once an adult, always an adult" rules, which I will refer to here as "Once/Always" statutes. According to Once/Always statutes, a juvenile who has been convicted or had sanctions imposed by a criminal court will have *any* future delinquent allegations brought before the criminal court.[71] Second is statutory transfer, which involves excluding juvenile offenders with specific age and offense combinations from the juvenile courts and granting original jurisdiction over the matter to the criminal courts.[72]

Statutory transfer is particularly harmful to the purpose and effectiveness of the juvenile court system in rehabilitating young offenders. The legislature is the decision-maker, rather than judges or even prosecutors, by dictating who belongs within the scope of the transfer statutes. The legislature can utilize the transfer statutes to include or exclude individuals who would otherwise be considered delinquent and within the juvenile court's purview by limiting jurisdiction based on variables such as age and offense.

II. STATUTORY TRANSFER: "ADULT CRIME, ADULT TIME"

Today, in most states a juvenile court will have original jurisdiction over an individual who is 17 years old or younger;[73] however, over the years, age limits have generally fluctuated dramatically from mid-teens to mid-twenties.[74] Historically, the threshold for transitioning from childhood to adulthood has been determined by a person's "capacity[y] to perform the types of work required of a given time and place, to bear arms and fight on behalf of the state, and/or to form and support a family."[75] This legal age of majority "reflects a presumption that typical individuals of that age are 'mature enough to function in society as adults, to care for themselves, and to make their own self-interested decisions.'"[76] Modern research across several disciplines has demonstrated that "setting the age of majority at eighteen fails to . . . [consider] individual development [or] the time necessary to acquire the skills and abilities required for adulthood."[77] Social pressure and the advancement of scientific research regarding juvenile brain development have

70. *Jurisdictional Boundaries: Transfer Provisions*, *supra* note 59.

71. *Id.* As of 2016, 35 states had statutes in place. *See, e.g.*, WIS. STAT. ANN. § 938–183(1)(c) (stating that "courts of criminal jurisdiction have exclusive original jurisdiction over . . . [a] juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation over which the court of criminal jurisdiction had original jurisdiction").

72. *Jurisdictional Boundaries: Transfer Provisions*, *supra* note 59. As of 2016, 28 states had statutes in place. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-501 (outlining the various age and charge combinations by which "[t]he county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult").

73. PUZZANCHERA ET AL., *supra* note 4, at 87.

74. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 57 (2016).

75. *Id.*

76. *Id.* at 66 (quoting Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559 (2000)).

77. *Id.* at 57.

resulted in significant swings in attitude regarding juvenile offenders and how they fit in the criminal justice system.

A. The "Super-Predator" Myth

The widespread expansion of statutory transfer provisions began in the 1990s. In 1984, the overall homicide rate in the United States was 7.9 per 100,000 residents.[78] The rate increased to a peak of 9.8 per 100,000 in 1991.[79] This increase was attributed to juveniles (ages 14–17) and young adults (ages 18–24).[80] Generally, young adults consistently had the highest offending rate, which nearly doubled between 1985 and 1993 from 22.1 offenders per 100,000 young adults to nearly 43.1 offenders per 100,000 young adults.[81] In response, several influential criminologists predicted a coming wave of "radically impulsive, brutally remorseless . . . elementary school youngsters who pack guns instead of lunches" and who have "absolutely no respect for human life."[82] At the time, criminologist James Fox warned that "unless we act today, we're going to have a bloodbath when these kids grow up."[83] John DiIulio, a political science professor at Princeton, originally coined the term "super-predators" and suggested that "all chronically antisocial youths were hopelessly defective—perhaps even genetically."[84] DiIulio famously predicted that by 2010, there would be "an estimated 270,000 more young predators on the streets than in 1990."[85]

In addition to the hysterical rhetoric from criminology professionals, the media sensationalized the increase in criminal activity by highly publicizing the most heinous crimes committed by juvenile offenders.[86] Pressure from the media

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78. Brief for Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 9, Jackson v. Hobbs, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240 [hereinafter Fagan Amici] (citing Alexis Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980–2008*, U.S. DEP'T OF JUST.: PATTERNS & TRENDS 2 (Nov. 2011)).

79. Alexis Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980–2008*, U.S. DEP'T OF JUST.: PATTERS & TRENDS 2 (Nov. 2011), http://bjs ojp.gov/content/pub /pdf/htus8008.pdf [https://perma.cc/938N-GAG9].

80. Fagan Amici, *supra* note 78, at 9.

81. *Id.* at 4.

82. *The Super Predator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Mar. 2014), https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/8XVZ-DP8 H] (quoting N.Y. TIMES, *Retro Report: The Superpredator Scare*, YOUTUBE (Apr. 8, 2014), https://www.youtube.com/watch?v=YidALyBwat0 [https://perma.cc/N6ZG-C9R8]).

83. *Id.*

84. Fagan Amici, *supra* note 78, at 19 (citing Laurie Garrett, *Murder by Teens Has Soared Since '85*, N.Y. NEWSDAY (Feb. 18, 1995)).

85. *Id.* at 14.

86. *Id.* at 15; *see, e.g.*, John J. Goldman, *Central Park Jogger Tells of 'Wilding' Attack Injuries*, L.A. TIMES (July 17, 1990), https://www.latimes.com/archives/la-xpm-1990-07-17-mn-71-story.html [https://perma.cc/SHT6-SYTJ]; Mark Obmascik, *Columbine High School Shooting Leaves 15 Dead, 28 Hurt*, DENVER POST (Apr. 21, 1999), https://www.denverpost.com/1999/04/21/columbine-high-school-shooting/ [https://perma.cc /8DZS-YV3V]; Audrey Duff, *"We Get All Hyped Up. We Do a Drive-by.": A Report from the Front Lines of the San-Antonio Gang Wars*, TEX. MONTHLY (Oct. 1994), https://www.texasmonthly.com/true-crime/we-get-all-hyped-up-we-do-a-drive-by/ [https:// perma.cc/HM29-HXD6].

and local communities resulted in nearly every state passing legislation between 1992 and 1999 dramatically altering the treatment of juvenile defendants.[87] In that period, 45 states "adopted or modified laws that facilitated the prosecution of juveniles as adults in criminal court."[88] In tandem with targeting specific crimes for transfer, the state legislatures significantly decreased the age of offenders eligible for transfer.[89] At the federal level, Congress introduced numerous bills between 1995 and 1996 attempting to address the issue of juvenile crime.[90]

Ultimately, and rather unsurprisingly, the prophetic claims of juvenile chaos did not come to fruition. Violent juvenile crime dropped beginning in the 1990s and has since continued on that downward trajectory.[91] The rate of homicides committed by juvenile offenders illustrates this trend.[92] For example, the offending rate for teens increased from 10.4 offenders per 100,000 teens in 1985 to 30.7 offenders per 100,000 teens by 1993.[93] However, by 2000, the rate of teen homicide offenders stabilized at approximately 9.5 per 100,000 rather than increasing "three-fold," as DiIulio suggested.[94] Additionally, the average age of homicide offenders rose from 26.4 years in 1994 to 28.8 in 2008.[95] Data collected since then indicates that the decrease in overall juvenile crime was not due to incarceration effects.[96] For example, as the rate of juvenile crime decreased on a national level, between 1997 and 2007, "the states that decreased juvenile confinement rates most sharply (40

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87. Fagan Amici, *supra* note 78, at 15.

88. *Id.* at 16.

89. *See generally* PATRICK GRIFFIN ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 15 (Dec. 1998), https://www.ojp.gov/pdffiles/172836.pdf [https://perma.cc/NDN7-BU37]. For example, Idaho made it possible for a 14-year-old to be automatically transferred to criminal court for certain drug offenses. *Id.* at 9. A transfer statute in Vermont allowed for a 14-year-old to be tried as an adult for property crimes. *Id.* In Georgia, the minimum age for murder was 13 years old. *Id.* Finally, and most shockingly, in Mississippi, a 13-year-old could be charged with a capital crime. *Id.*

90. Fagan Amici, *supra* note 78, at 17. *See, e.g.*, Juvenile Justice and Delinquency Prevention Act of 1996, S. 1952, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, S. 1991, 104th Cong. (1996); Violent and Repeat Juvenile Offender Reform Act of 1996, S. 1854, 104th Cong. (1996); Balanced Juvenile Justice and Crime Prevention Act of 1996, H.R. 3445, 104th Cong. (1996); Violent and Hard-Core Juvenile Offender Reform Act of 1996, H.R. 3494, 104th Cong. (1996); Violent Youth Predator Act of 1996, H.R. 3565, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, H.R. 3698, 104th Cong. (1996); Juvenile Crime Control and Delinquency Prevention Act of 1996, H.R. 3876 104th Cong. (1996); Juvenile Crime Prevention and Reform Act of 1995, S. 1036, 104th Cong. (1995); Violent and Hard-Core Juvenile Offender Reform Act of 1995, S. 1245, 104th Cong. (1995).

91. Fagan Amici, *supra* note 78, at 21.

92. *Id.* at 21–22.

93. Cooper & Smith, *supra* note 79, at 4.

94. *Id.* ("Since 1993, the offending rate for 18 to 24 year-olds has declined to 24.6 offenders per 100,000 in 2008."); Fagan Amici, *supra* note 78, at 22.

95. Cooper & Smith, *supra* note 79, at 5.

96. Fagan Amici, *supra* note 78, at 30.

percent or more) saw a slightly greater decline in juvenile violent crime arrest rates than states that increased their youth confinement rates."[97]

The "super-predator" myth was also debunked by scientific evidence. Molecular genetics studies have revealed that genes "account for very little of the variation in violent behavior, except when interacting with *environmental* experiences such as physical maltreatment."[98] Since the "super-predator" myth has been thoroughly and unequivocally proven false, its creator—John DiIulio—has repudiated the idea and "expressed regret, acknowledging that the prediction was never fulfilled."[99] In the wake of the overwhelming rebuttal of the "super-predator" myth, many states began to roll back the 1990s-era reforms lowering the age of criminal culpability below the historical age of 18.[100]

B. Raise the Age Laws and the "Emerging Adult" Model

As a natural response to the complete failure of the "super-predator" concept, state legislatures began setting the age of culpability back to 18. Only three states—Georgia, Wisconsin, and Texas—do not have "Raise the Age" laws today.[101] Raise the Age laws set a higher age requirement for when the criminal courts can charge someone as an adult rather than a juvenile.[102] These laws significantly change how juveniles are treated in court and detention facilities.[103] The legislative response of passing Raise the Age laws illustrates that the majority of states focus on expanding rehabilitative opportunities for juvenile offenders, rather than strictly applying punitive measures.[104] Raise the Age reform has gained legitimacy through scientific research that identified significant differences between the brains of adults

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97. *See* Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, ANNIE E. CASEY FOUND. 26 (2011), https://assets.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf [https://perma.cc/6ESN-AANW].

98. Fagan Amici, *supra* note 78, at 19–20 (emphasis added) (citing Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCI. 851 (2002)).

99. *Id.* Professor DiIulio was a signatory of the Fagan Amici. *Id.*

100. *See infra* Section II.B.

101. Julia Vitale, *A Look at why Almost All States Have "Raise the Age" Laws,* INTERROGATING JUST. (July 22, 2021), https://interrogatingjustice.org/https-interrogatingjustice-org-governmental-accountability/a-look-at-why-almost-all-states-have-raise-the-age-laws/ [https://perma.cc/V3GX-WS28]. In Wisconsin, Georgia, and Texas, the cut-off age remains 16 years old. *Id.*

102. *See id.*

103. *Id.*

104. *Id.* The positive outcome cannot be overstated:

> One year after North Carolina raised their age from 16 to 18 years old, around 4,300 16- and 17-year-olds in the juvenile justice system were positively affected. . . . 24% of those youth were in community programs before appearing for a judge, a six percent increase from the year before. . . . [Connecticut] raised their cut-off age to 18, they have seen the lowest record numbers for youth in pretrial detention . . . [and] some of its lowest numbers for youth going to trials at their adult facility.

Id.

and those of younger individuals, affecting the younger individuals' ability to understand culpability.[105]

For example, the term "emerging adult" was coined in 2000 by psychologist Jeffrey Arnett.[106] Although there is no universally accepted definition for an "emerging adult" in the criminal justice context, it generally includes "individuals transitioning from childhood to adulthood, from the age of 18 to 25."[107] This age range is based on the scientifically supported theory that the human brain continues to develop well into a person's 20s.[108] Individuals at this critical stage of brain development react differently than "adults," particularly in "emotionally charged situations, especially around their peers."[109] These individuals tend to be "overly motivated by reward-seeking behavior, more susceptible to peer pressure, and more prone to risk-taking and impulsive behavior."[110] Under the right circumstances, these "childish" characteristics can culminate in problematic behavior potentially resulting in delinquent conduct.[111] Emerging adults' behavioral tendencies can play a critical role in individuals acting out criminally.[112] However, research shows that few youths involved in delinquent behavior continue such behavior into adulthood.[113] While juveniles may be more susceptible to acting out due to immaturity and irrational cognitive functions, juveniles' underdeveloped brains also make them more responsive to rehabilitation efforts.[114]

In 2005, the Supreme Court legitimized the difference in criminal culpability between children and adults in *Roper v. Simmons*.[115] Christopher Simmons was charged with murder when he was 17 years old.[116] Nine months later, Simmons turned 18.[117] He was tried as an adult, convicted, and sentenced to death.[118] In reviewing Simmons' habeas corpus petition, the Court found that sentencing an

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105. *See generally* Selene Siringil Perker & Lael Chester, *Emerging Adult Justice in Massachusetts*, HARV. KENNEDY SCH. MALCOLM WEINER CTR. FOR SOC. POL'Y (June 2017), https://scholar.harvard.edu/files/selenperker/files/emerging_adult_justice_issue_brief_final.pdf [https://perma.cc/8TTA-WZSL].

106. *Id.* at 1.

107. *Id.*

108. *Id.* at 3.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See generally id.*

113. *Id.*

114. *Id.* A 2016 Intervention program conducted in Massachusetts found that 87% of emerging adult participants involved with Roca Inc.'s 24-month intensive support program had no new arrests, and 88% retained employment for six months or more. *Id.* Similarly, 83% of youth who completed United Teen Equality Center ("UTEC") programming in 2014 had no new arrests within two years after leaving UTEC, and 82% remained employed. *Id.* UTEC is a community center established in 1999 that provides various programs to at-risk teens "to trade violence and poverty for social and economic success." UTEC, https://utecinc.org/ [https://perma.cc/M9FC-WJ3Y] (last visited Feb. 3, 2024).

115. 543 U.S. 551, 555 (2005).

116. *Id.* at 556.

117. *Id.*

118. *Id.*

adolescent to death violated the Eighth Amendment's prohibition against cruel and unusual punishment.[119] The Court identified three differences between adults and juveniles that justified its refusal to apply the death penalty.[120] First, scientific and sociological studies confirmed that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . qualities [that] often result in impetuous and ill-considered actions and decisions."[121] Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[122] Finally, the Court recognized that juveniles are not as developed as adults.[123] The Court concluded that, due to these unalienable youthful characteristics, juveniles cannot properly be categorized as "the worst offenders."[124] The Court reasoned that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[125]

Ultimately, by the mid-2000s, scientists and the court system had regained much of the ground lost during the pandemonium of the 1990s. Scientific studies identified concepts such as the "emerging adult" and conducted physical examinations on children to highlight the mental and physical differences between juveniles and adults.[126] Armed with this material, criminal courts showed a willingness to accept that children are incapable of an adult-level understanding of criminal culpability.[127] While states began to rebound from the damage done in the 1990s, all the states supporting Raise the Age agendas balked at increasing the age of juvenile delinquency above 17 years old.[128] Until, that is, the Vermont legislature passed Bill S. 97 in 2021.

III. VERMONT PAVES THE WAY(?)

A. Beyond Eighteen

On June 7, 2021, Vermont Governor Phil Scott signed Bill S. 97 ("Act 65").[129] The document is innocuously titled "[a]n act relating to miscellaneous judiciary procedures" and amends, among other things, sections 5103 and 5204 of the Vermont Statutes Annotated.[130] Section 5103 governs the jurisdiction of the

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119. *Id.* at 553.
120. *Id.* at 569.
121. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); *see also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective,* 12 DEV. REV. 339, 339, 343–44 (1992) (noting that "adolescents are overrepresented statistically in virtually every category of reckless behavior").
122. *Roper*, 543 U.S. at 569.
123. *Id.* at 570 (citing E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).
124. *Id.* at 569.
125. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).
126. *See supra* Section II.B.
127. *See supra* Section II.B.
128. *See supra* Part II; PUZZANCHERA ET AL., *supra* note 4, at 87.
129. *See generally* S. 97, 2021–2022 Leg., Reg. Sess. (Vt. 2021) (enacted) https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT065/ACT065%20As%20Enacted.pdf [https://perma.cc/9RV9-QZQ6].
130. S. 97 §§ 13–16.

Family Division of the Superior Court.[131] This statute says that generally, the jurisdiction of the Family Division "shall not be extended beyond the child's 18th birthday."[132] However, jurisdiction "over a child with a delinquency may be extended until six months beyond the child's 19th birthday if the child was 16 or 17 years of age when [they] committed the offense; or 20th birthday if the child was 18 years of age when [they] committed the offense."[133]

The statute includes a third exception, effective July 1, 2023, where "jurisdiction over a child with a delinquency may be extended six months beyond the child's 21st birthday if the child was *19 years of age* when [they] committed the offense."[134] Section 5204 governs the "[t]ransfer from Family Division of the Superior Court."[135] This statute was also amended so the Family Division would have jurisdiction over an adult defendant for a crime committed when the defendant was 19 years old.[136]

1. Operations Plan

Preparation for these legislative changes began in 2019 when the Vermont legislature received a report from various progressive justice groups and state agencies involved in juvenile adjudication.[137] The Vermont Department for Children and Families ("DCF") produced the report with the Columbia Justice Lab.[138] The report outlined an "Operations Plan" the State would implement, making Vermont the first state in the country to raise the upper age of juvenile jurisdiction past age 18.[139]

The legislation would produce two critical results. First, most youths accused of committing a crime at the age of 19 would be included in the juvenile justice system.[140] As a result, the state's upper age of juvenile jurisdiction becomes the juvenile's 20th birthday.[141] Second, most juvenile defendants would be prosecuted in the Family Division of the Superior Court instead of the Criminal Division, with DCF providing supervision and coordination of services rather than the Department of Corrections ("DOC").[142] The report continued by recommending

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131. VT. STAT. ANN. tit. 33, § 5103.

132. § 5103(c)(1).

133. §§ 5103(c)(2)(A)(i)–(ii); *See also* S. 97, § 15 (removing "pending" delinquency from section 5103(c)(2)(A)).

134. S. 97 § 15 (emphasis added).

135. VT. STAT. ANN. tit. 33, § 5204.

136. § 5204(a); *see also* S. 97, §16 (statute amended replacing "18" with "19").

137. *See generally* Karen Vastine et al., *Act 201 Implementation Plan Report & Recommendations*, VT. AGENCY HUM. SERVS.: DEP'T. FOR CHILD. & FAMS. (Nov. 1, 2019), https://static1.squarespace.com/static/5c6458c07788975dfd586d90/t/5dd2ebfce2b1425d33ae1ef1/1574104062934/Vermont-RTA-DCF-Report-Final_EAJP.pdf [https://perma.cc/WCT8-B8UX].

138. *Id.* at 1.

139. *Id.*

140. *See supra* Section III.A.

141. Vastine et al., *supra* note 137, at 1.

142. *Id.*

three key strategies to secure a smooth implementation of legislation to include 18- and 19-year-old defendants in Vermont's juvenile justice system.[143]

The first strategy was to "[i]ncrease opportunities to divert cases from formal justice processing."[144] When the report was published, diversion in Vermont, like many other states, occurred both informally and formally.[145] Informal diversion occurs when a law enforcement officer or prosecutor utilizes discretion in resolving a particular case without referring the juvenile to any particular diversion program.[146] Formal diversion proceeds through referral to specific programs before or after charges are filed in court.[147]

The report provides detailed recommendations to better utilize these diversion programs, relieve stress on the juvenile courts, and ensure state resources are used efficiently.[148] The first recommendation included establishing an "Agency of Education to collaborate on the schools' role for overseeing and providing guidance on school-based issues so issues are handled internally."[149] The second recommendation included outreach to law enforcement "regarding increasing training and support for schools and police."[150] The third recommendation was to "[i]ncrease the use of pre-charge diversion for youth at [Community-Based Restorative Justice programs], with the four-year goal of diverting 50–60% of cases pre-charge."[151] The final recommendation was to "[e]xpand and refine the Family Division's diversion programs, with the four-year goal of diverting an additional 25–30% of cases premerits."[152]

The report's second recommended strategy was to "[m]aximiz[e] the efficiency of the court process."[153] When the report was made, cases in the Family Division could take more than 60 days to resolve.[154] Congestion in the Family Division docket would only increase as the number of juveniles falling within its jurisdiction increased upon enacting Act 65. As the report noted, for intervention to be "a developmentally appropriate response for emerging adults . . . [l]ong case lengths [would] make it more challenging to provide meaningful interventions for

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143. *Id.* at 6–21.

144. *Id.* at 16.

145. *Id.* at 17.

146. *Id.* "Informal diversion pre-charge can include everything from a police officer sending a young person home or calling a parent, to a State's Attorney ("SA") deciding after a preliminary investigation not to file charges." *Id.*

147. *Id.* at 17–18. Pre-charge programs include 1) 20 Community Justice Centers located across the state and funded by the DOC, or 2) 11 Balanced and Restorative Justice Programs funded by the DCF. There are currently 14 post-charge diversion ("Court Diversion") programs in Vermont. Court Diversion programs are created by statute and funded by the Attorney General, client fees, and local financial support. *Id.*

148. *Id.* at 20.

149. *Id.* Implementation by February or March of 2020. *Id.*

150. *Id.* Implementation by February or March of 2020 and completion of training by December 2021. *Id.*

151. *Id.* Benchmark set for December 2023. *Id.*

152. *Id.* Benchmark set for December 2023. *Id.*

153. *Id.* at 16–21.

154. *Id.* at 21.

the charged youth."[155] The report offered two recommendations to increase the Family Division's efficiency in preparation for the increased caseload.[156] The first recommendation was adjusting the juvenile court's timeline so that the time between the preliminary hearing and disposition was 45 days.[157] The second recommendation was the general improvement of case processing, resulting in cases progressing through the juvenile courts as quickly as possible.[158]

The report's final strategy involved "[e]nsuring a full continuum of post-dispositional options."[159] When the report was published, most delinquency cases that reached the post-merits stage in the Family Division received Probation Certificates, which placed the individual under the supervision of DCF, sometimes for extended periods.[160] Therefore, the concern was that if the age of eligibility for delinquency were increased to 19 years old, DCF would also be overwhelmed by an unmanageable caseload.[161] The report recommended utilizing or implementing an array of post-disposition options in order to relieve DCF of some of the increased caseload. This recommendation also had the additional benefit of providing juveniles with a greater spectrum of rehabilitative services that may better serve their particular needs.[162] Although the report produced by DCF and the Columbia Justice Lab proposed detailed recommendations that would streamline the implementation of the new legislation, these strategies have yet to be utilized.

2. "Pause"

In October of 2021, Governor Scott stressed the necessity to "pause" implementation of the statute that would extend juvenile delinquency status to 19-year-old defendants.[163] The administration stressed that programs and services should be in place *before* the statute became effective to manage the influx of cases.[164] Jaye Pershing Johnson, Governor Scott's general counsel, stated the administration "would support proposals which push back the statutory 'raise the age' triggers until such time as we have the systems, included data systems, services and programs in place to not only address the need of the offenders we are attempting to help, but also consider the needs of the victims and the health and safety of our communities."[165]

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155. *Id.*

156. *See id.*

157. *Id.* Two pilot programs in two counties were set up to experiment with the new program, which would be expanded by January 1, 2021, in the event of success. *Id.* at 22.

158. *Id.* Implementation would be immediate, focusing on improving "the use of non-court time to manage schedules and reach case resolution by [a]dding required (pre-trial) case conference where the parties confer on case." *Id.*

159. *Id.* at 16–21.

160. *Id.* at 22.

161. *Id.*

162. *Id.*

163. Alan J. Keays, *Scott Administration Seeks to Slow Down Raise the Age Initiative*, VTDIGGER (Oct. 10, 2021, 8:42 AM), https://vtdigger.org/2021/10/10/scott-administration-seeks-to-slow-down-raise-the-age-initiative/ [https://perma.cc/2TCN-3ZVC].

164. *Id.*

165. *Id.*

The DCF commissioner, Sean Brown, testified before the State Judiciary Committee regarding the statute's implementation. Brown reiterated concerns about the availability of programs and services to support the additional cases, especially considering that the court system as a whole was still recovering from the COVID-19 pandemic.[166] However, others in the legislature pushed back against these doubts. Senator Jeannette White stressed that delays in implementing the statute should come with a new "trigger date."[167] White stressed that waiting until resources are available risks indefinite delay because "[w]e never have enough resources."[168]

The Vermont Senate Judiciary Committee voted to pause the effective date of Act 65, expanding juvenile jurisdiction to 19-year-old defendants.[169] The Committee amended the statutes to become effective July 1, 2023.[170] The decision was reached based on two concerns.[171] First, the legislature was concerned about the lack of DCF resources and available rehabilitative programs to accommodate the additional juveniles.[172] Second, the Judiciary Committee expressed concern about an alleged increase in gang violence and young offenders coming from other states to commit crimes in Vermont to take advantage of the State's more lenient juvenile laws.[173]

Ultimately, the legislative doubts over available resources and programs were two significant issues with Vermont's Raise the Age initiative. The legislature's decision to defer the enactment of Act 65 placed charging discretion back in the hands of prosecutors.[174] Bennington County Attorney Erica Marthage stressed that state attorneys neither supported nor opposed the Raise the Age initiative but emphasized the need for prosecutorial discretion to decide which cases were tried.[175] Marthage stressed, "[y]ou can't judge a book by its cover by saying that this kid committed this offense, so he needs to be put in this or that box."[176] Marthage reinforced that "[s]ome of those cases belong in criminal court . . . some of those cases are affiliated with gang-related activities. Some involve violence and weapons. Not everyone who is violent has a mental illness. Not everyone who commits violence has had a bad childhood."[177] However, exceptions for transferring juveniles who commit specific offenses within the Statute still impede the

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166. *Id.*
167. *Id.*
168. *Id.*
169. Michael Albans, *Pause on Raise the Age Law Passes Senate*, BENNINGTON BANNER (Jan. 28, 2022), https://www.benningtonbanner.com/local-news/pause-on-raise-the-age-law-passes-senate/article_60767220-807d-11ec-b634-f7486a1d0528.html#:~:text=In%202020%2C%20Vermont%20became%20the,crimes%20they%20are%20charged%20with [https://perma.cc/P45M-P7SW].
170. S. 224, 2021–2022 Leg., Reg. Sess., at 24 (Vt. 2022), https://legislature.vermont.gov/Documents/2022/Docs/BILLS/S-0224/S0224%20As%20Passed%20by20Both%20House%20and%20Senate%20Official.pdf [https://perma.cc/5NC8-XPCQ].
171. *Id.*
172. Keays, *supra* note 163.
173. Albans, *supra* note 169.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*

prosecutor's ability to exercise discretion and the Statute's ability to make genuine and lasting changes to the juvenile justice system.

B. Caution: The "Big-12" Remains

Section 5204 of the Vermont Statutes Annotated governs the transfer of juvenile defendants from the Family Division of the Superior Court to the Criminal Division.[178] The statute outlines 12 specific crimes commonly referred to as the "Big 12": (1) arson causing death; (2) assault and robbery with a dangerous weapon; (3) assault and robbery causing bodily injury; (4) aggravated assault; (5) murder; (6) manslaughter; (7) kidnapping; (8) unlawful restraint; (9) maiming; (10) sexual assault; (11) aggravated sexual assault; and (12) burglary into an occupied dwelling.[179] If a defendant is accused of committing one of the Big 12 crimes, the Family Division may transfer jurisdiction to the Criminal Division upon motion of the state's attorney and after a hearing.[180]

A transfer may be appropriate if the child is at least 16 years old at the time of a non-Big 12 offense or if the child is between 12 and 14 years old when committing one of the Big 12 offenses.[181] In determining whether a transfer is appropriate, the court may consider several factors including the maturity of the child, the extent of the child's prior record, past treatment efforts (including mental health and substance abuse treatments), nature of the offense, potential injury to victims resulting from or intended to be caused by the offense, and the child's connection to the community.[182]

The Vermont legislature passed H.95 in 2016, which amended § 5201, a statute that governs the "[c]ommencement of delinquency proceedings."[183] The Act added two sections that had significant effects on traditional transfer provisions. First, subsection (d) dictates that "[a]ny proceeding concerning a child who is alleged to have committed a misdemeanor offense before attaining 17 years of age shall originate in the Family Division of the Superior Court."[184] The second provision, subsection (e), mandates that "[a]ny proceeding concerning a child who is alleged to have committed a felony offense other than [a Big 12 offense] before attaining 17 years of age shall originate in the Family Division of the Superior Court provided that jurisdiction may be transferred in accordance with this chapter."[185]

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178. VT. STAT. ANN. tit. 33, §§ 5204(a)(1)–(12).

179. *Id.* Statutes for each individual crime in ascending order: (1) VT. STAT. ANN. tit 13, § 501; (2) § 608(b); (3) § 608(c); (4) § 1024; (5) §§ 2301 or 2311; (6) § 2304; (7) § 2405; (8) §§ 2406 or 2407; (9) § 2701; (10) §§ 3252(a)(1) or (a)(2); (11) § 3253; (12) § 1201(c).

180. VT. STAT. ANN. tit. 33, § 5204(a). In determining whether the transfer is appropriate, the Family Division makes a probable cause determination and consideration as to whether public safety and the interests of the community would not be served by retaining jurisdiction within the Family Division. §§ 5204(c)(1)–(2).

181. § 5204(a).

182. §§ 5204(d)(1)–(13).

183. H. 95, 2016–2017 Legis., Reg. Sess., at 9 (Vt. 2016), https://legislature.vermont.gov/Documents/2016/Docs/ACTS/ACT153/ACT153%20As%20Enacted.pdf [https://perma.cc/TD9A-ZATK].

184. *Id.* at 9.

185. *Id.*

These two provisions require a Family Division judge to decide whether a juvenile should be transferred; therefore, prosecutors are denied the opportunity to file in the Criminal Division or rely on mandatory transfer provisions.

The implication of keeping the Big 12 crimes available for presumptive transfer to the Criminal Division indicates the legislature's intent to preserve adult punishment for the most "heinous" crimes. However, punishing particularly violent crimes invariably punishes the children most likely to have been seriously victimized by society. As Erica Marthage said, "[y]ou don't magically become an adult when you turn 18 . . . the 12-year-old [in juvenile court] that maybe was neglected as a kid, then turned into a delinquent kid, all tied to their lack of community support, their lack of role models, [and] unstable housing."[186] Additionally, as supported by the emerging adult research conducted over the years, it does not make sense to preserve age-based distinctions between different crimes because children are less capable of understanding criminal culpability in general, never mind distinguishing between the enhanced criminal consequences of certain crimes, some of which are not inherently violent.[187]

The failure of charging children based solely on the nature of the alleged crime has been illustrated by Ashley Nellis, a senior research analyst with The Sentencing Project. Nellis conducted a national survey in 2012 that included 1,579 people serving life sentences without the possibility of parole ("LWOP").[188] Nellis received responses from the majority of states as well as federal facilities housing juveniles serving life sentences without the possibility of parole.[189] Respondents had been in prison for an average of 15 years.[190] The survey prompted participants to discuss their upbringings.[191] The questionnaire revealed that respondents "experienced highly elevated levels of poverty, abuse, exposure to community violence, and familial incarceration, and were frequently raised in homes with few adult guardians."[192]

Before incarceration, approximately one in three respondents reported living in public housing.[193] Almost all (93.36%) of the respondents who lived in public housing before incarceration were youth of color.[194] While 82.1% of respondents reported they were living with at least one close adult relative in the home before their incarceration, for nearly 60% of these respondents, it was a single-

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186. Albans, *supra* note 169.

187. *See generally* Perker & Chester, *supra* note 105.

188. *See generally* Ashley Nellis, *The Lives of Juvenile Lifers*, SENT'G PROJECT (Mar. 2012) [hereinafter Nellis, *Lives of Juvenile Lifers*], https://web.archive.org/web/20150322080416/http://sentencingproject.org/doc/publications/publications/jj_The_Lives_of_Juvenile_Lifers.pdf [https://perma.cc/6NE2-7HUN].

189. *Id.* at 7. There was a 68.4% response rate that resulted in 1,579 individuals participating in the study. *Id.*

190. *Id.*

191. *See generally id.*

192. *Id.* at 9.

193. *Id.* "[I]n Alabama 43.6% of respondents were living in public housing, as were 39.7% of respondents in North Carolina." *Id.*

194. *Id.*

parent home.[195] Further, 17.9% of the respondents reported being homeless, living with friends, or being housed in a detention facility or group home.[196] Much of this household instability can be attributed to incarceration breaking up family units.[197] In 2007, 1.7 million children had at least one parent in prison, and 70% of those same children were non-white.[198] In the study conducted by Nellis, more than a quarter of respondents reported having a parent in prison, and 59.1% had a close relative in prison.[199] Children whose parents are removed due to incarceration are often removed from their homes to live with relatives or child welfare agencies. Often, the children ultimately become homeless.[200] Parental incarceration is often associated with emotional and behavioral problems among children, including elevated aggression, violence, defiance, cognitive and developmental delays, and extreme antisocial behavior.[201]

In addition to unstable or unavailable housing, respondents also reported high levels of physical and sexual abuse.[202] Exposure to violence is an essential factor when considering a juvenile's potential propensity for delinquency because violence can become a learned behavior: "[W]hen [violence] is demonstrated by adults in a home environment as a tool to resolve problems, children internalize this and, without intervention, are prone to repeat it."[203] Respondents were not only exposed to violence inside the home: 62.8% of the respondents thought their neighborhood was unsafe, and more than two-thirds witnessed drugs being sold openly where they lived.[204]

The last major factor Nellis reviewed was respondents' experiences with school and friends. Less than half (46.6%) of respondents were attending school when they committed the offense for which they received life sentences.[205] Respondents also stated that some (43.1%) or most (40.4%) of their friends had been

195. *Id.* ("[F]ewer than one and four [respondents] lived with both parents.").

196. *Id.* ("[2.2%] of juvenile lifers were living in foster care.").

197. *Id.* at 12.

198. *Id.* (citing Sarah Schirmer et al., *Incarcerated Parents and Their Children: Trends 1991–2007*, SENT'G PROJECT (Feb. 2009), https://search.issuelab.org/resourceincarcerated-parents-and-their-children-trends-1991-2007.html).

199. *Id.*

200. *Id.*

201. *Id.* (citing Terry-Ann L. Craigie, *The Effect of Paternal Incarceration on Early Child Behavioral Problems: A Racial Comparison*, 9 J. ETHNICITY CRIM. JUST. 179 (2011)).

202. *Id.* at 10. Of respondents, 79% witnessed violence in their homes, 46% experienced physical abuse, and one in five lifers, mostly girls, reported sexual abuse. *Id; see also* David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Oct. 2009) https://www.ojp.gov/pdffiles1/ojjdp/227744.pdf [https://perma.cc/5PCB-F4DZ] (estimating that one in 16 young people in the public experiences sexual abuse).

203. Nellis, *Lives of Juvenile Lifers*, *supra* note 188, at 10 (citing Cathy Spatz Widom, *Child Abuse, Neglect, & Violent Criminal Behavior*, NAT'L INST. JUST. 251–71 (1989)).

204. *Id.* at 11 fig.1 (stating that more than half (54.1%) of respondents witnessed acts of violence at least weekly).

205. *Id.* at 13. Nearly all the respondents (84.4%) had been suspended or expelled at some point. *Id.*

in trouble with the law.[206] This social factor illustrates that peer influences can significantly predict the likelihood of later contact with the criminal justice system.[207] Negative social influence may result in multiple suspensions from school or eventually, expulsion.[208] Lack of school attendance decreases adult supervision and increases the child's contact with other children who may be prone to delinquent behavior.[209] Therefore, it is reasonable to conclude that children have a better chance of avoiding contact with the law if they associate with other law-abiding children and stay in school.

The individuals included in the study were only those who had committed a crime so heinous in the eyes of the law that they deserved the severe punishment of LWOP.[210] Thus, Nellis's study illustrates that children committing serious crimes are more likely to suffer from extenuating and extreme social, emotional, physical, and economic hardship than their "law-abiding" counterparts.[211] The Vermont statute embraces advanced scientific knowledge that children are physiologically different from adults and should be treated as such.[212]

However, by retaining statutory transfer for the Big 12 crimes, Vermont has failed to appreciate statistics such as those presented in Nellis's study. As a result, Vermont cannot be truly progressive and meaningfully committed to reform if it ignores the personal histories of each juvenile committing an offense, including the Big 12 crimes.[213] The most practical way to embrace these statistics and effect change is to place the decision back in the prosecutor's hands.[214] As the Statute is written, the Big 12 crimes mandate that juvenile offenders be automatically transferred to criminal courts.[215] However, if the legislation placed the decision with prosecutors, they could review the accused's complete record, including the nature of the crime, prior criminal history, and the individual's background.[216] With this information, the prosecutor would be better equipped to decide whether the individual should be tried as an adult.

Prosecutors may decide that a particular defendant's circumstances indicate that, even for a Big 12 crime, the individual's circumstances warrant keeping the case within the juvenile system.[217] Therefore, the defendant would remain eligible for more diverse and immersive rehabilitative services. Not every child who commits a serious crime is "harmless"; some should be charged as adults and incarcerated accordingly because they pose a legitimate and continuing risk of harm to the public. However, every child who commits a crime deserves to have

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206. *Id.*
207. *Id.*
208. *See id.*
209. *See id.*
210. *Id.* at 7.
211. *Id.* at 13.
212. *See* Vastine et al., *supra* note 137, at 3–5.
213. Albans, *supra* note 169.
214. *Id.*
215. VT. STAT. ANN. tit. 33, § 5204(a)(1)–(12).
216. *See* Nellis, *Lives of Juvenile Lifers*, *supra* note 188 (outlining factors such as economic status, incarceration of parents, school attendance, etc.).
217. *Id.* at 6.

their case thoroughly examined and carefully considered before such measures are taken. Statutory exclusion removes this power from prosecutors and ignores the plight of the most vulnerable people in our population.[218]

IV. POTENTIAL NATIONAL APPLICATION OR LEGISLATIVE FLUKE?

Although there are some significant drawbacks to Vermont's 2021 delinquency status legislation, ultimately it is a step in the right direction for juvenile justice. Vermont concedes that individuals do not develop the capacity to understand adult culpability until their mid-20s and that children would benefit significantly from rehabilitative opportunities instead of incarceration. This Part considers whether the legislation passed in Vermont could serve as a model for other states to raise the age of juvenile delinquency, or whether it is simply an anomaly attributed to Vermont's particular characteristics. Vermont's demographics can be compared to other states' to determine whether this legislative reform will stand alone as an outlier. Texas is an interesting comparison because its population size, demographics, political affiliations, and the role private prisons play in its criminal justice system are distinct from Vermont's.

A. Vermont vs. Texas

1. Racial Demographics

Overall, Vermont could not comfortably be characterized as a heterogeneous racial population. According to the 2022 national census, Vermont reported a population of 647,110 people.[219] Of this population, 92% reported as "white alone, not Hispanic or Latino," 1.5% reported as "black or African American alone," 2.2% reported as "Hispanic or Latino," and 2% reported as "Asian alone."[220] In addition to a significant disproportion in racial demographics, the age distribution in Vermont is also significant. Only 18.1% of the population is under the age of 18, and only 4.4% are under 5.[221] This suggests that individuals who would typically be

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218. It is extremely unlikely that states will ever completely abolish the Big 12 from the statutes that govern juvenile transfer provisions. However, the impact of these transfers may be significantly lessened if some of these charges were removed. Rather than the Big 12, there could be, for example, the "Big-6." Serious violent crimes such as murder, rape, and assault with a deadly weapon would be included to protect the community from juveniles that legitimately pose a legitimate threat. Retaining violent crimes would satiate political demands that public figures be "tough on crime." Ultimately, these violent crimes would only encompass a very small percentage of juvenile defendants. Crimes involving property, burglary, and sexual misconduct could be removed. These crimes are particularly illustrative of the effects of a juvenile's naivete or pure hormonal drive. Omitting these crimes would acknowledge the limitations of juvenile culpability and significantly reduce the number of juveniles who are still transferred to the criminal system.

219. *Quick Facts: Vermont*, U.S. CENSUS BUREAU [hereinafter Census: Vermont 2022], https://www.census.gov/quickfacts/VT [https://perma.cc/DDF3-NBQX] (last visited Jan. 7, 2023).

220. *Id.*

221. *Id.*

considered "juveniles" under most legal definitions only comprise 13.7% of Vermont's population.[222]

Compare these numbers with larger states characterized as more demographically heterogeneous. For example, with a population of 30,029,572, Texas is roughly 46 times the size of Vermont.[223] Texas also boasts a more diverse racial demographic compared to its northern counterpart: 40.3% reported as "white alone, not Hispanic or Latino," 13.2% reported as "Black or African American alone," 40.2% reported as "Hispanic or Latino," and 5.5% reported as "Asian alone."[224] Along the same trend, Texas reported a higher number of individuals under the age of 18 (25.3%) and number of individuals under the age of five (6.5%).[225] Therefore, the estimated percentage of "juveniles" in the population under the traditional definition in Texas is 18.8%.[226]

Texas's greater diversity in race and age indicates that raising the age of delinquency above 18 may be more challenging there than in Vermont. In Vermont, there was concern regarding implementing the new statute when considering the infrastructure available to accommodate a significant influx of individuals who qualified for rehabilitative social services instead of incarceration.[227] Those concerns may be even more considerable in a state with a significantly higher number of individuals who can be considered a "juvenile" under traditional standards.[228] In addition to the difference between Vermont's and Texas's age and racial demographics, the states' respective incarceration rates also illustrate how Texas may not be situated for such legislative reform.

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222. *Id.* (subtracting 4.4% of the population of Vermont who are under the age of 5 from the percent under the age of 18, assuming that individuals under the age of 5 generally are not committing crimes). This number is likely inflated as Vermont only transfers children to adult court if they are 16–19 years old and charged with a felony or if they are 12–14 years old and charged with a "Big 12" offense. *Age Matrix: Vermont*, INTERSTATE COMM'N FOR JUVS., https://juvenilecompact.org/age-matrix [https://perma.cc/72TA-A6B4] (last visited Oct. 22, 2023).

223. Dividing 30,029,572 by 647,064 to roughly estimate the difference in size between Texas and Vermont.

224. *Quick Facts: Texas,* U.S. CENSUS BUREAU [hereinafter Census: Texas 2022], https://www.census.gov/quickfacts/fact/table/TX/PST045222 [https://perma.cc/W6V2-3CV3] (last visited Jan. 7, 2023).

225. *Id.*

226. *Id.* (subtracting 6.5% of the population of Texas that are under the age of five from the percent under the age of 18, assuming that individuals under the age of five generally are not committing crimes). This number is slightly inflated as Texas only prosecutes individuals as young as ten, but there are no individualized statistics identifying the number of individuals in Texas between the ages of six to nine. *See generally* TEX. FAM. CODE. ANN. § 54.02.

227. *See generally supra* Section III.A.

228. *See* Census: Vermont 2022, *supra* note 219. The percentage of Vermont's population that is eligible for delinquency status is 13.7%, whereas the population of Texas that may be considered delinquent is 18.8%.

2. The Business of Incarceration

Understanding the feasibility of a state such as Texas passing legislation similar to Vermont's "Raise the Age" initiative requires considering the role of prisons and incarceration rates. By the end of 2020, the United States held 1,215,800 people in either a state or federal prison.[229] There was a 15% decrease in persons incarcerated between 2019 and 2020.[230] Notably, Vermont was one of nine states whose state (as opposed to federal) prison populations decreased by more than 20%.[231] In addition, Texas reported a 14.2% decrease in incarcerated persons and was one of three jurisdictions with the largest "absolute decrease in the number of persons imprisoned in their correctional systems."[232]

In 1997, the National Institute of Corrections completed an annual study of the incarceration rates in all 50 states.[233] Vermont is one of six states with a unified corrections system,[234] which organizes the state-level prison and jail systems into one controlling system.[235] Up until 1975, Vermont had county jails.[236] Vermont unified its corrections system primarily as the result of a contractual arrangement with the U.S. Bureau of Prisons to house 40 of Vermont's most dangerous inmates.[237] Today, there are 14 counties and six facilities.[238] Within these six facilities, there are 1,284 inmates and 1,018 staff.[239] Vermont has allocated $168.7 million of its annual budget to the maintenance and staffing of these facilities.[240]

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229. E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2020 – STATISTICAL TABLES 7 (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/p20st.pdf [https://perma.cc/K72C-7BYV]. The 2020 statistics for prison population are used to compare with the most up-to-date information collected on incarceration rates in each state, which is also from 2020. *Id.*

230. *Id.*

231. *Id.* at 7–8. Vermont decreased its state-level prison population by 20.1% and is joined by New Jersey (31.1%), Connecticut (25.5%), Illinois (22.3%), North Dakota (21.9%), Maine (21.6%), New York (21.5%), Hawaii (21.0%), California (20.7%). *Id.*

232. *Id.* at 8–9. Texas decreased its absolute number of persons imprisoned by 22,500. The Department of Prisons reduced its absolute number of persons imprisoned by 23,000, and California had the largest reduction of the absolute number of persons imprisoned by 25,400. *Id.*

233. *See generally* NAT'L INST. OF CORRS., *A Review of the Jail Function Within State Unified Corrections Systems*, U.S. DEP'T OF JUST., 2 (Sept. 1997), https://static.prisonpolicy.org/scans/nic/014024.pdf [https://perma.cc/53PT-4M49].

234. *Id.* Other states with a unified corrections system include Alaska, Connecticut, Delaware, Hawaii, and Rhode Island. *Id.*

235. *Id.*

236. *Id.* at 20.

237. *Id.* at 18. Vermont consolidated its prisons and jails under one administration in order to both "facilitate the state's agreement with the Bureau of Prisons and act on a 'Yankee impulse' to eliminate bureaucratic levels." *Id.*

238. NAT'L INST. CORRECTIONS, *Vermont 2020*, U.S. DEP'T OF JUST., https://nicic.gov/state-statistics/2020/vermont-2020 [https://perma.cc/745T-T7WQ] (last visited Jan. 23, 2023).

239. *Id.* The community corrections population of Vermont includes 3,125 individuals under probation and 909 on parole.

240. *Id.*

Texas has not implemented a unified corrections system.[241] In 2020, the National Institute of Corrections reported 252 jails in the 254 Texas counties, which housed 69,610 people.[242] Additionally, there are 64 Texas state prisons with a population of 135,906 people.[243] These state-operated facilities were staffed with 26,688 people with an annual budget of $3.4 billion.[244] Most importantly, the incarceration rate in Texas is 455 per 100,000 residents, which is significantly higher than Vermont's 146 per 100,000.[245] One primary difference between the corrections systems in Texas and Vermont is the number of facilities built, managed, and staffed by private companies within the state.[246] In Texas, there are now four privately owned correctional centers.[247] Before removing three facilities, the private correctional centers had 4,618 beds for both female and male inmates.[248] In addition to the four private prison facilities, Texas has three privately owned jail facilities and one "multi-use" facility, providing a total of 6,316 beds for both male and female inmates.[249]

The impact of the corrections systems in either Vermont or Texas cannot be appropriately addressed without acknowledging the intersection of race and incarceration rate. It is well-established that people of color are overrepresented in the prison population.[250] A report by The Sentencing Project found that Black individuals were incarcerated in state prisons at almost five times the rate of their

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241. *See* NAT'L INST. OF CORRECTIONS, *Texas 2020*, U.S. DEP'T OF JUST., https://nicic.gov/state-statistics/2020/texas-2020 [https://perma.cc/4GRP-T5SK] (last visited Jan. 23, 2023).

242. *Id.*

243. *Id.* The community corrections population of Texas includes 334,353 individuals on probation and 110,437 individuals on parole. *Id.*

244. *Id.*

245. *Id.*; *see also* NAT'L INST. CORRS., *Vermont 2020*, *supra* note 238.

246. *See, e.g.*, Laura Krantz, *Vermont Inmates on Lockdown at Kentucky Prison*, VTDIGGER, (Jan. 21, 2014, at 8:14 PM), https://vtdigger.org/2014/01/21/vermont-inmates-lockdown-kentucky-prison/ [https://perma.cc/4LVF-DAJ2] (explaining that Vermont had a contract with a private firm, Corrections Corp. of America, which allowed Vermont to send up to 660 inmates to Kentucky and 40 to Arizona).

247. *Private Facility Contract Monitoring/Oversight Division: Contracted Facilities*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/divisions/pf/pf_unit_list.html [https: / /perma.cc/7B55-22AB] (last visited Jan. 23, 2023).

248. *Id.* B.M. Moore Correctional Center (500 male beds), Bridgeport Correctional Center (520 male beds), Oliver J. Bell Unit (520 male beds), Coleman Unit (1000 female beds), Diboll Correctional Center (518 male beds), Kyle Correctional Center (520 male beds), and Sanders Estes Correctional Center (1040 male beds). *Id.* With the removal of Oliver J. Bell, Diboll, and Sanders facilities, there are now a total of 2,540 beds. Private Facility Contract Monitoring/Oversight Division, *Contracted Facilities*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/divisions/pf/pf_unit_list.html [https://perma.cc/7B55-22AB] (Jan. 23, 2024).

249. *Id.* Jail facilities include Bradshaw State Jail (1,980 male beds), Lindsey State Jail (1,031 male beds), and Willacy County State Jail (1,069 male beds). East Texas Multi-Use Facility has 2,236 beds for both male and female individuals. *Id.*

250. *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT 5 (Oct. 2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/K864-2YPC].

white counterparts.[251] Latinx individuals were incarcerated in state prisons at a rate of 1.3 times that of white individuals.[252] Specifically, Vermont reported a rate of Black imprisonment of 1,737 per 100,000 residents while the rate of white imprisonment was 239 per 100,000.[253] Texas reported a rate of Black imprisonment at 1,547 per 100,000 residents, Hispanic imprisonment at 471 per 100,000 residents, and white imprisonment at 452 per 100,000 residents.[254]

However, this racial disparity has been linked more closely to economics than race alone.[255] For example, white men in the lowest class category[256] had a 43% probability of ever being jailed, while white men in the highest class category had an 8.9% probability.[257] However, race becomes statistically significant when considering the probability of an individual being jailed for more than one year by age 24–32.[258] The U.S. Sentencing Commission came to a similar conclusion, finding that "[n]on-government sponsored[259] departures and variances appear to contribute significantly to the difference in sentence length between Black and White male offenders. Black male offenders were less likely . . . to receive a non-government sponsored downward departure or variance."[260] However, the

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251. *Id.*

252. *Id.*

253. *Id.* at 7. This rate of imprisonment resulted in 1 in every 58 Black residents of Vermont being incarcerated. *Id.*

254. *Id.* Information on the Hispanic incarceration rates for Vermont was not provided. The rate of imprisonment by race resulted in 1 in every 65 Black residents of Texas being incarcerated. *Id.*

255. *See generally* Nathaniel Lewis, *Mass Incarceration: New Jim Crow, Class War, or Both?*, PEOPLE'S POL'Y PROJECT 3 (Jan. 2018), https://www.peoplespolicyproject.org/wp-content/uploads/2018/01/MassIncarcerationPaper.pdf [https://perma.cc/3JHX-Z64C]. The author compared race and economic data against four different outcomes: (1) whether someone had been incarcerated at all since the age of 18; (2) whether they had been incarcerated for more than a month in total; (3) whether they had been incarcerated for more than a year total; and (4) for those who had ever been arrested, whether or not they had been jailed after arrest. *Id.* at 17.

256. The study calculated "class category" based on a combination of factors including "household income at adolescence constituting one-half of the composite variable, with current income, current assets (including homeownership), and current educational attainment each constituting one-sixth of the index." *Id.* at 16.

257. *Id.* at 20.

258. *Id.* at 20–21, fig.1. Lewis concedes that there is still a strong correlation between race and class as "class is not evenly distributed across races." Illustrated in Figure 2, Black individuals are highly concentrated in the lowest class and white people are disproportionately represented in the highest class. *Id.* at 22.

259. *Non-government sponsored definition*, L. INSIDER, https://www.lawinsider.com /dictionary/non-government-sponsored [https://perma.cc/9XBQ-6UP8] (last visited Nov. 23, 2023) ("Non-government sponsored means that the below-Guidelines sentence was not due to the defendant's substantial assistance to the prosecutor (§ 5K1.1) or because Early Disposition Programs (§ 5K3.1) [or] the prosecutor recommended the downward departure.").

260. William H. Pryor Jr., *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, U.S. SENT'G COMM'N 20 (Nov. 2017), https://www.ussc.gov/sites/ default/files/pdf/research-and-publications/researchpublications/2017/20171114_Demo graphics.pdf [https://perma.cc/2Z8W-YYM6].

Commission found that "even when Black male offenders received a non-government sponsored departure or variance, their sentence was longer than White male offenders who received a non-government sponsored departure or variance."[261] This trend is not isolated to only adult offenders but is demonstrated in juvenile offenders as well.[262] "[A]lthough White youth represent 75% of the adolescent population, they make up only 45% of arrests for violent crimes."[263] On the other hand, "Black youth, who represent 15% of the population, are involved in 52% of juvenile arrests for violent crimes."[264] Therefore, the combination of the social, economic, and racial factors discussed illustrate that not only are children generally more susceptible to delinquent behavior, but as a result, children of color are particularly at risk when coming into contact with the justice system.

3. Political Persuasion

Politics has played an essential role in the criminal justice system. The 1960s and 70s were turbulent years in the United States as the Country struggled through the Civil Rights Movement.[265] In response to public opinion favoring more rigid crime control, "conservative politicians at the national and state levels stoked their constituents' fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time."[266] In 1968, Richard Nixon was the first politician to portray himself as a defender of "law and order" in a presidential campaign.[267] However, Ronald Reagan had also utilized the strategy two years earlier in his 1966 gubernatorial campaign.[268] Reagan focused on the rising violent crime in California and placed the blame on liberal tolerance of disorder and unrest.[269] Reagan distinguished himself in politics by vigorously supporting the death penalty and accusing his Democratic opponents of sympathizing more with killers than victims.[270]

In the 1980s, Republican politicians proved adept at capitalizing on voters' fears and anxieties about racial tensions and rising crime,[271] while Democratic

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261. *Id.*

262. *See generally* Nora Leonard, *Racial and Ethnic Disparities in the Youth Justice System*, COAL. FOR JUV. JUST., (Mar. 2, 2023), https://www.juvjustice.org/blog/1436#:~:text=The%20National%20Academies%20of%20Sciences,juvenile%20arrests%20for%20violent%20crimes [https://perma.cc/BJE3-KW7K].

263. *Id.*

264. *Id.*

265. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough On Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 12 (2013).

266. *Id.*

267. *Id.* at 14.

268. *Id.* at 17.

269. *Id.*

270. *Id.* Reagan relied on this rhetoric in his 1980 presidential campaign, which he won. *Id.*

271. *Id.* at 18. For example, in 1981, approximately 3% of the population felt that cutting the drug supply would be an important means of reducing crime. However, Reagan's "War on Drugs" placed drug-related stories in mainstream media to place the issue on the public's radar. By 1989, approximately "27% of Americans believed that drug abuse was the most serious problem facing the country." *Id.* at 18–19.

politicians desperately attempted to eschew the "soft on crime label."[272] Since then, crime and law enforcement policy has been at the forefront of politics. In the 2022 midterm elections, "[c]lose to 60% of Republican spending on campaign ads . . . [was] on the topic of crime . . . and Democrats [] responded with their own $36 million war chest."[273] Therefore, a politician's stance on crime and law enforcement plays an essential role in their electability, real or perceived.

As a result, states' political affiliations have significant implications for the viability of legislative reform, such as passing a law that would increase the age of delinquency above 19. A Federal Election Committee breakdown of the 2020 election results illustrates how Vermont was politically poised to raise the age of juvenile delinquency and how other states, such as Texas, appear more conservative, meaning passing such a bill may not be feasible. In the most recent presidential election between Joe Biden and Donald Trump, Vermont swung dramatically in favor of the Democratic ticket. 242,820 Vermont voters selected Joe Biden, comprising 66.09% of the 367,428 total votes for the state.[274] Republican-leaning constituents were much less represented, with only 112,704 (30.67%) voting for Donald Trump.[275] In Texas, 5,890,347 voters submitted ballots in favor of Donald Trump—52.06% of the 11,315,056 total ballots received.[276] Surprisingly, 5,259,126 (46.48%) of Texas voters selected Joe Biden despite traditional voting trends.[277] Texas demonstrated a higher Republican turnout than Vermont, although the spread was not as significant as the near-30% difference in party affiliation seen in Vermont's turnout.[278]

Considering the history surrounding the development of "tough on crime" rhetoric, the political affiliation of a particular state makes a significant difference in how that state addresses law enforcement policies. More Democratic states like Vermont tend to lean towards policies favoring rehabilitation and social services as alternatives to incarceration. Meanwhile, Republican-leaning states such as Texas

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272. *Id.* at 19. Bill Clinton famously (and rather tragically) traveled to Arkansas to view the execution of a severely mentally disabled inmate, afterward stating, "[N]o one can say I'm soft on crime." *Id.* (citing MARC MAUER, RACE TO INCARCERATE 68–69 (1999)).

273. Udi Ofer, *Politicians' Tough-on-Crime Messaging Could Have Devastating Consequences*, TIME, (Nov. 3, 2022), https://time.com/6227704/politicians-crime-messaging-mass-incarceration/ [https://perma.cc/9E5M-HZQA].

274. Allen Dickerson et al., *Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N, 37–38 (October 2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf [https://perma.cc/4YBR-4PAE].

275. *Id.*

276. *Id.* at 37–38. Vermont had 21 additional names on the ballot, not including Joe Biden and Donald Trump. *Id.*

277. *Id.* In the 2016 presidential election, 38% of Texas voters cast ballots for the Democratic candidate Hilary Clinton while 50% of voters cast their ballot for the Republican candidate Donald Trump. *Poll Tracker State Polling Averages: Texas*, USA TODAY, https://www.usatoday.com/pages/interactives/2016/election/poll-tracker/ [https://perma.cc/CZ5R-4QJA] (last visited Nov. 23, 2023).

278. Dickerson et al., *supra* note 274, at 37. In Texas, there was a 5.58% spread between votes cast for Trump and votes cast for Biden. *Id.* In Vermont, there was a 35.42% difference between votes cast for Biden and votes cast for Trump. *Id.*

tend to adhere to more traditional approaches like incarceration, which diverts funding from rehabilitative services. Particularly harmful policies in the juvenile justice system include longer sentences and transfer provisions that make it easier to classify youth offenders as adults.

B. Can Texas "Raise the Age" Above 18?

Many factors must be considered when a state attempts to significantly change its criminal justice system. Vermont illustrates that significant logistical concerns can make implementation difficult, even in states with more homogenous demographics, smaller and less complicated prison populations, and political support.[279] Therefore, with Texas's demographics, prison system, and political makeup, it is likely that Texas would find it more difficult to pass any legislation resembling Vermont's. Texas has a significantly larger and more diverse population than Vermont.[280] While Vermont has a relatively small prison population organized within a unified corrections system, Texas has one of the Country's largest prison systems that is not unified and incorporates several privately run facilities.[281] Finally, there has been a recent resurgence of "tough on crime" rhetoric in politics, which draws support primarily from Republican voters; most Texas voters tend to vote Republican.[282]

Undeniably, due to Texas's sheer size, the number of individuals potentially impacted by Vermont-style legislation would be significantly higher than the number of individuals impacted by the new regime in Vermont.[283] Vermont has already balked at implementing its statute raising the age of delinquency to 19.[284] Vermont cited concerns over available finances and resources to accommodate the influx of individuals shifting from the criminal court system to the family division.[285] While approximately 13% of Vermont's population was within the age range to be considered "delinquent" by the general standard, Texas has a much higher number at approximately 18%.[286] Additionally, the number of individuals who could be considered delinquent would go up if Texas passed legislation similar to Vermont's. Therefore, Texas would predictably run into resource constraint issues similar to those Vermont faces.

A state's demographics will, of course, implicate issues with a state's prison system, as the resources required by the former will impact the latter. Like Vermont, if Texas raised the age of delinquency, there would be a significant increase in the number of individuals under the original jurisdiction of the family division. More money and resources would need to be allocated to the family courts and departments of child and family services that supervise these individuals through the delinquency process. Additionally, because the purpose of juvenile

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279. *See generally supra* Subsection II.A.ii.
280. *See supra* Subsection IV.A.i.
281. *See supra* Subsection IV.A.ii.
282. *See supra* Subsection IV.A.iii
283. *See supra* Subsection IV.A.i.
284. *See supra* Subsection II.A.ii.
285. *See supra* Subsection II.A.ii.
286. *See supra* Subsection IV.A.i.

courts is primarily rehabilitation and social services,[287] funds would need to be allocated from traditional prisons, which would no longer be charged with housing and supervising these individuals. It is unlikely that Texas would be able to successfully shift money from the existing prison structure to provide these additional resources.

Texas has a significant number of private companies that run prison facilities housing adult prisoners.[288] The State pays these private facilities under contract agreements to use their space and resources.[289] It is doubtful these private facilities will look favorably on legislation increasing the age of delinquency for two reasons. First, the legislation would result in fewer prisoners being eligible for transfer to their facilities once those individuals have "aged out" of the juvenile system. Corrections companies' contracts with Texas may change accordingly, resulting in less money for the corrections companies. Second, Texas may reevaluate its spending in these facilities and find that funds can be allocated to social and rehabilitative services and family courts to accommodate an increase in eligible juveniles. However, these allocations might result in less money for private corrections companies.

As discussed above, Texas would likely face logistical and resource issues in accommodating a more significant population of juveniles in its juvenile court system. Because the needed resources could efficiently be allocated from funds Texas pays to private corrections companies, there would likely be significant resistance and aggressive lobbying to defeat any reforms that might alter the existing contractual relationships between the state and private corrections companies.

The U.S. government spends approximately $81 billion on incarceration annually,[290] with $3.9 billion spent specifically on private prisons and jails.[291] The benefactors of these government contracts have a significant stake in preserving the status quo of incarceration.[292] Over the past few years, the general incarceration rate in adult facilities has decreased, particularly in Texas.[293] Passing legislation increasing the age of delinquency would not only continue to reduce the prison population but could also lead to a drastic reduction in government spending as Texas attempts to reallocate funds to support the services required for greater juvenile delinquency adjudication. Therefore, these companies may resort to "tough on crime" tactics successfully implemented in the past to preserve their positions as essential to public safety and order.

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287. *See generally supra* Section II.A.

288. *See supra* Subsection IV.A.iii.

289. *See* Kristen M. Budd & Niki Monazzam, *Private Prisons in the United States*, SENT'G PROJECT (June 15, 2023), https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/ [https://perma.cc/H9ZW-UE44].

290. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE, (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/7E6Q-PYJL].

291. *Id.*

292. For example, in 2017 private prisons averaged an annual profit of $374 million. *Id.*

293. *See supra* Subsection IV.A.ii.

Private corrections companies may find Texans particularly receptive to these tactics, as the state primarily votes Republican[294] and has adhered to conservative approaches to law enforcement over the years. While views regarding incarceration have changed, even in states such as Texas, the argument favoring investing in rehabilitation over punishment and accepting social inequality as a catalyst for criminal behavior may still be unconvincing to many Texans. As illustrated by the 2024 midterm elections, fear of criminals and general crime-related anxiety is high, and "tough on crime" rhetoric seems to satiate this anxiety. However, there is little evidence to show that it works.[295]

Finally, although there are undeniable logistical issues with raising the age of delinquency to 19, it is an essential step in improving our criminal justice system. The process of delinquency adjudication must be addressed not only from a logical and practical position but also from an existential one. Children are the most vulnerable group in our society. Children experience violence, poverty, neglect, and negative influences differently than their adult counterparts.[296] Lack of proper support, stability, nutrition, and education increases the likelihood that a child will have contact with the police, social services, and judges who consider whether they are worthy of society's time, money, and protection.[297] However, unless Texas (and even Vermont) begin developing their juvenile justice systems with these goals in mind, it is unlikely these states will implement significant changes such as raising the age of delinquency and ending the process of automatic transfers.

CONCLUSION

The statute passed by Vermont in 2022 raising the age of delinquency beyond 18 acknowledges that young adults in their early 20s may benefit more from the rehabilitative approach of the juvenile courts than the punitive approach of criminal courts. Preserving the original jurisdiction of the juvenile courts by limiting the transfer of youths from juvenile to criminal court benefits the public. It improves safety by providing rehabilitative services rather than punishment to the individuals who need these services the most. States might find it challenging to implement these legislative reforms due to demographic, financial, or political reasons. However, juveniles' contact with the criminal justice system is the barometer illustrating how socioeconomics can contribute to crime rates. Therefore, by accepting that children are susceptible and vulnerable and that 18 is an arbitrary and

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294. *See supra* Subsection IV.A.iii.

295. *See generally* SAMUEL WALKER, SENSE & NONSENSE ABOUT CRIME, DRUGS, AND COMMUNITIES (8th ed.).

> Simply putting more cops on the street will not deter crime any more effectively than the police already do. Removing procedural restraints on police regarding evidence and interrogations won't result in more convictions of criminals. The alleged loopholes of plea bargaining and the insanity defense do not really exist. Harsher sentences will not deter crime any better than we currently do. These are among the most popular conservative crime control proposals.

Id. at 370.

296. *See supra* Section III.B.

297. *See supra* Section III.B.

outdated threshold for determining culpability, we can address the underlying reasons for crime and stop the unending cycle of victimization.