EXPOSING THE BACKROOM SHAKEDOWN: THE WEAPONIZATION OF ADULT PROSECUTION IN JUVENILE COURT PLEA NEGOTIATIONS

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ABSTRACT

During the 1980s and 1990s, fear of a juvenile crime wave spurned legislation that expanded the reach of adult criminal court. An "adult time for adult crime" ideology took hold, and between 1992 and 1997, 44 states and the District of Columbia enacted or expanded provisions to transfer children to adult courts. Although in the past two decades courts and state legislatures have exhibited a deeper understanding of the neurological differences between children and adults, most states have retained the ability to criminally prosecute children under 18 if they are charged with certain crimes. As a result, prosecutors can often use the threat of adult criminal charges as a bargaining chip against children in juvenile court plea negotiations. This practice drastically raises the stakes in a process that adolescents are developmentally ill-equipped to handle.

In this article I consider how juvenile defenders might mount an attack against prosecutors who wield the threat of adult prosecution against children in juvenile court. I argue that the practice of threatening children with adult prosecution is likely to disproportionately harm Black and Latinx youth, who are routinely seen as older, more dangerous, and more responsible for their actions than their white peers. Additionally, I review findings that adolescents struggle to make risk-reward calculations in situations characterized by high emotion or stimulation, thereby indicating that adolescents are at a distinct disadvantage in the plea bargaining process. I discuss promising Supreme Court decisions rooted in adolescent neuroscience that limited the most extreme sentences for youth—capital punishment and juvenile life without parole in non-homicide offenses—after recognizing that children are fundamentally different from adults. These decisions provide a strong basis for bringing prosecutorial vindictiveness claims against prosecutors who wield the threat of adult charges against children in juvenile court. Although the Supreme Court in its newest composition has not explicitly overruled these decisions, its most recent decision on youth sentencing, Jones v. Mississippi*, seriously undermined them.* Jones *poses a grave danger to children in the adult criminal legal system, making it all the more important to keep them out of it.*

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INTRODUCTION

D, a 15-year-old Black boy, allegedly took a pack of cigarettes from an unlocked car in 2019. The state of Louisiana charged him with simple burglary and placed him in juvenile detention. When I met him during the summer of 2020, he was still locked up on this charge. At the time I was working as a legal intern at a children's defense office in Louisiana, and I assisted with D's representation.

When D was initially arrested, he appeared before a juvenile court judge who placed him in juvenile detention. However, the judge failed to conduct a continued custody hearing within three days of D's entry. This failure violated Article 819 of the Louisiana Children's Code. Accordingly, D was entitled to release pursuant to the article, which states,

> If a child is not released to the care of his parents, the court shall set and hold a hearing within three days after the child's entry into the juvenile detention center or shelter care facility . . . . If the hearing is not held, the child shall be released.[1]

When D's attorney explained to the prosecutor that she was going to move for his release on these grounds, the prosecutor made a threat. He said that if D's attorney petitioned for D's release, he would use another charge that D was facing in a separate case to transfer D to adult court. Unrelated to the simple burglary, D had been charged with aggravated battery. While aggravated battery is not a transferrable offense under the Louisiana Children's Code, attempted murder is.[2] The prosecutor said that if D's attorney moved for his release on the stolen cigarettes case, he would increase D's aggravated battery charge to an attempted murder charge and then transfer that case to adult court.

As D's mother remarked, the prosecutor was playing dirty. A conviction in criminal court commonly entails a longer sentence, a public criminal record and its associated collateral consequences, and incarceration in adult prison, where the chance of violence against youth is high.[3] Transfer to adult court is therefore so consequential that our client—and most young people—would go to great lengths to avoid it. In the face of this threat, D and his attorney decided against moving for his release. Therefore, as COVID-19 was wreaking havoc in prisons and jails across the country, D remained locked up when he was entitled to release.

D's experience is an example of the weaponization of adult transfer in juvenile proceedings, which goes virtually unchecked. A wealth of transfer provisions enacted during the 1990's "Tough on Crime" era grants prosecutors enormous discretion in transfer decisions, leaving them the power to transfer kids to adult court with almost no oversight.[4] Prosecutors can and do use the threat of adult prosecution as a bargaining chip. Typically, plea negotiations take place under a time crunch, demand a weighing of immediate reward against remote risk, and require trust between adolescents and their attorneys—issues the adolescent brain is developmentally ill-equipped to handle.[5] Combined with the threat of adult prosecution, the plea bargaining process becomes downright coercive.[6] Furthermore, evidence concerning racial disparities at all stages of the juvenile legal system indicates that prosecutors wield the threat of adult prosecution disproportionately against children of color.[7]

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1. LA. CHILD. CODE ANN. art. 819 (2019).

2. LA. CHILD. CODE. ANN. art. 305 (2016) (listing attempted murder but not aggravated battery as a charge for which a child is subject to the exclusive jurisdiction of the criminal court).

3. *See* discussion *infra* Section II.C.

4. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 252 (2007) ("Between 1992 and 1995 alone, forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court."). *See also* discussion *infra* Sections II.B, II.C.

5. *See* discussion *infra* Section III.A.

6. *See* discussion *infra* Section III.A.

7. *See* discussion *infra* Section III.B.

When I explained D's situation and the prosecutor's threat to a friend, she raised a question that I ask almost daily: How on earth are they—prosecutors—allowed to do that? D had a statutory right to his release. How was a prosecutor permitted to pressure him into relinquishing that right? In *Blackledge v. Perry*, the Supreme Court held that malicious or bad faith increases in punishment threatened by prosecutors constituted "vindictiveness,"[8] and that "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise" of their due process rights.[9] *Perry* concerned a writ of habeas corpus. Mr. Perry had been convicted of a misdemeanor, which carried a six-month sentence. He had then filed an appeal. In response, the prosecutor brought felony charges against Perry for the same incident, "subjecting him to a significantly increased potential period of incarceration."[10] In the face of these new charges, Perry withdrew his appeal and pled to a five-to-seven-year sentence. The Court held that the prosecutor's potentially vindictive behavior violated Perry's due process rights.[11] Therefore, the Court affirmed habeas relief.

Unfortunately, the Supreme Court gutted its own vindictiveness doctrine just four years later in *Bordenkircher v. Hayes*.[12] In that case, Hayes challenged a charge brought against him under the Habitual Criminal Act, which carried a mandatory life sentence.[13] The prosecutor had only filed this charge after Hayes refused to take a plea offer on a lesser charge. In his brief for the Court, Hayes argued that this practice constituted prosecutorial vindictiveness:

> The potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an enhanced indictment against a defendant who has refused to plead guilty to the unenhanced charge in exchange for the State's offer of leniency. Due process was offended by placing Mr. Hayes in fear of retaliatory action for insisting upon his right to plead not guilty. Consequently, Mr. Hayes' conviction as an habitual offender must be vacated

8. Blackledge v. Perry, 417 U.S. 21, 27–28 (1974).

9. *Id.* at 28 (citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989)). In *Pearce*, the Court held that a sentencing judge acted vindictively and thereby violated a defendant's due process rights when he imposed a harsher reconviction sentence after a defendant had his original conviction set aside. *Perry* applied the same logic to prosecutorial behavior:

> We think it clear that the same considerations [as in *Pearce*] apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."

Id. at 28.

10. *Id.*

11. *Id.*

12. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

13. *Id.* at 35859.

> because it is the product of the prosecutor's constitutionally impermissible retaliatory act.[14]

The *Bordenkircher* Court disagreed. According to the Court, the prosecutor had not exhibited vindictiveness—he had simply bargained.[15] This ruling presents a significant obstacle to D or people like him who might hope to bring a vindictiveness claim.

However, I argue that Supreme Court decisions rooted in adolescent brain science have created an avenue for challenging *Bordenkircher*'s applicability in juvenile proceedings. Lawyers can draw on the Supreme Court's holdings in *Roper v. Simmons*,[16] *Graham v. Florida*,[17] *Miller v. Alabama*,[18] and *J.D.B. v. North Carolina*,[19] to undermine *Bordenkircher*'s applicability in juvenile court. These cases recognize that "children are different"[20] and require courts to take into account the mitigating factors of youth in sentencing decisions and analyses of *Miranda* warnings.[21]

Recently, however, in *Jones v. Mississippi*, the newly comprised Supreme Court claimed to uphold these cases while simultaneously subjecting adolescents in the criminal legal system to harsher punishment.[22] The 2021 decision, authored by Justice Brett Kavanaugh for a 6-3 majority, has been characterized as "one of the most dishonest and cynical decisions in recent memory."[23] Writing for the dissent, Justice Sonia Sotomayor stated that "the Court is fooling no one" in its claim that the decision adhered to precedent.[24] Personally, I find it maddening when the Supreme Court proclaims to uphold precedent while simultaneously undermining it. In this case, however, the practice has a silver lining: the Court's

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14. Brief for Respondent at 4, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (No. 76-1334).

15. *Hayes*, 434 U.S. at 364 ("[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."). *See also* discussion *infra* Section IV.A.

16. Roper v. Simmons, 534 U.S. 551 (2005).

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

18. Miller v. Alabama, 567 U.S. 460 (2012).

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

20. *Miller*, 567 U.S. at 480.

21. *See* discussion *infra* section IV.C.

22. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1317 (2021) (holding that a sentencing judge need not make a finding that an adolescent is "permanently incorrigible" before sentencing them to life without parole). "This case was the first time the court has heard arguments in a juvenile sentencing case with three Trump appointees on the bench, including new Justice Amy Coney Barrett, who replaced the late Justice Ruth Bader Ginsburg." Nina Totenberg, *Supreme Court Rejects Restrictions on Life Without Parole for Juveniles*, NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/989822872/supreme-court-rejects-restrictions-on-life-without-parole-for-juveniles [https://perma.cc/LLB9-NRYP]. *See also* discussion *infra* Section IV.D.

23. Mark Joseph Stern, *Brett Kavanaugh's Opinion Restoring Juvenile Life Without Parole is Dishonest and Barbaric*, SLATE (Apr. 22, 2021), https://slate.com/news-and-politics/2021/04/brett-kavanaugh-sonia-sotomayor-juvenile-life-without-parole.html [https://perma.cc/YZ94-U5UK]. *See also* discussion *infra* Section IV.D.

24. *Jones*, 141 S. Ct. at 1328. *See also* discussion *infra* Section IV.D.

insistence that it has not departed from precedent leaves open the pathway for defenders to mount an attack against *Bordenkircher* in juvenile court.

Part I of this paper will outline the history of the juvenile court and explain how the boundary between juvenile and criminal courts has blurred over time. Part II will describe how an influx of transfer provisions during the Tough on Crime era shifted the power to transfer from judges to prosecutors. Prosecutors took on the role of gatekeeper to the juvenile system and accordingly possess inordinate power in the plea bargaining process. Part III will explain how adolescents are at a developmental disadvantage in the plea bargaining process. This Part also discusses the likelihood that adult prosecution is weaponized disproportionately against children of color. Finally, Part IV addresses how to stop prosecutors from using the threat of adult court to bolster their power in juvenile court. This Part proposes that a prosecutorial vindictiveness claim, rendered mostly defunct by *Bordenkircher v. Hayes*, can prevail in circumstances in which prosecutors weaponize transfer in plea bargaining proceedings. Although the Supreme Court in its current composition has demonstrated its unwillingness to expand protections for adolescent offenders,[25] some state courts have proven susceptible to creative arguments.[26] It is critical for defenders to use every tool at our disposal to thwart prosecutors' attempts to use adult prosecution as a bargaining chip in juvenile court.

I.
THE HISTORY OF JUVENILE COURT

A. The Progressive Era

The early United States legal system did frighteningly little to distinguish between children and adults. Children as young as seven were sometimes considered capable of forming adult intent, prosecuted as adults, and dealt adult penalties.[27] In early America, some states sentenced children as young as 12 to death under their capital punishment schemes.[28] This flawed perception of children began to shift at the end of the 19th century, as the nation industrialized. In search of factory jobs, immigrants from Southern and Eastern Europe, and from rural America, streamed into cities.[29] A group of Progressive reformers—who eventually earned the nickname of "Child Savers"—grew concerned for the

25. *See Jones*, 141 S. Ct. 1311. *See also* discussion *infra* Section IV.E.

26. *See* discussion *infra* Sections IV.B, IV.D.

27. Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 148 (2014) ("[T]he government could effectively rebut" the presumption that a child under seven was incapable of forming criminal intent "upon a showing that a particular child was capable of discerning right from wrong.").

28. *Id.*

29. Barry C. Feld, *The Transformation of the Juvenile Court–Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 332 (1999).

welfare and development of these children.[30] These reformers championed the belief that children were not fully formed individuals and therefore could be treated and cured of the underlying conditions that led to their delinquency.[31] The Progressives ran a successful campaign and, in 1899, the first Juvenile Court was founded with a focus on rehabilitation rather than punishment.[32] Jane Addams, a leader of the Progressive reformers, contended that institutions designed for children would "feed the divine fire of youth," rather than "smother it."[33] By 1928, all but two states had created juvenile courts.[34]

While Progressive reformers were correct in their understanding that children are developmentally and morally different from adults, their work was motivated, at least in part, by white saviorism.[35] Their efforts were geared towards immigrant children who did not comport with Anglo-Protestant Western European ideals.[36] The informality and therapeutic veneer of the juvenile legal system allowed for Progressives to widen the net of state control, classifying things like sexual activity, smoking, truancy, immorality, and living a "wayward, idle, and dissolute life" as delinquent acts.[37] Critics of Progressive reformers note that the reformers used the system to mold immigrant and poor children into "sober, virtuous, middle-class Americans like themselves."[38] As Southern and Eastern European immigrants assimilated and gained the status of whiteness, the juvenile legal system adapted: it pivoted its focus to children of color.[39] Following World War I, when many Black southerners traveled North in the Great Migration, Black youth were ushered into the juvenile legal system where they "could remain under the control of the parental state."[40]

In this era, the juvenile legal system was characterized as benevolent and informal. Children were not called defendants, nor were they "found guilty" of crimes. Rather, they were called "respondents" and they were "adjudicated delinquent."[41] The goal was not punishment, but rather rehabilitation.[42] In this

30. *Id.* at 334–35, 337.

31. *Id.* at 336; Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 389 (2013).

32. Taylor-Thompson, *supra* note 27, at 150.

33. Jane Addams, *The Spirit of Youth*, PITTSBURGH DAILY POST SUN (May 30, 1909), https://digital.janeaddams.ramapo.edu/items/show/9302 [https://perma.cc/79MV-6ZYY].

34. Taylor-Thompson, *supra* note 27, at 150.

35. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 404–05.

36. *Id. See also* Feld, *The Transformation of the Juvenile Court–Part II: Race and the "Crack Down" on Youth Crime*, *supra* note 29, at 339.

37. Feld, *The Transformation of the Juvenile Court–Part II: Race and the "Crack Down" on Youth Crime*, *supra* note 29, at 337–38.

38. *Id.* at 334.

39. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 406.

40. *Id.*

41. This terminology endures in present-day juvenile court.

42. Taylor-Thompson, *supra* note 27, at 151.

setting—where the express purpose was to protect and rehabilitate children—due process protections guaranteed to criminal defendants were considered unnecessary. Children received no notice, possessed no right to counsel, and had no right to present or cross-examine witnesses.[43] The state was not required to prove its case beyond a reasonable doubt.[44] Rather, a child's fate was at the complete discretion of the judge, and the idea that the State can parent poor children and children better than their own parents persists in today's juvenile courts.[45] This term persists in today's juvenile court,[46] as does the notion that the state can parent poor children and children of color better than their own parents.[47]

B. The Due Process Era

The Progressive conception of juvenile justice prevailed until the 1960s, when due process advocates began to question the substantial amount of social control the juvenile court exerted without any due process safeguards.[48] The Warren Court addressed the issue in *In re Gault*, where it characterized juvenile courts as "the worst of both worlds," affording "neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children."[49] *Gault* noted that Progressive-era juvenile courts had not lived up to their rehabilitative vision.[50] In response, the Court guaranteed children in the juvenile system much needed procedural safeguards: the right to timely notice of charges, the right to counsel, the right to confront and cross examine witnesses, and the right against self-incrimination.[51] The Court reasoned that the administration of due process safeguards "would not compel the states to abandon or displace any of the substantive benefits of the juvenile process."[52] There is

43. *Id.* at 152; GUGGENHEIM, *supra* note 4, at 7.

44. *See, e.g.*, N.Y. FAM. CT. ACT § 744(b) (McKinney 1962) (requiring that a finding of juvenile delinquency "be based on a preponderance of the evidence") (repealed in 1970 and replaced with reasonable doubt requirement).

45. Taylor-Thompson, *supra* note 27, at 152.

46. *See, e.g.*, ARIZ. JUV. CT. Rule 226 (2022) (characterizing the juvenile court as following the "parens patriae plan of procedure").

47. *See, e.g.*, Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention.*, PROPUBLICA, (July 14, 2020), https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention [https://perma.cc/X95P-93UM].

48. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 391.

49. *In re* Gault, 387 U.S. 1, 18 n.23 (1967) (citing Kent v. United States, 383 U.S. 541, 556 (1966)).

50. *Id.* at 60 (Black, J., concurring) ("The juvenile court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal has failed of achievement since the beginning of the system.").

51. *Id.* at 52, 70, 95, 98. These safeguards are also afforded in criminal court. Notably, however, the Supreme Court declined to guarantee juvenile respondents the right to a jury trial.

52. *Id.* at 21.

some irony here: the Court sought to bring out the unique benefits of the juvenile legal system by making it more closely resemble the adult criminal system.

In re Winship[53] and *Breed v. Jones*,[54] decided shortly thereafter, followed *Gault*'s blueprint: they introduced adult features to the juvenile system in the hopes of better protecting children.[55] However, the Court later stopped short of affording children the right to a jury trial in *McKeiver v. Pennsylvania*,[56] insisting that this would "remake the juvenile proceeding into a fully adversary process and w[ould] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[57] Thus, even as the Court required that juvenile proceedings resemble those in adult criminal court, it recognized the value of maintaining a distinct, rehabilitative juvenile system.

Gault and its progeny are widely considered to be victories for children's rights, and rightly so: the extension of procedural rights to the juvenile system gave children much needed protection. But these cases also illustrate a Court that was grappling with the failings of the juvenile system and choosing to address those failings by making the system more adult. Though perhaps unintentionally, *Gault* set in motion a convergence between the juvenile and criminal courts.[58]

C. The "Get Tough" Era

Starting in the 1980s, the rehabilitative ideals of the juvenile court fell decisively out of favor as the media, politicians, and academics began peddling fear of a juvenile crime wave. Amid several high-profile crimes involving children in the late 1980s, the media cast aside its traditional policy of confidentiality and discretion when it came to child lawbreakers.[59] Instead, media outlets inundated the public with stories of "wilding" youth, kids of color making the infamous "perp walk," and sensationalized reports on violent crime stories.[60] Crime became the most covered topic on the evening news.[61] This reporting warned that the children of the 1980s and 1990s were different: more violent, more depraved, more adult.[62] Peter Reinharz, the chief prosecutor for the New York City Family Court said to *The New York Times*, "We're not dealing with the same kind of kids

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

54. Breed v. Jones, 421 U.S. 519 (1975).

55. *See Winship*, 397 U.S. at 364 (requiring that prosecutors in juvenile court prove their cases beyond a reasonable doubt); *Breed*, 421 U.S. at 541 (applying the Fifth Amendment's double jeopardy clause to the juvenile system).

56. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

57. *Id.* at 545 (holding that a criminal defendant's right to a jury trial does not extend to juvenile court).

58. Taylor-Thompson, *supra* note 27, at 152; Feld, *The Transformation of the Juvenile Court–Part II: Race and the "Crack Down" on Youth Crime*, *supra* note 29, at 350.

59. Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 851–52 (2010).

60. *Id.*

61. *Id.* at 861.

62. *See id.* at 866; Taylor-Thompson, *supra* note 27, at 152–55.

as in the 60's. We're not dealing with stealing hubcaps, breaking bottles and standing around on street corners. What we're dealing with now are felony offenders."[63] Judge Tom Rickhoff of San Antonio District Court described 10-year-olds in juvenile court as "exceptionally dangerous people."[64]

The public was listening. Surveys conducted at the time consistently showed a public that was more fearful of violent juvenile offenders than previous decades.[65] As is all too typical, politicians responded to public fear by playing to the retributive impulses fostered by the carceral state.[66] State legislators rushed to make it easier to prosecute children in adult court. Between 1992 and 1997, 44 states and the District of Columbia enacted or expanded provisions to transfer children to adult courts.[67] These policies endure to the present day. Today, 23 states have no minimum age for transfer.[68] Legislators lowered the age for transfer, increased the number of offenses that triggered transfer to adult court, and gave prosecutors more power to file directly in criminal court.[69] They began to infuse the juvenile legal system with punitive language, amending their states' juvenile codes' purpose clauses to endorse punishment.[70] Politicians scrambled to prove that they were tough on crime. For example, fearful that the Democrats in the New York State Assembly were appearing soft on crime, Democratic Speaker Sheldon Silver described kids as "hardened juvenile thugs whose lack of remorse is all too commonplace."[71]

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63. Joseph B. Treaster, *Cuomo Seeks Sterner Law for Juveniles*, N.Y. TIMES (June 21, 1994), https://www.nytimes.com/1994/06/21/nyregion/cuomo-seeks-sterner-laws-for-juveniles.html [https://perma.cc/2ZE5-K2V].

64. Peter Applebome, *Juvenile Crime: The Offenders are Younger and the Offenses More Serious*, N.Y. TIMES (Feb. 3, 1987), https://www.nytimes.com/1987/02/03/us/juvenile-crime-the-offenders-are-younger-and-the-offenses-more-serious.html [https://perma.cc/P38U-SDPA].

65. Moriearty, *supra* note 59, at 872–73.

66. *See* RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 4–5 (2019) ("Laypeople will always have a particular reaction to particular high-profile crimes . . . . Politicians, for their part, will consistently seek to gain an electoral advantage by catering to [punitive] instincts . . . . Criminologists have labeled this setting of policy based on the emotional response of the public 'penal populism,' and it is an embedded feature of U.S. politics.")

67. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 CRIME & JUST. 81, 84 (2000).

68. Taylor-Thompson, *supra* note 27, at 146.

69. Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, 47 CRIME & JUST. 417, 451 (2018).

70. *Id.* at 423. For a comprehensive look at revisions to juvenile codes that emphasized punishment and deemphasized rehabilitation, see Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 842–45 (1988).

71. James Dao, *New York's Top Democrat Takes Tougher Stance on Juvenile Crime*, N.Y. TIMES (Dec. 10, 1996), https://www.nytimes.com/1996/12/10/nyregion/new-york-s-top-democrat-takes-tougher-stance-on-juvenile-crime.html [https://perma.cc/RCW3-26CB].

Politicians, pundits, and academics alike marshalled this hysteria against a particular group: Black boys.[72] Media coverage overrepresented children of color as perpetrators of crime and underrepresented them as victims.[73] The term "wilding," first introduced to the crime lexicon by *The New York Times* in its coverage of the Central Park Jogger case, was immediately racialized to signal a "new breed" of morally depraved adolescents, and, in New York publications, was used exclusively in coverage of crimes committed by youth of color.[74] This language set the stage for John DiLulio's infamous article, "The Coming of the Super-Predators," where he warned of "tens of thousands of severely morally impoverished juvenile super-predators" on the horizon.[75] The media ran with this narrative, even as crime rates dropped precipitously.[76] Policymakers adopted "adult time for adult crime" as a rallying cry.[77] And, as will be discussed below, youth selected for "adult time" were and continue to be disproportionately children of color.

II.
AN INFLUX OF TRANSFER PROVISIONS AND THEIR IMPACT

Legislators implemented the "adult time for adult crime" ideology in the form of new transfer laws that made it easier to prosecute children in adult court.[78] In general, there are three types of transfers: judicial waivers, statutory exclusionary waivers, and direct file provisions. This section will explain the types of waivers and describe how an influx in exclusionary waivers and direct file laws facilitated a shift in power from judges to prosecutors.

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72. Taylor-Thompson, *supra* note 27, at 154–55 (noting that academics most often reserved terms like "superpredator" and "temporary sociopaths" for children of color); Moriearty, *supra* note 59, at 850–51 ("During the 1990s, juveniles of color were the focus of what some have called a classic 'moral panic' in this country, during which politicians, educators, religious leaders, law enforcement, and much of the public were consumed by the looming threat posed by America's youth.").

73. Moriearty, *supra* note 59, at 852.

74. *Id.* at 863 ("[The] racial connotations [of 'wilding'] were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception of a single incident, each of the victims was described as a white female.").

75. John DiLulio, *The Coming of the Super-Predators*, WASH. EXAMINER (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/2TWV-RP7X].

76. Moriearty, *supra* note 59, at 852 ("During the mid-1990s, even as juvenile crime rates dropped by record rates, crime news coverage skyrocketed.").

77. Taylor-Thompson, *supra* note 27, at 155–56.

78. *See* Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, *in* THE OXFORD HANDBOOK ON JUVENILE CRIME AND JUVENILE JUSTICE 801, 815 (Barry C. Feld & Donna M. Bishop eds., 2011).

A. Judicial Waivers

Prior to the "Get Tough" era, judicial waivers were the primary method of transfer to adult court. Juvenile court judges oversee this process and they can waive jurisdiction over a child after conducting a hearing.[79] Most states modeled their judicial waiver hearings according to *Kent v. United States*,[80] which set forth criteria that a federal judge must weigh in evaluating a child's suitability for adult court. Among other criteria, a judge must consider the child's home environment, whether they are amenable to treatment, and whether they are a public safety risk.[81] Most states have adopted *Kent*-type criteria for judicial waiver hearings.[82] While judges have considerable discretion in the judicial waiver process, they are guided by set criteria and subject to appellate review.

During the "Get Tough" era, judicial waivers fell out of favor. Conservative critics accused judges of being soft on crime—too reluctant to transfer kids to adult court.[83] Exclusionary and direct file laws skyrocketed.[84] Today, although 45 states have judicial waiver statutes, the vast majority of children are waived via exclusionary or direct file waivers.[85] While judicial waivers require an evaluation of the alleged *offender*, exclusionary waivers and direct file laws are concerned with the alleged *offense*.[86]

B. Exclusionary and Direct File Waivers

Exclusionary waivers[87] broaden the list of offenses that are excluded from juvenile court jurisdiction and lower the ages at which kids can be transferred.[88] Juvenile courts are a legislative creation, and therefore legislators can exclude ages and offenses from juvenile court jurisdiction at their discretion. Exclusionary

79. *Id.* at 802. In some jurisdictions, a youth's case begins in adult court and a judge has the discretion to "reverse-waive" the youth back to juvenile court. *Id.* at 824.

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

81. *Id.* at 566–67.

82. Feld & Bishop, *supra* note 78, at 817.

83. *Id.* at 817–18.

84. *See* GUGGENHEIM, *supra* note 4, at 252 ("Between 1992 and 1995 alone, forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court."); Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 6–7 (2010).

85. Taylor-Thompson, *supra* note 27, at 157 ("[E]ighty-five percent of the determinations to send juveniles into the adult criminal justice system are not made by judges, but instead by prosecutors or legislatures."). It is noteworthy that, concerned with the ease with which prosecutors could transfer kids to adult court, California voters passed Proposition 57 in 2016, which eliminated direct file laws in the state. Sarah Barr, *Supporters Gear Up for New California Law That Eliminates Direct File*, JUV. JUST. INFO. EXCH. (Nov. 9, 2016), https://jjie.org/2016/11/09/supporters-gear-up-for-new-california-law-eliminating-direct-file/ [https://perma.cc/EY55-E436].

86. Feld & Bishop, *supra* note 78, at 815 ("Get tough amendments shifted the focus of transfer policies and practices from the offender to the offense and moved discretion from judges to prosecutors.").

87. Exclusionary waivers are also commonly called legislative waivers or statutory waivers.

88. Feld & Bishop, *supra* note 78, at 806.

waivers exploded in popularity during the "Get Tough" Era: in 1991, an estimated 176,000 youth under were charged in criminal court because they were defined as adults under exclusionary laws.[89] Direct file provisions[90] are less popular, and currently exist in only 12 states and the District of Columbia.[91] These laws create concurrent jurisdiction over certain offenses, giving the prosecutor the choice of whether to bring a charge in adult or juvenile court.[92]

While exclusionary waivers are responsible for the vast majority—85%—of children transferred to adult court,[93] direct file laws receive more routine criticism for the significant discretion they award prosecutors.[94] This critique is short-sighted. Exclusionary waivers give prosecutors equally broad discretion because the criminal code allows prosecutors to cherry-pick charges to land a child in the forum of their choice. If a prosecutor wants the child charged as an adult, they can charge them with an excluded offense. If a prosecutor wants the child to remain in juvenile court, they can bring a charge that retains juvenile jurisdiction.[95] D's case illustrates the perverse effect of exclusionary waivers. The prosecutor had originally charged him with aggravated battery, an offense over which the juvenile court retained jurisdiction.[96] The prosecutor then threatened to bring an attempted murder indictment, which would require D's transfer to adult court.[97] The expansiveness and imprecision of the criminal code make it easy for prosecutors to manipulate charges in this manner.[98] Therefore, the critique of the waiver process cannot be limited to direct file laws.

In the past several years, juvenile rights advocates nationwide have succeeded in passing Raise the Age Laws, which raise the age that a child is automatically treated as an adult. Only three states now treat 17-year-olds automatically as

89. MELISSA SICKMUND, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, HOW JUVENILES GET TO CRIMINAL COURT 3 (1994).

90. Direct file laws are also commonly called prosecutorial waivers.

91. *Direct File*, CAMPAIGN FOR YOUTH JUST., http://www.campaignforyouthjustice.org/images/factsheets/Direct_File_FINAL.pdf [https://perma.cc/DLN9-8XAX] (last updated Dec. 10, 2018).

92. Zimring, *supra* note 84, at 9; Feld, *Punishing Kids in Juvenile and Criminal Courts*, *supra* note 69, at 452.

93. Taylor-Thompson, *supra* note 27, at 157.

94. *See, e.g.*, Funmi Anifowoshe Manning, *When Prosecutors Act as Judges: Racial Disparities and the Absence of Due Process Safeguards in the Juvenile Transfer Decision*, 8 VA. J. CRIM. L. 1, 4 (2020); Matthew William Bell, *Prosecutorial Waiver in Michigan and Nationwide*, MICH. ST. L. REV. 1071, 1076 (2004).

95. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 110 n.60 (2010).

96. LA. CHILD. CODE ANN. art. 305 § A(1)-(2) (1991) *amended by* 2022 La. Sess. Law Serv. Act 175 (West) (listing attempted murder but not aggravated battery as an indictment for which a child is subject to the exclusive jurisdiction of the criminal court).

97. *Id.*

98. Feld & Bishop, *supra* note 78, at 821 ("Because offense categories are necessarily crude and imprecise indicators of the seriousness of any offense, prosecutors exercise enormous sentencing discretion when they decide whether to charge a youth with an excluded offense rather than a lesser included offense, or to select the forum in a direct-file jurisdiction.").

adults, while the remaining states consider 18 to be the age of adulthood.[99] However, these victories are limited: although the age at which children are *automatically* treated as adults has risen, children charged with certain offenses can still be waived to the adult system at a much younger age. In 22 states and the District of Columbia, there is no minimum age at which children can be charged as adults for certain crimes.[100] Therefore, while the proliferation of Raise the Age Laws is a significant victory, it is inaccurate to assume that they prevent the adultification of children.

C. Impact: A Shift in Power from Judges to Prosecutors

The rise in exclusionary statutes and direct file laws created a shift in power from judges to prosecutors. Exclusionary and direct file waivers enable prosecutors to usurp judicial authority by simply charging children as adults.[101] Rather than going through the trouble of preparing and arguing at a *Kent*-type hearing, prosecutors can charge a child with an excluded offense or an offense for which the criminal court has overlapping jurisdiction. Prosecutors make these charging decisions with virtually no oversight. They are not required to show the reasoning behind their charging decisions or to keep a record of them.[102] There is almost no opportunity for appellate review.[103] Citing separation of powers doctrine, appellate courts have proclaimed that prosecutors' charging decisions are immune from judicial interference.[104]

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99. Chuck Carrol, *Raise the Age: Where Legislation Stands in the Final Three States*, THE IMPRINT (Feb. 24, 2021, 7:00 PM), https://imprintnews.org/justice/raise-age-where-legislation-stands-final-three-states/52186 [https://perma.cc/9QCT-EYHY].

100. OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION, *Juveniles Tried as Adults*, https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2019&text=no&maplink=link1 [https://perma.cc/U9LH-DYCJ] (last visited Aug. 2, 2022) ("In 2019, there were 22 states and the District of Columbia that had at least one provision for transferring minors to criminal court for which no minimum age was specified.").

101. Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 242 (Jeffrey Fagan & Franklin Zimring eds., 2000) ("The appeal of prosecutorial waiver lies largely in the fact that it expedites the transfer process by circumventing the juvenile court.").

102. *See* Feld & Bishop, *supra* note 78, at 822 (noting that exclusionary and direct file laws "enable prosecutors covertly to manipulate charges or to select a juvenile or criminal forum in a low-visibility, discretionary setting with minimal information or record, and without providing any legal justification, accountability, or review").

103. Feld, *Punishing Kids in Juvenile and Criminal Courts*, *supra* note 69, at 452 ("Appellate courts rely on the doctrine of 'separation of powers' and decline to review prosecutors' exercises of executive discretion except under manifestly discriminatory circumstances . . . . Locally elected prosecutors . . . exercise their discretion as subjectively as do judges but without being subject to appellate review.").

104. *See* United States v. Bland, 472 F.2d 1329, 1335, 1337 (D.C. Cir. 1972) (holding that "the legitimate scope of prosecutorial discretion clearly encompasses the exercise of such discretion where it has the effect of determining whether a person will be charged as a juvenile or as an adult" and that the lower court's opposite holding "ignores the long and widely accepted concept of prosecutorial discretion, which derives from the constitutional principle of separation of powers").

The influx of exclusionary statutes and direct file laws made prosecutors "gatekeepers" to the juvenile legal system.[105] This role gives them enormous power in juvenile court, particularly for squaring off against kids who are desperate to be treated as kids. For D, the prospect of adult court was so dangerous to him that he agreed to remain in juvenile detention during a pandemic to avoid it. Prosecutors, armed with transfer statutes, have the power to send a message: *make my job difficult, and I will see you in criminal court*.

It is important to understand why the threat of transfer carries so much weight. While juvenile courts and juvenile jails are riddled with problems and abuse, the adult court alternative is more harmful and more dangerous.[106] The adult system introduces harsher sentences, more severe collateral consequences, and, in many states, adult prison.[107] Youth in adult facilities are five times more likely to be sexually assaulted than youth who are held in juvenile facilities—often within the first 48 hours of incarceration[108]—and 36 times more likely to commit suicide in adult jail than in a juvenile facility.[109] Adult prosecution is akin to a nuclear option in juvenile court.

III.
THE WEAPONIZATION OF ADULT PROSECUTION IN PLEA NEGOTIATIONS: PROBLEMS WITH THE PRACTICE

It is perhaps easiest for prosecutors to wield the threat of adult prosecution in the plea bargaining process. In a series of interviews with juvenile defenders in a large urban district, Erika Fountain and Jennifer Woolard found that close to a quarter of attorneys interviewed said that their clients accepted plea offers to avoid adult prosecution.[110] And while this area is ripe for more research, the tactic of

105. Feld, *Punishing Kids in Juvenile and Criminal Courts*, *supra* note 69, at 452.

106. *See* Jeffrey Fagan & Adam Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. FOR L. & SOC. CHANGE 29, 57–58 (2011) (regarding juvenile incarceration as "the lesser of two evils").

107. Taylor-Thompson, *supra* note 2727, at 182, 184 (explaining how in some states children are held in adult facilities, and detailing collateral consequences for children who are charged as adults, including disenfranchisement, loss of access to educational loans, the requirement of disclosing a conviction to employers, and exclusion from certain jobs or licenses); Fagan & Kupchik, *supra* note 106, at 58 ("[Y]oung adults are substantially more likely to fear for their safety in adult facilities, they report inferior relations with staff, and they seem somewhat less involved in available services than are young adults in the other two facility types. Moreover, they show significantly higher scores of psychological distress and PTSD.").

108. Jonathan Lippman, *Criminal Justice Reform is Not for the Short-Winded: How the Judiciary's Proactive Pursuit of Justice Helped Achieve "Raise the Age" Reform in New York*, 45 FORDHAM URB. L. J. 241, 253 (2017). *See also* Taylor-Thompson, *supra* note 27, at 182–83 ("Children placed in adult prisons are fifty percent more likely to endure physical attacks by fellow inmates with a weapon. They become easy prey because they are smaller and more vulnerable in facilities that provide little, if anything, in the way of protections for the children housed in them.").

109. Taylor-Thompson, *supra* note 27, at 183 ("[C]hildren in adult jails are . . . 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.").

110. Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 PSYCH. PUB. POL'Y & L. 192, 198 (2018).

threatening adult prosecution to secure a guilty plea runs parallel to the practice of "overcharging" in adult court. Prosecutors in adult court commonly "overcharge" by "including all colorable charges into the indictment or information . . . to induce plea bargaining."[111] It is consistent that prosecutors would deploy the same strategy in juvenile court and use the severity of adult prosecution to secure a guilty plea. This section will address two specific problems with weaponizing adult prosecution. First, the tactic places additional pressure on adolescents in a process that the adolescent brain is ill-equipped to take on. Second, we know that Black youth are disproportionately punished at every phase of the juvenile legal system and more likely to be transferred to adult court. It is therefore extremely likely that Black children are more prone to face the threat of transfer to adult court.

A. Adolescent Brain Development

In the past three decades, prolific neuroscience research has confirmed what anyone who has spent time with teenagers already knows: adolescents are developmentally different from adults. Specifically, the still-developing adolescent brain is prone to risky decision-making. From a juvenile justice perspective, three findings are critical: (1) that adolescents weigh the possibility of immediate reward more heavily than future risk;[112] (2) that adolescents are more vulnerable to risk-taking in emotionally "hot contexts,"[113] and (3) that adolescents both have difficulty trusting their attorneys[114] and are more vulnerable to their influence.[115] All of these factors put adolescents at a significant disadvantage during the plea bargaining process.

1. Adolescents Weigh Immediate Reward More Heavily than Future Risk

Adolescence is characterized by a "temporal gap" between the development of the socioemotional system and the prefrontal cortex, which "creates a period of heightened vulnerability to risk-taking."[116] Around the time of puberty,

111. Bell, *supra* note 94, at 1083–84, citing Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 107 (2002) (internal quotations omitted).

112. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLIN. PSYCH. 459, 469 (2009).

113. Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 11184, 11186 (2012).

114. *See* Fountain & Woolard, *supra* note 110, at 194 ("Juvenile clients are . . . at greater risk of misunderstanding the court process, which itself is associated with reduced trust in attorneys."); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272 n.124 (2005) (identifying studies that have "raised concerns about the difficulties children have in developing trusting a relationship with an attorney").

115. Fountain & Woolard, *supra* note 110, at 201 (discussing how "adolescents are more likely than adults to give in to the recommendations of authority figures" and that "younger adolescents are less likely to bring up disagreements with their attorneys than older adolescents").

116. Steinberg, *supra* note 112, at 466.

dopaminergic activity increases in the socioemotional system, which governs experiences of reward and punishment.[117] Dopamine plays a critical role in the brain's reward circuitry and its increase promotes sensation-seeking.[118] Lagging several years behind, however, is the development of the prefrontal cortex: the brain's behavioral control system.[119] This temporal gap makes adolescents more sensitive to rewards and more prone to risk-taking.[120] While adolescents and adults tend to weigh risks about the same, the increased weight adolescents place on rewards makes them more prone to risky decisions.[121]

If we picture a risk-reward scale in every brain, the scale in the adolescent brain is tipped towards reward. This presents a significant problem in the plea bargaining context, which is a process of weighing risks and rewards. First, consider the rewards of a guilty plea—most prominently, a lighter penalty than what a judge would award if the accused were convicted at trial. The difference between the penalty offered and the penalty threatened is often called a "trial penalty" or a "plea discount."[122] In New York City, a survey of adolescent offenders who pled guilty revealed that the average plea discount of those surveyed was 98%.[123] That is the difference between a year in jail and a week in jail. Furthermore, more than 90% of the adolescents who pled guilty received no jail time and went home on probation.[124] This is a significant and immediate reward. In Fountain and Woolard's survey of juvenile defenders, attorneys reported that "going home" was the most common reason why their clients took plea deals.[125] In addition, youth who plead guilty avoid having to confront witnesses at trial,[126] a process that may be anxiety-inducing for adolescents.[127] A guilty plea also puts an end to a lengthy and uncertain process.[128]

On the other hand, a guilty plea entails serious risks. A conviction, even in juvenile court, can carry weighty collateral consequences, which include: "enhanced penalties as an adult defendant, deportation, sex offender registration,

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117. *Id.*

118. *See id.*

119. *Id.* at 467.

120. *Id.* (discussing how an adolescent's "temporal gap . . . may combine to make adolescence a time of inherently immature judgment," therefore limiting "their ability to regulate . . . behavior in accord with these advanced intellectual abilities").

121. *Id.* at 469.

122. Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters, & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH. PUB. POL'Y & L. 250, 250 (2016).

123. *Id.* at 254.

124. *Id.*

125. Fountain & Woolard, *supra* note 110, at 198.

126. *See id.* ("The second most common reason [for accepting a plea] was the client's desire to avoid trial ($n = 7$; 38.9%). Specifically, youth did not want to see witnesses testify against them.").

127. *See id.* at 201 (characterizing the processes inherent to a trial as "negative stressors" for some adolescents).

128. *See id.* ("Four attorneys (22.2%) noted that their juvenile clients wanted to leave court or just get the process over with as quickly as possible . . . .").

inability to join the military, difficulty enrolling in university or securing federal funds, and . . . removal from school or public housing," among others.[129] The adolescent brain struggles to weigh these future risks against immediate rewards.[130] Making matters more difficult, adolescents also have problems with understanding future orientation. They are limited in their ability to contemplate long-term consequences, especially when weighed against a short-term gain.[131] Adolescents are hardwired to gravitate towards the short-term gains offered by plea deals and undervalue the consequences a plea might entail.

2. Adolescents are Prone to Risky Decisions in Emotionally "Hot" Contexts

Adolescent propensity for risk-taking is especially pronounced in emotionally "hot" contexts.[132] Research shows that fast-paced, emotionally charged settings exacerbate adolescents' existing deficiencies in decision-making.[133] Unfortunately for adolescents, plea bargains often take place in such settings. Consider the emotional weight of the following factors that may be present when weighing a plea offer: the fear of jail time, the shame of disappointing one's family, the humiliation of admitting to wrongdoing, and the loss of future opportunities. Then add a time constraint. Fountain and Woolard found that 72% of attorneys reported that the prosecution offered plea deals to their clients *the morning of the trial*.[134] The time that attorneys spent discussing plea bargains with their clients was, on average, an estimated 46 minutes.[135] Similarly, in a series of interviews with adolescents involved in the New York City criminal legal system, clinical psychologist and professor Tina Zottoli and her colleagues found

129. *Id.* at 200. Notably, even if adolescents were able to fully understand the collateral consequences involved in plea deals, they might not be advised of the full picture: "Defenders are not legally required to inform clients about collateral consequences" beyond deportation. *Id.*

130. *See* Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Between Adolescents and Adults Under the Law*, 1 ANN. REV. OF DEV. PSYCH. 21, 29 (2019) ("Compared to adults, adolescents also tend to overvalue immediate rewards relative to delayed ones, a finding often interpreted as indicating a weaker ability to delay gratification."); Feld, *Punishing Kids in Juvenile and Criminal Courts*, *supra* note 69, at 444 ("Juveniles' emphasis on short-term over long-term consequences . . . increase[s] their likelihood of entering false guilty pleas.").

131. Steinberg & Icenogle, *supra* note 130, at 29 ("[A]dolescents discount the consequences of possible future events when an immediate reward is presented. There is some evidence that this myopia extends to legal decision making explicitly.").

132. Blakemore & Robbins, *supra* note 113, at 1187 (showing that in contexts characterized by high emotion or stimulation, adolescents were more likely than children or adults to make risky decisions).

133. *Id.*; Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 272 ("Research suggests that youth rely on their cognitive reasoning skills with even less dependability and uniformity than adults in stressful settings."); Fountain & Woolard, *supra* note 110, at 194 ("Prolific research on adolescent development asserts that juveniles' decisional capacities leave them vulnerable to poor decision making in emotional and high stakes contexts.").

134. Fountain & Woolard, *supra* note 110.

135. *Id.*

that half of those interviewed had *less than an hour* to make a plea decision.[136] These severe time constraints are likely to "exacerbate[] an already emotional situation, creating the type of 'hot context' in which adolescent decisional capacities are more easily undermined than adults."[137] Thereby plea negotiations tend to actively produce a situation that fosters risky decision-making.

3. Adolescents Simultaneously Distrust their Attorneys and are Vulnerable to Adult Influence

The plea bargaining process is an incubator for risky decision-making: the rewards are immediate, the risks are not, and the clock is ticking. Competent counsel needs to mind these forces and work to counter them. There is a wealth of literature advising juvenile defenders on how to do just that.[138] However, we must note that adolescents are at yet another disadvantage in the plea bargaining process when it comes to relating to their attorneys. First, research shows that adolescents have a hard time trusting their attorneys and often misunderstand confidentiality requirements, frequently believing that their attorneys share information with the judge.[139] At the same time, adolescents are more susceptible to adult influence: their "dependence on adult authority figures increase[s] their likelihood of entering false guilty pleas."[140] Research shows that "adolescents tend to be more compliant with authority figures than adults"[141] and are thus more susceptible to making a plea decision based on adult influence.

Critics of plea bargaining in criminal court have described the process as coercive, poisonous, and a "cheap backroom shakedown."[142] Adolescents must endure this same process with a developmental disadvantage. Their risk-reward calculus is distorted, they struggle in fast-paced, emotionally charged situations, and they have difficulty working with their attorneys. The threat of adult prosecution ratchets up the coerciveness of plea negotiations by adding the possibility of being housed in adult jail, decades behind bars, and a public record to the decision-making process. In Fountain and Woolard's study, almost a quarter of attorneys surveyed said their clients took pleas because they wanted to avoid adult prosecution.[143] One attorney reported:

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136. Zottoli, Daftary-Kapur, Winters, & Hogan, *supra* note 122, at 254.

137. Fountain & Woolard, *supra* note 110, at 200.

138. *See, e.g.*, Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases*, *supra* note 114.

139. Fountain & Woolard, *supra* note 110, at 194.

140. Feld, *Punishing Kids in Juvenile and Criminal Courts*, *supra* note 69, at 444.

141. Lindsay C. Malloy, Elizabeth P. Shulman, & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 J. L. & HUM. BEHAV. 181, 182 (2014).

142. Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU (Jan. 13, 2020), https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/ [https://perma.cc/KYQ4-GGTH].

143. Fountain & Woolard, *supra* note 110, at 198.

> As a broader issue, I think it renders the plea kind of involuntary, frankly . . . . On the one hand, any way you can get them back to juvenile court is a good thing, on the other hand it's hard not to look at this situation and say, "That is a coerced plea."[144]

Adolescence is a physiologically distinct period of brain development. The only thing that transforms an adolescent brain into an adult one is time. There is no offense, no magic wand donned by prosecutors, that can speed up this process. Therefore, we must eliminate the prosecutor's ability to use adult prosecution as a bargaining chip.

B. The Impact of Race

In February 2021, a viral video showed a police officer pepper-spraying a nine-year-old Black girl who was handcuffed in the back of a police car.[145] "You're acting like a child," an officer yells at her. "I am a child," she screams back.[146] This disturbing scene is one of many examples of how youth of color are violently denied the protective status of childhood. The stories of Tamir Rice, a 12-year-old Black child playing with a toy gun, who was shot dead by officers who saw him as a threatening adult,[147] and of Adam Toledo, the 13-year-old Latino child who was shot and killed by a Chicago police officer,[148] are all too common. Compare this to the treatment of Kyle Rittenhouse, the 17-year-old white boy who was acquitted on all charges after killing two protestors in Kenosha, Wisconsin.[149] Conservative politicians and pundits rushed to Rittenhouse's defense, with one referring to him as a "little boy trying to protect his community."[150] The notion that children must be protected is not extended to children of color, who are viewed as more adult than their white peers.

In a series of pivotal studies, Philip Goff and his colleagues found that Black children are seen as older, less innocent, and less deserving of protection than their

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144. *Id.*

145. Tim Stelloh, *Three Officers Suspended After Police Pepper Spray Nine-Year-Old Girl in Rochester, N.Y.*, NBC NEWS (Feb. 1, 2021), https://www.nbcnews.com/news/us-news/police-pepper-spray-9-year-old-girl-rochester-n-y-n1256313 [https://perma.cc/A5MG-FFHK].

146. *Id.*

147. *See, e.g.*, Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One***,** N.Y. TIMES (Jan. 22, 2015), https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html [https://perma.cc/QMB8-2BX6].

148. Julie Bosman & Neil MacFarquhar, *Video Is Released of Chicago Police Fatally Shooting 13-Year-Old*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/us/adam-toledo-chicago-shooting-video.html [https://perma.cc./96MX-XKJY].

149. Becky Sullivan, *Kyle Rittenhouse is Acquitted of All Charges in the Trial Over Killing Two in Kenosha*, NPR (Nov. 19, 2021), https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict [https://perma.cc/2NNJ-HUER].

150. Kim Taylor-Thompson, *Op-Ed: Why America is Still Living with the Damage Done by the 'Superpredator' Lie*, L.A. TIMES (Nov. 27, 2020), https://www.latimes.com/opinion/story/2020-11-27/racism-criminal-justice-superpredators [https://perma.cc/YDA5-DMGE].

white peers.[151] In one study, participants were handed pictures of white and Black children and told that the children were felony suspects. On average, participants viewed Black felony suspects as 4.53 years older than they actually were, meaning that a 13-and-a-half-year-old was perceived to be 18—an adult.[152] Goff and his colleagues replicated the study with police officers as participants, and they fared slightly worse than the general public, on average rating Black felony suspects as 4.59 years older than they actually were.[153] This adultification has consequences. We perceive Black children as carrying greater moral responsibility for their actions than their white and Latinx peers.[154] A study of the relationship between attribution theory[155] and transfer revealed similar findings: decision-makers in the juvenile legal system were more likely to view Black youths' delinquent behavior as fundamental parts of their personalities and white youths' as a result of a bad environment.[156] System actors perceive a Black youth engaged in delinquent behavior to be showing who they *really* are, while they perceive a white youth engaged in the same behavior as a victim of their surroundings.

Transfer data reflect this racist fiction. Black children are 18 times more likely than white children to be sentenced as adults.[157] Although Black children make up just 16% of the general population, they represent 35% of youth waived to adult court and 58% of youth confined in adult prisons.[158] A study of California direct

151. Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta, & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCH. 526, 540 (2014).

152. *Id.* at 532.

153. *Id.* at 535. In another study, participants perceived the innocence of Black children as equal to or less than the innocence of non-Black children in the next oldest cohort. This means that "the perceived innocence of Black children age 10–13 was equivalent to that of non-Black children age 14–17, and the perceived innocence of Black children age 14–17 was equivalent to that of non-Black adults age 18–21." *Id.* at 529.

154. *Id.* at 532 ("Participants . . . deemed Black targets more culpable for their actions than [w]hite or Latino targets.").

155. Attribution theory relates to how we perceive the causes of an individual's behavior. Research in attribution theory shows that our biases influence what we believe to be driving one's behavior. *See* Harold H. Kelley & John L. Michela*, Attribution Theory and Research*, 31 ANN. REV. PSYCH. 457, 477–78 (1980).

> Decision makers [in the criminal legal system] routinely exercise professional judgments to decide "what defendants are *really* like" and to make prognoses for long-term behavior. For example, [studies] have shown that in borderline cases the attributions that prosecutors and other social control agents (such as police, probation officers, and judges) make about adult defendants and their cases are very important in deciding what the final charge should be.

M. A. Bortner, Marjorie S. Zatz, & Darnell F. Hawkins, *Race and Transfer: Empirical Research and Social Context*, *in* CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 296–97 (Jeffrey Fagan & Franklin Zimring eds., 2000) (citations omitted).

156. *Id.* at 297 ("[P]robation officers tend to attribute the delinquent acts of African Americans to their negative attitudinal and personality traits, while they attribute the delinquent acts of Euro-Americans to their social environment.").

157. Goff, Jackson, Di Leone, Culotta, & DiTomasso, *supra* note 151, at 526.

158. NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 2–3 (2007) [hereinafter AND JUSTICE FOR SOME].

file laws found that "[i]n 2013, for every white teenager who experienced direct file, 2.4 Latinx youth and 4.5 [B]lack youth faced the same situation."[159]

The decision to transfer is not an isolated racist decision in an otherwise neutral system. The view that Black youth are more adult and more responsible for their actions factors in to every point of the process, making it less likely that they will be offered one of the many diversionary off-ramps that exist in the system.[160] Children of color are more likely to be arrested at school than their white peers: in some states Black students are three times more likely to be arrested at school than white students.[161] Outside of school, Black youth are arrested anywhere from 2.8 to 5.5 times as often as white youth on drug charges, even though Black and white youth engage in drug offenses at roughly comparable rates.[162] After arrest, police decide whether a young person enters the system.[163] 23% of cases are handled internally and informally by the police department, and the children are released.[164] Many people who grew up in white suburban neighborhoods are familiar with this form of policing: misbehaving teens left in the hands of their parents to handle the situation as a family matter. Black children are less likely to be afforded this treatment. They are more likely to enter the system at this stage than their white peers,[165] reflecting the presumption that Black children are more deserving or in need of system involvement.[166] After

159. Manning, *supra* note 94, at 4 (first alteration in original). California has since eliminated its direct file laws. Sarah Barr, *Supporters Gear Up for New California Law That Eliminates Direct File*, JUV. JUST. INFO. EXCH. (Nov. 9, 2016), https://jjie.org/2016/11/09/supporters-gear-up-for-new-california-law-eliminating-direct-file/ [https://perma.cc/PP6C-UCZX].

160. *See* Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 408 ("At every decision point in the system, statistics show that [B]lack youth are more likely to experience harsher dispositions and penetrate further into the system than white youth.").

161. AMIR WHITAKER, SYLVIA TORRES-GUILLÉN, MICHELLE MORTON, HAROLD JORDAN, STEFANIE COYLE, ANGELA MANN, & WEI-LING SUN, ACLU, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 24 (2019).

162. Taylor-Thompson, *supra* note 27, at 166 (citing HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG ENFORCEMENT AND RACE IN THE UNITED STATES (2008)).

163. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 104 (2006).

164. *Id.* ("In 2010, 23% of all juvenile arrests were handled within the police department and resulted in release of the youth.").

165. *See* AND JUSTICE FOR SOME, *supra* note 158, at 3 (stating that Black youth make up 28% of youth arrested but 34% formally processed by juvenile court). It is also important to note that the number of white youth who are compared to Black youth is often artificially inflated because white or white-presenting Latinx youth are often coded as white in crime records. Bortner, Zatz, & Hawkins, *supra* note 155, at 283 (noting that coding Latinx individuals as white "would underestimate the number of youths of color who are processed and sanctioned, making the racial/ethnic disproportionality seem smaller than it really is").

166. *Cf.* Jodi S. Cohen, *supra* note 47 (detailing the story of a 15-year-old Black girl who was incarcerated, against her mother's wishes, during the coronavirus pandemic after a judge ruled that she had violated her probation by not completing her online schoolwork).

arrest, youth of color are more likely to be detained,[167] and they are less likely to be offered a rehabilitative program in lieu of carceral punishment.[168] If waiver is on the table, white youth enjoy a "waiver advantage" and are more likely to remain in juvenile court.[169]

Although we know that Black youth are more likely to be transferred to adult court,[170] there have not been any studies on whether Black children are more likely to be *threatened* with transfer than their white peers. It would be very difficult to quantify, as prosecutors are not required to record their plea deals, let alone the threats they use to secure them.[171] But consider the juvenile legal system that we have. It is a system that arrests and detains a disproportionate number of Black children, leaving more Black children at the disposal of a prosecutor.[172] It is a system that consistently views Black children as more adult, more violent, and more responsible for their actions.[173] Evidence suggests that prosecutors use a defendant's race as a proxy for her latent criminality and likelihood to recidivate.[174] The implication of this reality is obvious: Black children are more likely than their white peers to face the threat of transfer to adult court in the plea bargaining process.

IV.
THE WEAPONIZATION OF ADULTHOOD IN PLEA NEGOTIATIONS: CHALLENGES TO THE PRACTICE

One route for attacking the weaponization of adult prosecution is alleging prosecutorial vindictiveness. Prosecutorial vindictiveness, as defined by the

167. Josh Rovner, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 4 (2021). *See also* AND JUSTICE FOR SOME, *supra* note 158, at 3 (stating that Black youth make up 28% of youth arrested but 37% of youth detained).

168. *See* Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, *supra* note 31, at 424 and n.227.

169. AND JUSTICE FOR SOME, *supra* note 158, at 2 ("[A]mong drug offense cases referred to juvenile court, White youth enjoy an 11% 'waiver advantage,' while African American youth carry a 12% 'waiver disadvantage.'").

170. *Id.*

171. *See* Feld & Bishop, *supra* note 78, at 822 (noting that transfer decisions are made in a "low-visibility, discretionary setting with minimal information or record, and without providing any legal justification, accountability, or review"); Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 1 (referring to transfer as a "jurisprudential wasteland").

172. *See* AND JUSTICE FOR SOME, *supra* note 158, at 1–2 (stating that Black youth "were disproportionately arrested in 26 of 29 offense categories documented by the FBI" in 2004, and that Black children are overrepresented compared to white children with regards to detention in 45 states).

173. *See* Goff, Jackson, Di Leone, Culotta, & DiTomasso, *supra* note 151, at 529 (discussing how perceived innocence of Black children decreases compared to other children starting around age 10).

174. *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) ("[I]n the absence of evidence of a defendant's recidivism risk . . . , prosecutors may be using race as a proxy for the defendant's likelihood to recidivate.").

Supreme Court in the 1974 case *Blackledge v. Perry*, means that a prosecutor has retaliated against a criminal defendant for exercising a legal right, thereby denying them due process.[175] *Perry* concerned a writ of habeas corpus. Mr. Perry had been convicted of misdemeanor assault in North Carolina's District Court Division of the General Court of Justice, which had exclusive jurisdiction over misdemeanor cases. His conviction carried a six-month sentence.[176] Perry then filed a notice of appeal in the Superior Court, as North Carolina law granted an absolute right to a trial *de novo* in the Superior Court.[177] In response, the prosecutor charged Perry with a felony in the Superior Court for the same conduct that underpinned the original misdemeanor charge. Faced with this more serious charge, Perry took a plea offer that carried a five-to-seven-year sentence. Thus, due to a prosecutor's retaliatory charging decision, Perry's sentence increased tenfold after he exercised his legal right to an appeal. He filed a writ of habeas corpus. The District Court granted Perry's habeas writ and the Supreme Court affirmed, holding that the prosecutor violated Perry's due process rights when he retaliated against him for exercising his legal right to appeal.[178]

While it seems like textbook vindictiveness to threaten adult prosecution against an adolescent asserting their constitutional right to trial, juvenile defendants bringing this claim face an obstacle: *Bordenkircher v. Hayes*. Just four years after *Perry*, the Supreme Court kneecapped its own vindictiveness rule when it held that criminal defendants are precluded from bringing vindictiveness claims against prosecutors who retaliate with harsher charges when the defendant insists on their right to trial.[179] *Bordenkircher* thus closed off vindictiveness claims for criminal defendants faced with coercive plea tactics. However, this section will explain that there is a strong argument that *Bordenkircher* does not apply in the juvenile context. For one, the Utah Supreme Court has limited *Bordenkircher*'s reach in juvenile court.[180] Furthermore, Supreme Court decisions in the last 15 years rooted in adolescent brain development undercut *Bordenkircher*'s rationale and open an avenue for vindictiveness claims in juvenile court.[181]

175. Blackledge v. Perry, 417 U.S. 21, 27–28 (1974) (holding that "due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation" on the part of the prosecutor); Doub Lieb, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1017 (2014) ("[A]s defined by the Supreme Court, vindictiveness means that a prosecutor has retaliated against a defendant for the exercise of a legal right, denying her due process.").

176. *Id.* at 21–22.

177. *Id.* at 22.

178. *Id.* at 27.

179. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

180. *See* discussion *infra* Section IV.B.

181. *See* discussion *infra* Section IV.C.

A. Bordenkircher *Presents an Obstacle to Prosecutorial Vindictiveness Claims Brought in Response to Coercive Plea Tactics*

Just four years after the Supreme Court defined prosecutorial vindictiveness, it held in *Bordenkircher* that it is not vindictive to penalize a criminal defendant for asserting their right to trial.[182] Mr. Hayes was charged with writing a fraudulent check for $88.30. This offense carried a two-to-ten-year prison sentence. The prosecutor offered Hayes a plea bargain: five years if he would plead guilty to the indictment. If Hayes refused to plead guilty and forced the court to go through "the inconvenience and necessity of a trial"[183] the prosecutor promised to return to the grand jury to secure an indictment under the Kentucky Habitual Criminal Act—a three-strike law that would subject Hayes to a mandatory life sentence because he had two prior felony convictions. Hayes refused to take the deal and the prosecutor followed through on his promise. Hayes was convicted at trial and sentenced to life in prison.

The Supreme Court affirmed Hayes's life sentence. While the Court nodded to its vindictiveness rule, proclaiming that it is in fact a due process violation to punish a person for exercising his constitutional or statutory rights,[184] the Court reasoned that the prosecutor here was not *punishing* Hayes; he was simply *bargaining*.[185] The Court referred to plea bargaining as a "give-and-take" process, where "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[186] And defendants are, according to the Court, free to accept or reject any plea deal, given that they are "advised by competent counsel and protected by other procedural safeguards."[187] Relying on its history of tolerating and encouraging plea negotiations, the Court determined that it had "necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[188] With this holding, the Supreme Court "eviscerated the [vindictiveness] doctrine it had just created, effectively excepting the right to trial from those protections against prosecutorial retaliation."[189]

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182. *Bordenkircher*, 434 U.S. at 365; Lieb, *supra* note 175, at 1033 (arguing that the court in *Bordenkircher* "gutted its protection of the right to trial in an effort to protect plea bargaining").

183. *Bordenkircher*, 434 U.S. at 358.

184. *Id.* at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.").

185. *Id.* ("Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.").

186. *Id.*

187. *Id.*

188. *Id.* at 364.

189. Lieb, *supra* note 175, at 1022.

B. Mohi *Serves as an Example for Challenging* Bordenkircher *in Juvenile Court, but it Does Not Go Far Enough*

Bordenkircher presents a significant hurdle for children threatened with adult prosecution. However, there is ample room to challenge *Bordenkircher*'s applicability in the juvenile context. In fact, there is precedent for doing so. In *State v. Mohi*, the Supreme Court of Utah invalidated the state's direct-file law, which created concurrent jurisdiction in adult and juvenile court for certain offenses.[190] The court held that the statute violated the uniform operation clause of the Utah State Constitution because it allowed for children facing equivalent charges to be treated differently at the prosecutor's discretion.[191] This level of discretion, according to the court, was beyond what *Bordenkircher* authorized. The court remarked that *Bordenkircher* gave prosecutors exclusive control of the *charging* decision, not the *venue* of those charges:

> [I]t is only the *charging* decision that is protected by traditional notions of prosecutor discretion . . . . Choosing *which court* to file charges in has significant consequences for the offender, and the statute does not indicate what characteristics of the offender mandate that choice. The scope for prosecutor stereotypes, prejudices, and biases of all kinds is simply too great.[192]

Mohi serves as an example of a successful challenge to *Bordenkircher* in juvenile proceedings.[193] However, the decision's rationale limits its impact. The *Mohi* court left state exclusionary laws undisturbed, noting that "[i]f it is the legislature's determination to have all members of a certain group of violent juveniles (such as repeat offenders, those who use guns, etc.) tried as adults, it is free to do so."[194] An impactful challenge to *Bordenkircher* cannot be limited to direct file provisions, given that exclusionary waivers account for the vast majority of transfers and give prosecutors functionally equivalent levels of discretion.[195]

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190. *See* State v. Mohi, 901 P.2d 991 (Utah 1995).

191. *Id.* at 997–98 ("The amended statute plainly states that a certain class of juveniles will be treated in one way (remain in juvenile jurisdiction) while another class of like-accused juveniles will be treated in another (singled out by prosecutors to be tried as adults) . . . treat[ing] a certain subclass of juveniles nonuniformly.").

192. *Id.* at 1003 (emphasis added) (citing *Bordenkircher*, 434 U.S. at 364).

193. There is debate concerning whether the rights afforded by the Utah State Constitution's Uniform Operations Clause are "one and the same" as those rights conveyed by the Equal Protection Clause. Steven F. Huefner, *A Champion of State Constitutions*, 75 ALB. L. REV. 1673, 1674 (2012). At times, the Utah Supreme Court has said that there are no distinctions between the Uniform Operations Clause and the Equal Protection Clause, while at other times the Court has said that the Uniform Operations Clause is more expansive. *Id.* A broad reading of *Mohi* suggests that direct file laws present equal protection issues. However, an attack on only direct file laws does not address the full scope of the problem, as exclusionary waivers are responsible for 85% of transfers. Taylor-Thompson, *supra* note 27, at 157.

194. *Mohi*, 901 P.2d at 1003.

195. Taylor-Thompson, *supra* note 27, at 157.

Thus we should view *Mohi* as a starting point—not an exemplar—for challenging *Bordenkircher*.

Notably, the *Mohi* decision makes no mention of adolescent brain development. The 1995 decision preceded a series of prolific decisions from the Supreme Court that, relying on adolescent brain science, limited extreme punishment for youth.[196] Now that we can draw on these cases, we can mount a much stronger challenge to *Bordenkircher* that is rooted in adolescent brain development. I argue that this challenge can block the threat of adult prosecution, regardless of the type of waiver a prosecutor deploys in making the threat.

C. A Challenge to Bordenkircher *that is Rooted in Adolescent Brain Development*

Adolescents are at a developmental disadvantage during the plea bargaining process.[197] They are prone to (1) weighing immediate rewards more heavily than future risks, (2) making risky decisions in fast-paced and emotionally-charged situations, and (3) both distrusting their attorneys and yielding to their influence.[198] Crucially, these are limitations that the Supreme Court has recognized.

In a string of Eighth Amendment decisions often referred to as the *Roper-Graham-Miller* trilogy, the Supreme Court limited the harshest punishment for children under 18, recognizing once and for all that "children are different."[199] *Roper v. Simmons* outlawed the juvenile death penalty, reasoning that youth have a diminished culpability because of their lack of maturity and underdeveloped sense of responsibility, their heightened vulnerability to negative influence, and the fact that their character is not as well formed as that of an adult.[200] Five years later, the Court reiterated the distinctive characteristics of youth in *Graham v. Florida,* where it held that the Eighth Amendment outlawed life without parole for juveniles who committed non-homicidal offenses.[201] Shortly thereafter, the Court in *Miller v. Alabama* prohibited a *mandatory* sentence of life without parole for all juvenile offenders, once again relying on the mitigating characteristics of youth.[202]

Each of these cases builds on the previous and delves deeper into the science that differentiates adolescents from adults. In *Graham*, the Court spoke directly to the characteristics of youth that I have outlined as playing a crucial role in the plea

196. *See* discussion *infra* Section IV.D.

197. *See* discussion *supra* Section III.A.

198. *See supra* notes 112–15 and accompanying text.

199. Miller v. Alabama, 567 U.S. 460, 480 (2012).

200. Roper v. Simmons, 534 U.S. 551, 569–70 (2005) (discussing three broad sociological and scientific differences between youth and adults, including an underdeveloped sense of responsibility, a greater susceptibility to negative influence, and a less fixed and more transitory character).

201. Graham v. Florida, 560 U.S. 48, 82 (2010).

202. *Miller*, 567 U.S. at 489.

bargaining process, proclaiming that "difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense."[203] Thus, adolescents are "at a significant disadvantage in criminal proceedings."[204] The *Miller* Court built on *Graham* and further explored the science behind its holding.[205] Citing an amicus brief from the American Psychological Association, the Court stated that "[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[206]

These decisions and the science on which they rely directly undercut *Bordenkircher*'s rationale. *Bordenkircher*, in upholding the prosecutor's coercive plea tactics, asserted that criminal defendants are "presumptively capable of intelligent choice in response to prosecutorial persuasion."[207] This assertion is already dubious when it comes to an adult up against the power of the state.[208] With regard to adolescents, both science and Supreme Court precedent outright refute that rationale. Adolescents are presumptively *in*capable of intelligent choice in the context of a plea bargain.[209] They are prone to weighing the immediate rewards that a plea bargain offers more heavily than future risks that a guilty plea might entail,[210] especially in an emotionally "hot" context like the plea bargaining process.[211] Furthermore, they are likely to simultaneously distrust their attorneys and succumb to their influence.[212]

Bordenkircher also placed great weight on the fact that criminal defendants are "unlikely to be driven to false self-condemnation" when "advised by

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

204. *Id.*

205. *Miller*, 567 U.S. at 470 ("*Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offenses . . . . Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.").

206. *Id.* at 472 n.5 (quoting Brief for American Psychological Association, American Psychiatric Association, & National Association of Social Workers as *Amici Curiae* 4).

207. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

208. Oftentimes there is no "intelligent" choice for a criminal defendant to make. Rather, the choice is an impossible one. *See* Trivedi, *supra* note 142.

209. *See* discussion *supra* Section III.A.

210. *See* discussion *supra* Section III.A.1.

211. *See* discussion *supra* Section III.A.3.

212. *See id.*

competent counsel."[213] Again, this assertion is suspect in the adult context[214] and outright debunked in the juvenile one. As *Graham* highlighted, children "are less likely than adults to work effectively with their lawyers to aid their defense."[215] Thus, for adolescents, competent counsel cannot constitute a sufficient safeguard against the threat of adult prosecution.

J.D.B. v. North Carolina deals the final blow to *Bordenkircher*. *J.D.B.* extended the rationale applied in the *Roper-Graham-Miller* trilogy beyond the context of sentencing, holding that youth is a proper factor in determining whether a suspect was in custody for the purposes of *Miranda*.[216] The Court in *J.D.B.* insisted that the "differentiating characteristics of youth are universal" and therefore are not limited to a single area of the law.[217] This opens up an avenue to apply the rationale of the *Roper-Graham-Miller* trilogy to challenge *Bordenkircher*. Furthermore, *J.D.B.* asserted that "events that would leave a man cold and unimpressed can overawe and overwhelm a teen."[218] It is but a small step to extend this assertion from the interrogation context to that of plea negotiations. While the Supreme Court has already concluded that an adult is presumptively capable of navigating the most coercive plea bargaining tactics, it should recognize that these same tactics can "overwhelm and overawe a teen."[219]

D. Moving Forward: The Impact of Jones v. Mississippi

The decisions described in the previous section "were issued when the makeup of the court is quite different than it is now."[220] In April of 2021, the Supreme Court decided *Jones v. Mississippi*. "This case was the first time the [C]ourt has heard arguments in a juvenile sentencing case with three Trump appointees on the bench, including new Justice Amy Coney Barrett, who replaced the late Justice Ruth Bader Ginsburg."[221] Perhaps unsurprisingly, the *Jones* Court made it significantly easier for adolescents convicted of homicide in adult court to be sentenced to life without parole.[222] Justice Brett Kavanaugh, writing for a 6-3

213. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

214. *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 727 (2020) (citing Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) ("There is abundant, undisputed evidence that defendants in the US criminal justice system regularly plead guilty to crimes they did not commit.").

215. Graham v. Florida, 560 U.S. 48, 78 (2010).

216. J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011) ("Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.").

217. *Id.* at 273.

218. *Id.* at 272 (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948)).

219. *Id.*

220. Totenberg, *supra* note 22.

221. *Id.*

222. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

majority, declared that a sentencing judge need not make a finding that an adolescent convicted of homicide is "permanently incorrigible" before sentencing them to life without parole.[223] The decision has been characterized as "appalling,"[224] "mangled,"[225] and "a U-turn" from precedent.[226]

In 2004, Brett Jones was sentenced to mandatory life without parole for a murder he committed when he was 15 years old.[227] Eight years later, in *Miller*, the Supreme Court held that mandatory life without parole sentencing schemes for adolescents under 18 violated the Eighth Amendment.[228] Years after that, the Supreme Court held in *Montgomery v. Louisiana* that its decision in *Miller* was retroactive,[229] so people like Brett Jones who had been sentenced to mandatory juvenile life without parole (JLWOP) before *Miller* were entitled to a resentencing hearing or consideration for parole.[230] Though *Miller* and *Montgomery* did not outright ban JLWOP sentencing, they held that JLWOP is unconstitutional for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[231]

At Jones's resentencing hearing—where the judge sentenced Jones again to life without parole—the sentencing judge did not make any finding that Jones was "permanently incorrigible."[232] Jones argued to the Supreme Court that the sentencing judge's failure to make this finding was in violation of *Miller* and *Montgomery*.[233] The conservative bloc of the court disagreed, insisting that *Miller* and *Montgomery* "squarely rejected" any formal fact finding requirement.[234]

In her dissent, Justice Sonia Sotomayor—joined by Justices Elena Kagan and Stephen Breyer—wrote, "Today, the Court distorts *Miller* and *Montgomery* beyond recognition."[235] She critiqued the Court's deceptive behavior, writing: "[T]he Court simply re-writes Miller and Montgomery to say what the Court now wishes they had said, and then denies that it has done any such thing."[236] Much commentary on *Jones* has uplifted Justice Sotomayor's dissent, noting the

223. *Id.* at 1317.

224. Stern, *supra* note 23.

225. Matt Ford, *Blame Anthony Kennedy for the Supreme Court's Mangled Ruling on Juvenile Life Without Parole*, THE SOAPBOX (Apr. 23, 2021), https://newrepublic.com/article/162162/anthony-kennedy-mistake-juvenile-defendants [https://perma.cc/9Z6H-Q8ZM].

226. Totenberg, *supra* note 22.

227. *Jones*, 141 S. Ct. at 1312.

228. Miller v. Alabama, 567 U.S. 460 (2012); *see also* discussion *supra* Section IV.D.

229. Montgomery v. Louisiana, 577 U.S. 190 (2016).

230. *Id.* at 212.

231. *Id.* at 209.

232. *Jones*, 141 S. Ct. at 1313.

233. *Id.*

234. *Id.* at 1314.

235. *Id.* at 1330 (Sotomayor, J., dissenting).

236. *Id.* at 1336.

hypocrisy of a decision that claims to uphold *Miller* and *Montgomery* while also making it easier to sentence youth to life without parole.[237]

Following *Miller*, 25 states and the District of Columbia statutorily banned juvenile life without parole sentencing schemes altogether.[238] However, in the states that still allow for the practice, *Jones* allows sentencing judges to hand out JLWOP sentences without giving meaningful consideration to the mitigating factors of youth.[239] It is a devastating ruling. But, as Justice Sotomayor noted, "For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law."[240] Defenders should do the same. Taken at its word, the decision does not thwart our ability to attack *Bordenkircher* based on the "distinctive attributes of youth."[241]

Furthermore, states need not let *Jones* undercut their progress in reducing harsh punishment for children. For example, in *In the Matter of Personal Restraint of Asaria Justice Miller*, the Division Two Court of Appeals of the State of Washington recently granted an incarcerated petitioner's motion for resentencing because "the sentencing court did not meaningfully consider mitigating factors related to her youth at sentencing."[242] Here, the sentencing judge had sentenced Asaria Miller to 390 months (32.5 years) in prison after pleading guilty to a murder she committed at age 16.[243] This 390-month sentence was 30 months greater than the high-end of the recommended sentencing range.[244] The court held that Miller was entitled to a resentencing hearing, as the sentencing judge failed to consider the "hallmark features" of youth.[245] The court also noted how racism impacts sentencing decisions:

> Amicus curiae argues that it is well-established by empirical literature and has been acknowledged by our Supreme Court that Black children are prejudiced by, in addition to other stereotypes, "adultification" or the tendency of society to view

237. *See, e.g.*, Stern, *supra* note 23 (characterizing the ruling as "one of the most dishonest and cynical decisions in recent memory," and stating that "[w]hile pretending to follow precedent, Kavanaugh tore down judicial restrictions on JLWOP, ensuring that fully rehabilitated individuals who committed their crimes as children will die behind bars"); Ford, *supra* note 225, citing Justice Thomas's concurring opinion ("It's hard not to see [the majority opinion] as a 'strained' reading, to say the least.").

238. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/Q8PP-38AB].

239. Andrew Cohen, *Supreme Court: Let's Make it Easier for Judges to Send Teenagers to Die in Prison*, THE BRENNAN CTR. (Apr. 27, 2021), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-lets-make-it-easier-judges-send-teenagers-die-prison [https://perma.cc/HF7M-6SKD].

240. *Jones*, 141 S. Ct. at 1337 (Sotomayor, J., dissenting).

241. Miller v. Alabama, 567 U.S. 460, 472 (2012).

242. *In re* Miller, 505 P.3d 585, 586 (Wash. Ct. App. 2022).

243. *Id.* at 587.

244. *Id.*

245. *Id.* at 588.

> Black children as older than similarly aged youths. This results in harsher punishments for Black children in the criminal justice system. Additionally, Black girls are also prejudiced by gender bias, further creating a punitive discrepancy between Black girls and their peers . . . . We agree that adultification may detrimentally affect children of color at criminal sentencings . . . . [W]e recognize that adultification is real and can lead to harsher sentences for children of color if care is not taken to consciously avoid biased outcomes.[246]

It is my hope that our future sees more decisions like this one from Washington, but at an earlier stage in the process. What if we avoided the adultification of Black youth not when sentencing them in adult criminal court, but rather by keeping children like Asaria Miller out of adult court in the first place? Though *Jones* indicates the Supreme Court's lack of receptivity to such an argument, *In re Miller* shows that state courts can still provide a path forward.

CONCLUSION

During the "Get Tough" era, prosecutors became gatekeepers to the juvenile system.[247] They obtained the power to transfer adolescents to criminal court with virtually no oversight. Armed with this power, prosecutors can and do wield the threat of adult prosecution as a bargaining chip in the plea negotiation process. This practice makes a process that adolescents are ill-equipped to handle all the more coercive. And, given that youth of color are adultified at every stage of the legal process,[248] it is highly likely that they face the threat of adult prosecution more often than their white peers. While threatening adult prosecution in response to an adolescent asserting their right to trial seems like textbook vindictiveness, juvenile defenders will be unsuccessful in their challenge of vindictiveness without arguing that *Bordenkircher* is inapplicable in juvenile court. Defenders can try to take down *Bordenkircher* in juvenile court by relying on adolescent brain development science, which shows how adolescents are at a disadvantage in the plea bargaining process: they struggle with risk-reward calculus, emotionally "hot" contexts, and the attorney-client relationship. This research has been affirmed by the Supreme Court in the *Roper-Graham-Miller* trilogy and in *J.D.B.* In *Jones*, the Supreme Court gave lip-service to these findings while simultaneously cutting back on Eighth Amendment protections for adolescents. Disappointing as this is, we must seize on the fact that "*Miller* and *Montgomery* are still good law"[249] and act quickly. It is now critical to eliminate the power of adult prosecution as a bargaining chip in juvenile court. The more danger adult prosecution carries, the more coercive the threat of it stands to be.

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246. *Id.* at 589–90.

247. *See* discussion *supra* Section II.C.

248. *See* discussion *supra* Section III.B.

249. Jones v. Mississippi, 141 S. Ct. 1307, 1337 (2021) (Sotomayor, J., dissenting).