

# How Tough on Crime Became Tough on Kids:

Prosecuting Teenage Drug Charges in Adult Courts



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# INTRODUCTION

Transfer laws in 46 states and the District of Columbia permit youth to be tried as adults on drug charges.

Successful campaigns to raise the age of juvenile court jurisdiction have rolled back some excesses of the tough on crime era. After the implementation of Louisiana's SB 324 in 2017 and South Carolina's SB 916 in 2019, just seven states will routinely charge 17-year old offenders as adults, including the two states that also charge 16-year olds as adults.<sup>1</sup> Despite other state laws that differentiate between adults and youth, placing limits on teens' rights to serve on juries, vote, or marry without parental consent, the criminal justice system in these jurisdictions erases the distinction when they are arrested.

Though the vast majority of arrested juveniles are processed in the juvenile justice system, transfer laws are the side door to adult criminal courts, jails, and prisons. These laws either require juveniles charged with certain offenses to have their cases tried in adult courts or provide discretion to juvenile court judges or even prosecutors to pick and choose those juveniles who will be tried in adult courts.

It is widely understood that serious offenses, such as homicide, often are tried in adult criminal courts. In fact, for as long as there have been juvenile courts, mechanisms have existed to allow the transfer of some youth into the adult system.<sup>2</sup> During the early 1990s, under a set of faulty assumptions about a coming generation of "super-predators," 40 states passed legislation to send even more juveniles into the adult courts for a growing array of offenses and with fewer procedural protections.<sup>3</sup> The super-predators, wrote John J. DiIulio in 1995, "will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high."<sup>4</sup>

This tough-on-crime era left in its wake state laws that still permit or even require drug charges to be contested in adult courts. Scant data exist to track its frequency,

but fully 46 states and the District of Columbia permit juveniles to be tried as adults on drug charges. Only Connecticut, Kansas, Massachusetts, and New Mexico do not. States have taken steps to close this pathway, including a successful voter initiative in California, Proposition 57. Nationwide, there were approximately 461 judicial waivers (those taking place after a hearing in juvenile court) in 2013 on drug charges. The totals stemming from other categories of transfer are not available.

From 1989 to 1992, drug offense cases were more likely to be judicially waived to adult courts than any other offense category.<sup>5</sup> Given the recent wave of concern over opiate deaths, it is reasonable to fear a return to this era, even as public opinion now opposes harsh punishments for drug offenses.<sup>6</sup>

The ability of states to send teenagers into the adult system on nonviolent offenses, a relic of the war on drugs, threatens the futures of those teenagers who are arrested on drug charges, regardless of whether or not they are convicted (much less incarcerated) on those charges. Transfer laws have been shown to increase recidivism, particularly violent recidivism, among those convicted in adult courts. Research shows waiver laws are disproportionately used on youth of color. Moreover, an adult arrest record can carry collateral consequences that a juvenile record might not. Since very few criminal charges ever enter the trial phase, the mere threat of adult prison time contributes to some teenagers' guilty pleas. This policy report reviews the methods by which juveniles can be tried as adults for drug offenses and the consequences of the unchecked power of some local prosecutors.

# PATHWAYS TO ADULT COURTS

All states set an **age boundary**, generally at 18 years of age, dividing juveniles from adults. The federal government, 41 states and the District of Columbia set the default maximum age for juvenile court jurisdiction at 17 years. In seven states (Georgia, Louisiana, Michigan, Missouri, South Carolina, Texas and Wisconsin), the maximum age is 16 years. In two states (New York and North Carolina), the maximum age is 15 years.<sup>7</sup> In every state, additional juveniles can be transferred into the adult criminal justice system via one of three broad paths.

## JUDICIAL DISCRETION

**Judicial or discretionary waivers** mean that the decision to transfer an individual case into adult court is in the hands of the juvenile court judge, following a request from a prosecutor and a transfer hearing. There are circumstances in which the waiver is a **presumptive waiver**, in which the prosecutor requests the transfer and the burden is on the young person to argue against it.<sup>8</sup> The transfer hearing separates discretionary waivers from prosecutorial and automatic transfers. Forty-four states and the District of Columbia allow for judicial waivers.<sup>9</sup>

## PROSECUTORIAL DISCRETION

Juvenile and criminal courts can share jurisdiction for some criminal charges, thus allowing prosecutors to determine whether charges should be filed in juvenile court or criminal court, though age requirements differ depending on the charge.<sup>10</sup> Used in 14 states and the District of Columbia,<sup>11</sup> **prosecutorial discretion** is the label for such a transfer; it is also termed “direct file,” because prosecutors file the charges directly in adult courts without the procedural difficulties of obtaining a judicial waiver. Before 1970, only Florida and Georgia allowed for prosecutorial discretion.<sup>12</sup>

## STATUTORY EXCLUSION

Under **statutory exclusion** laws, juveniles arrested on a set of specified offenses are automatically treated as though they were adults. Statutory exclusion laws, while neutral in appearance, increase the power of prosecutors. “The selection of the charge becomes the selection of the court,” notes Franklin Zimring.<sup>13</sup> A variation of the statutory exclusion is a **mandatory or automatic waiver**, in which certain cases begin in juvenile court only to verify that the case meets the requirements for transfer to adult court. Legislatures in 29 states have given criminal courts exclusive jurisdiction over at least one class of juvenile offenses.<sup>14</sup> Before 1970, only eight states had automatic transfers, typically for murder.<sup>15</sup>

In 33 states and the District of Columbia, once a juvenile has been convicted of an offense as an adult, he or she will henceforth always be treated as an adult.<sup>16</sup> These laws are called **once an adult, always an adult**, despite the fact that the defendant is still under 18. For example, a Washington juvenile could be convicted of a charge of burglary (a so-called adult offense), sentenced to probation, and then would be charged as an adult on any criminal offense, including simple possession of LSD.<sup>17</sup>

# TRANSFER PATHWAYS FOR DRUG CHARGES

The existence of a vast array of transfer mechanisms masks the extent to which juveniles can be charged as adults for drug charges. Some states specify drug charges in their criminal code; far more common is wide-ranging discretion over “any criminal offense” or “any felony,” meaning even drug charges can fall under the umbrella of transfer laws.

## STATES WITH NO MECHANISM TO CHARGE JUVENILES AS ADULTS FOR DRUG OFFENSES

Only four states – Connecticut, Kansas, Massachusetts, and New Mexico – have no mechanism under which juveniles can be charged as adults for drug offenses. Wide-ranging discretion and laws that specify drug

charges are troubling because drug arrests are among the most common reasons that teenagers are arrested.<sup>18</sup> These four states sharply limit the ability of courts and prosecutors to send drug charges to adult court, which is an important step in limiting the total number of juveniles in adult courts.

## JUDICIAL DISCRETION: ALLOWS JUVENILES TO BE TRANSFERRED ON DRUG OFFENSES AFTER A HEARING

The 41 jurisdictions shown in Figure 1 demonstrate the sweeping powers of transfer provisions. In 30 of these states, juvenile courts have the power to transfer juveniles for nearly any offense. **Delaware** has no lower

Figure 1. State use of judicial discretion for drug charges

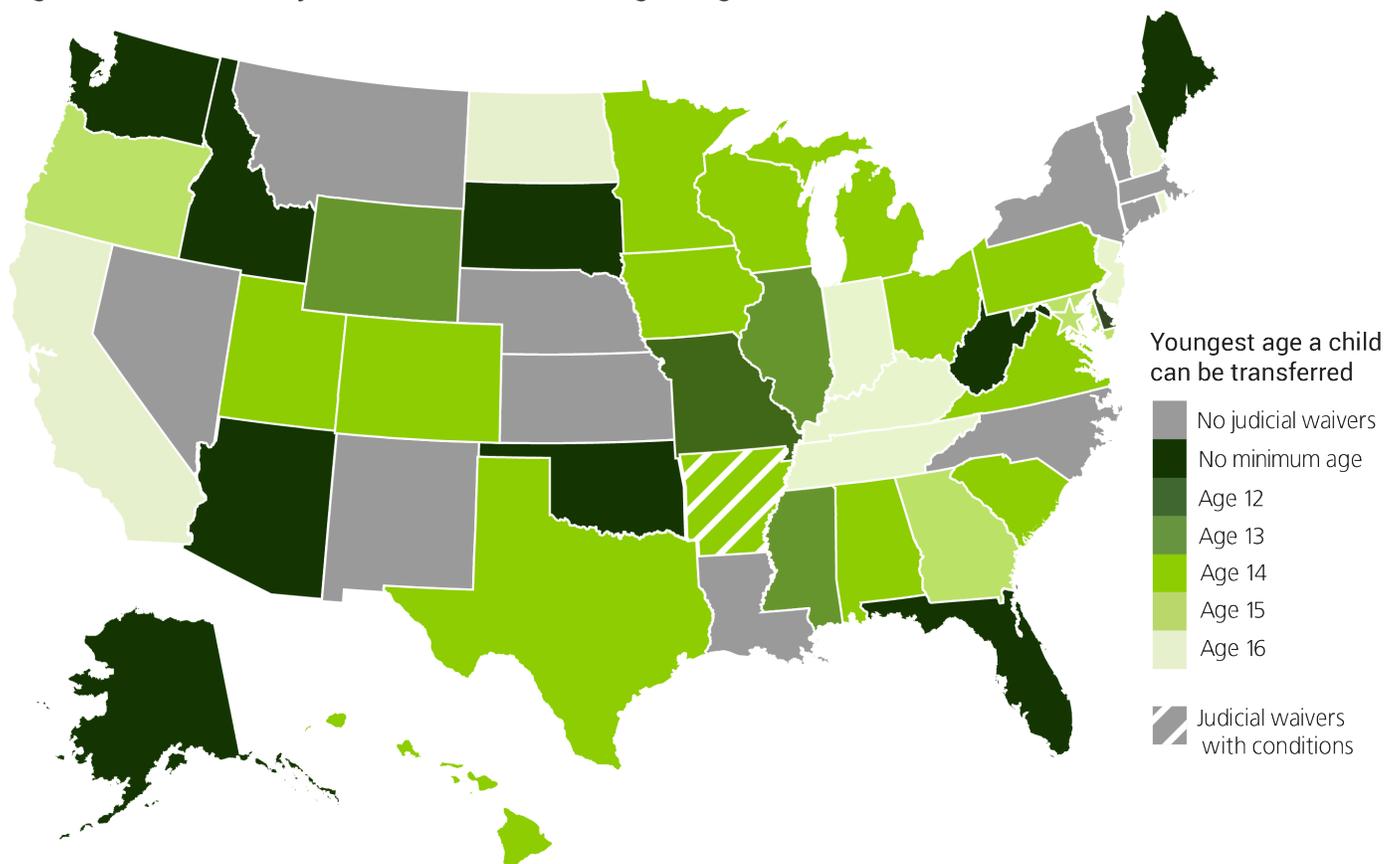
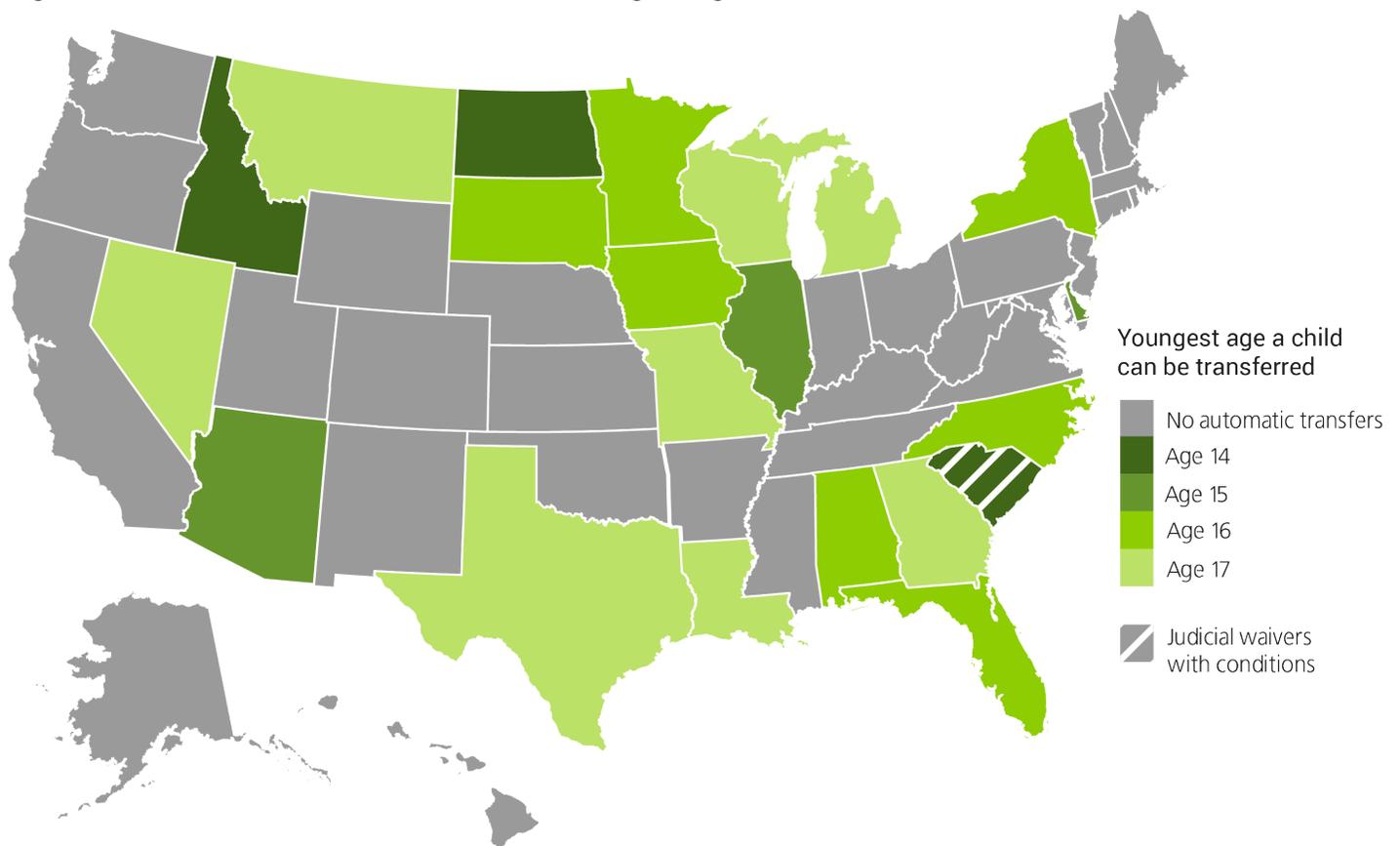




Figure 3. State use of automatic transfer for drug charges



transferred. In **California**, 14-year olds can be charged as adults for manufacturing, compounding, or selling at least half an ounce of any of various controlled substances under specified aggravating circumstances; at age 16, those aggravating circumstances are not required. **Louisiana** law gives prosecutors discretion on the second felony-level violation of the controlled substances law. In **Michigan**, prosecutors can charge 14-, 15- and 16-year olds as adults for the unlawful manufacture, creation or delivery of a minimum quantity of certain controlled substances, or possession with intent to manufacture, create, or deliver the same; any attempt, conspiracy, or solicitation to commit any of these offenses. In **Montana**, prosecutors can charge 16-year olds as adults for criminal distribution, production, manufacture, or possession of dangerous drugs (and the attempt to do so), a charge that becomes automatically adult for 17-year olds. **Oklahoma** prosecutors can charge 16- and 17- year olds as adults for trafficking in or manufacturing illegal drugs. In **Virginia**, prosecutors can charge anyone 14 and over with manufacture, sale, distribution and possession with intent to do so for a set of illicit substances, as long as the youth had two prior delinquent adjudications

for that same offense. **Wyoming** has a similar law, in that prosecutors can charge anyone 14 or over as an adult for any felony as long as the youth had two prior felony-level adjudications.

### **NO DISCRETION: STATES THAT AUTOMATICALLY CHARGE JUVENILES AS ADULTS ON CERTAIN OR ALL DRUG OFFENSES**

Twenty-one states, shown in Figure 3, automatically charge some juveniles as adults for a set of drug-related offenses. These states fit into three broad categories; South Carolina falls into all three.

#### **Nine states automatically charge youth as adults for drug-related offenses under certain conditions:**

**Arizona, Delaware, Florida, Idaho, Illinois, Iowa, Minnesota, Nevada, South Carolina**

In **Arizona**, anyone 15 and over with at least two previous, separate felony adjudications must be tried as an adult for any subsequent felony. **South Carolina** uses this standard for those 14 and over. In **Delaware**, trafficking or attempting to traffic certain illegal drugs is an adult

offense if the youth (age 14 and over) has been previously adjudicated delinquent on a felony; if the juvenile (age 15 and over) possessed a gun, any felony is an adult charge. In **Florida** and **Iowa**, drug trafficking while in possession of a firearm is an adult offense for 16- and 17-year olds. In **Idaho**, manufacture, delivery, or possession with intent to deliver in a school zone is an adult charge for anyone 14 and older. In **Illinois**, some drug violations near school zones or public housing are presumptively waived for anyone 15 and over. In **Minnesota** and **Nevada**, any felony committed with possession of a firearm is an adult offense for 16- and 17-year olds.

#### **Five states automatically charge youth as adults for certain drug-related offenses:**

##### **Alabama, Montana, North Dakota, South Carolina, South Dakota**

In **Alabama**, drug trafficking is an adult offense for 16- and 17-year olds. In **Montana**, criminal distribution, production, manufacture or possession of dangerous drugs, is an adult charge for 17-year olds. In **North Dakota**, anyone over 14 is automatically charged as an adult for manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance (with exceptions for small amounts of marijuana). In **South Carolina**, the distribution of various controlled substances, along with hiring a person under 17 for transportation of drugs, is an automatic adult charge for a 16-year old.<sup>20</sup> In **South Dakota**, the distribution of one pound or more of marijuana to a minor is an adult offense.<sup>21</sup>

#### **Nine states automatically charge youth as adults, unconditionally, for all offenses:**

##### **Georgia, Louisiana, Michigan, Missouri, New York, North Carolina, South Carolina, Texas, Wisconsin**

There are nine states that unconditionally charge 17-year olds as adults for all offenses: Georgia, Louisiana, Michigan, Missouri, New York, North Carolina, South Carolina, Texas, and Wisconsin.<sup>22</sup> New York and North Carolina are the two states that also charge 16-year olds as adults for all offenses. In regard to drug charges, these laws mean that everything from manufacturing and selling large amounts of methamphetamines to possession of a small amount of LSD is an adult charge.

## **AUTOMATICALLY CHARGE JUVENILES AS ADULTS ON DRUG OFFENSES IF PREVIOUSLY CONVICTED AS ADULT**

A majority of states have a “once an adult, always an adult” laws. Such laws require that a juvenile convicted previously as though he or she were an adult will henceforth be tried as an adult, regardless of charge. For example, in Washington state, a juvenile could be convicted of a charge of burglary, sentenced to probation, and then would be charged as an adult on simple possession of marijuana.<sup>23</sup>

States that use “once-an-adult, always-an-adult” laws are Alabama, Arizona, California, Delaware, Dist. of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

# STATES UNDERREPORT MOST OF THEIR TRANSFERS

The extent of this problem is masked by the fact that 22 states do not report on any of their transfers. For example, among the 28 states plus the District of Columbia that collect and report data on transfers, only five disaggregate judicial waivers from prosecutors' direct filings. Eleven states allow prosecutors discretion to charge juveniles on drug offenses, and six of them do not report data on any of their transfers. The knowledge gap is vast.

Donna Bishop estimated that 210,000 to 260,000 juveniles were annually charged as adults in 1996, 85 percent of them via prosecutorial discretion, statutory exclusions and jurisdictional boundaries.<sup>24</sup> Butts and Mitchell calculated that 200,000 juveniles were tried in 2000 as adults due to court age boundaries and an additional 55,000 due to statutory exclusions and prosecutorial discretion.<sup>25</sup> As of 2010, OJJDP estimated 137,000 arrested youth were referred annually to adult courts in the states that exclude 16- or 17-year olds from their juvenile courts.<sup>26</sup> This decline over time is more due to falling juvenile arrest rates<sup>27</sup> than less frequent use of waivers. Regardless of the exact number, these experts' calculations show a vast number of transfers hidden from the general public, far higher than the 4,000 judicial waivers annually estimated by OJJDP.<sup>28</sup> This discrepancy points to the need for jurisdictions to report, with specificity, the number of juveniles tried as adults and the charges thereunder.

Policymakers and the public are left with a fragmented and scattered list to get a sense of prosecutorial discretion. Only four states that utilize prosecutor discretion (direct file) for drug charges provide any data on its use. The little data available demonstrate that drug transfers are far more likely to occur by automatic waivers than following a hearing in juvenile court.

- In **Arizona**, a state government report for FY2015 found 224 youth directly filed and judicially waived into the adult system; 31 of these youth were transferred on drug charges, and only three of the 31 were waived following a waiver hearing.<sup>29</sup>
- In **California**, a state government report for 2015 found 492 cases directly filed into adult court, two of them on drug charges; 76 juveniles were transferred following a fitness hearing, (California's term for a waiver hearing).<sup>30</sup>
- In **Florida**, 1,607 juveniles were transferred into adult court in FY15, 55 of them on felony drug charges.<sup>31</sup>
- In **Michigan**, which automatically charges all 17-year olds as though they were adults, there were 12 juveniles transferred by direct file in 2015 and 37 by judicial waiver.<sup>32</sup> Charges are not specified.

Nationwide, there were approximately 461 judicial waivers in 2013 on drug charges.<sup>33</sup> The totals stemming from other categories of transfer are not available.

# TRANSFER LAWS DO NOT REDUCE OFFENDING OR RECIDIVISM

Statutory changes during the early 1990s preceded a drop in juvenile offending, and many politicians credited the newly harsh punishments;<sup>34</sup> researchers cast doubt on any such relationship. Zimring and Rushin, looking only at violent offending, compared homicide trends from the newly transferable teenagers with those of older adolescents (aged 18 to 24), finding that the declines in homicide rates dropped in roughly equal measures for both age groups. “These laws did little to uniquely deter juvenile offenders,” they found.<sup>35</sup>

State borders provide another opportunity for comparison. A study of young offenders in the New York City metro area found “adolescents processed in the New York adult courts [where 16- and 17-year olds are routinely charged as adults] were more likely to be re-arrested, they were re-arrested more often and more quickly and for more serious offenses, and they were re-incarcerated at higher rates than those in the New Jersey juvenile courts [where they are not].”<sup>36</sup> Any deterrent effect of transfer laws is unlikely. To take one example, the John Howard Association of Illinois interviewed six young people who were sentenced as adults while they were still teenagers, none of whom were aware that they could be prosecuted as adults.<sup>37</sup>

Moreover, other studies, including one from the CDC,<sup>38</sup> have found that harsher penalties increase reoffending rates, partially because the adult system is a “school for crime.”<sup>39</sup> Thus, two of the main arguments in favor of transfer – that they might deter offending and reduce reoffending – have not been proven true. The CDC has found other harms to juveniles who have been transferred, such as far higher rates of suicide and violent victimization while in prison, either by prison guards or by other inmates.<sup>40</sup>

In short, transfer into the adult system has proved ineffective at reducing offending, ineffective at reducing reoffending, and puts young people at risk of abuse or worse while incarcerated.

# REFORMS AND RECOMMENDATIONS

Some states have taken steps to limit transfer, though there is far more work ahead. In Kansas, which saw 30 transfers in FY2015,<sup>41</sup> SB 367 (2015) eliminated waivers on drug charges though it still allows for once an adult, always an adult prosecutions. In Vermont, H95 (2016) eliminated direct file for all but the most serious offenses. New Jersey's S2003 (2014) eliminated transfer for 14- and 15- year olds. Illinois passed PA 94-0574 in 2005, reversing a 1995 law that required 15- and 16-year olds be tried as adults for drug offenses within 1,000 feet of a school or public housing.<sup>42</sup> (At the time, Illinois required that all 17-year olds be treated as though they were adults.) In Chicago's Cook County alone, automatic transfers fell from 361 to 127 after passage with no increase in juvenile court petitions, according to a comprehensive review of the law by the Juvenile Justice Initiative.<sup>43</sup>

Presently, many states are addressing transfer. Bills to raise the age for all juveniles are perennially on legislative agendas in the seven states that have yet to move their age boundary to include most 16- and 17-year olds in their juvenile systems.<sup>44</sup> California voters supported Proposition 57 in the November 2016 elections, sharply limiting direct file and expands the requirements for transfer under the state's fitness hearings. In Florida, direct file reform (SB 314) attained passage in three Senate committees in 2016, and advocates there are working to pass it in 2017.

## RECOMMENDATIONS

The transfer of juveniles into adult court, according to Steven Zane and colleagues, is a policy without a rationale.<sup>45</sup> It is not clear if legislators believe certain offenses or certain juveniles are beyond rehabilitation, since the expansions of transfer in the 1990s were so all-encompassing as to allow even drug offenders into the adult system.

States should raise their ages of juvenile court jurisdiction to age 18, and should undertake a study – as Connecticut is already doing – to explore the feasibility and impact of raising juvenile court jurisdiction through late adolescence. Brain science research, which has influenced U.S. Supreme Court decisions on serious juvenile offending, has made clear that adolescent development continues through one's mid-20s. Juvenile courts and facilities are capable of finding ways to hold young offenders accountable without the severe consequences of adult charges on one's record.

Moreover, states should eliminate direct file and automatic waivers into adult courts. The decision is far too consequential to leave in the hands of prosecutors without the due process afforded in a transfer hearing. The evidence is strong that requiring a transfer hearing sharply limits the frequency with which prosecutors will seek adult charges against teenagers.

States can go further by eliminating low-level charges, like drug offenses, from adult courts altogether. From 1989 to 1992, drug offense cases were more likely to be judicially waived to criminal court than any other offense category.<sup>46</sup> Fears of a wave of drug use could make that happen again. And since we know transfer doesn't work, we need to prevent that from happening.

Lastly, states and localities ought to collect and report data on all juvenile transfers. The relatively small number of judicial waivers – though still in the hundreds annually – leaves a mistaken impression of the scope of transfer. The vast majority of transfers, either through minimum age requirements, automatic transfers, and direct filings, are hidden from view.

The examples of Illinois and Kansas, each of which passed laws to keep juveniles charged with drug offenses from adult courts, show that states can make needed reforms without harming public safety. It is time for the rest of the nation to follow their lead.

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