# A DEFENSE OF SENATE BILL 1391: THE CALIFORNIA LAW THAT ABOLISHES TRANSFERRING JUVENILES UNDER SIXTEEN TO CRIMINAL COURT

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## I. INTRODUCTION

Daniel Mendoza was fourteen years old when he was arrested for murder.[1] Raised by a single mother, Mendoza's family struggled to secure basic necessities.[2] The family also lived in a dangerous neighborhood, and by age fourteen, Mendoza had joined a local gang.[3] Police arrested Mendoza when he and several other gang members beat a forty-four-year-old man to death.[4] The attack erupted out of a turf war for gang territory.[5] Jose Maria Barajas, the victim of the killing, was not a member of a rival gang but simply lived nearby.[6] As a fourteen-year-old gang member charged with murder, Mendoza was tried in criminal court and faced a life sentence in an adult prison.[7] He was then given an opportunity that most juveniles tried in criminal courts are not: Mendoza was allowed to remain in juvenile custody while he finished high school and then proceeded to take online college courses.[8] His case was transferred back to juvenile court shortly after finishing his education, and Mendoza earned early release based on his progress.[9] Now Mendoza, who will be twenty-four this year, is a graduate of the

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[1] Robert Salonga, *Reformed Bay Area Teen Convicts Push Pending Bill to Spare Young Offenders*, MERCURY NEWS (Sept. 26, 2018, 6:00 AM), https://www.mercurynews.com/2018/09/26/reformed-teen-convicts-push-pending-bill-to-young-offenders.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Salonga, *supra* note 1; HUMAN RIGHTS WATCH, FUTURES DENIED: WHY CALIFORNIA SHOULD NOT PROSECUTE 14- AND 15-YEAR-OLDS AS ADULTS 21 (2018), https://www.hrw.org/sites/default/files/supporting_resources/futures_denied.pdf.

[8] Salonga, *supra* note 1.

[9] *Id.*

University of California at Davis.[10] Mendoza also earned the Brandon Harrison Youth Leader/Youth Organizer Award in 2018, recognizing him for his leadership.[11] Mendoza credits the opportunities he was given in the juvenile system for his change, calling them "integral to growth."[12] Once facing life-long imprisonment in the criminal system, Mendoza now refers to himself as "a taxpayer and a productive member of society."[13]

Mendoza has been a strong advocate of Senate Bill 1391,[14] an amendment to California's Welfare and Institutions Code, which governs juvenile offenders that are tried and sentenced in criminal (instead of juvenile) court.[15] Senate Bill 1391 bans the transfer of juveniles under the age of sixteen to criminal court, regardless of the alleged offense.[16] Mendoza was vocal in telling his story as an example of how the juvenile system allows and enables young juvenile offenders to change.[17] Mendoza points out that almost all juvenile offenders will get out eventually: "We have to decide whether we want them to come out worse than when they came in."[18] In September of 2018, California Governor Jerry Brown signed Senate Bill 1391, amending the Welfare and Institutions Code as of January 2019.[19] The amendment, still commonly referred to as Senate Bill 1391, has been criticized by District Attorneys' offices,[20] journalists,[21] and victims of crimes perpetrated by

10 *Daniel "Data" Mendoza*, FATHERS & FAMILIES OF SAN JOAQUIN, https://www.ffsj.org/leadership/daniel-data-mendoza (last visited Jan. 8, 2020).

11 Julia Ann Easley, *Convicted of Murder as Youth, UC Davis Student to be Honored for Leadership*, UC DAVIS (Mar. 8, 2018), https://www.ucdavis.edu/news/convicted-murder-youth-uc-davis-student-be-honored-leadership.

12 HUMAN RIGHTS WATCH, *supra* note 7, at 21.

13 Salonga, *supra* note 1.

14 *Id.*

15 CAL. WELF. & INST. CODE § 707 (2019).

16 S.B. 1391, 2018 Leg., Reg. Sess. (Cal. 2018).

17 Salonga, *supra* note 1.

18 *Id.*

19 Alexei Koseff, *Jerry Brown Limits Prosecution of Minors to 'Work Toward a More Just System,* SACRAMENTO BEE (Sept. 30, 2018, 8:50 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article219287990.html.

20 *See, e.g.*, Brief for Santa Clara County District Attorney's Office, C.S. v. Superior Court, Sixth Appellate District, Case No. H045665 (2018) (arguing that Senate Bill 1391 is unconstitutional and criticizing its removal of judicial discretion to consider juvenile punishments in the "most dangerous cases").

21 *See, e.g.*, Marcos Bretón, *Gov. Brown, If You Don't Veto a Bill to Protect Young Killers, You Create a Legacy of Pain*, SACRAMENTO BEE (Sept. 16, 2018, 2:00 AM), https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article218396140.html (arguing that Senate Bill 1391 does not protect the public or respect victims).

fourteen and fifteen-year-olds.[22] Much of the criticism focuses on the constitutionality of the amendment, which is currently being questioned in lower courts throughout California.[23] But its constitutionality is not the only controversy surrounding Senate Bill 1391; arguments regarding public safety, fairness, accountability, and punishment have been raised against the amendment as well. While multiple sources, primarily some California courts,[24] have rebutted arguments regarding Senate Bill 1391's constitutionality, a comprehensive reply to all of the opposition to the amendment is lacking.

This Comment will fill that void by identifying and addressing the major arguments, outside of the constitutionality debate, against Senate Bill 1391. Part II of this Comment will provide a brief overview of the juvenile justice system's history and purpose in both the United States as a whole and California. Part III of this Comment will explain and refute major criticisms of Senate Bill 1391: (1) the argument that Senate Bill 1391 is soft on juvenile crime and puts public safety at risk, and (2) the argument that Senate Bill 1391 goes too far in completely eliminating prosecutorial and judicial discretion in the transferring of youth under sixteen years old to criminal court. This Comment will show that Senate Bill 1391 furthers the main goal of the juvenile justice system by promoting juvenile rehabilitation and protects juveniles of differing backgrounds from disparate treatment while maintaining public safety through other provisions of the Welfare and Institutions Code.

## II. OVERVIEW OF THE JUVENILE JUSTICE SYSTEM: HISTORY AND PURPOSE

The history of juvenile justice systems throughout the United States makes clear that the main purpose of these systems is to rehabilitate juvenile offenders and steer them away from the criminal

[22] *See, e.g.*, *id.* (quoting Nicole Clavo, mother of a murder victim, calling Senate Bill 1391 "'a slap in the face' to the families of victims"); Darrell Smith, *Sacramento's 'Community of Victims' Fight Law Shortening Sentences for Young Killers*, SACRAMENTO BEE (March 31, 2019, 2:40 AM), https://www.sacbee.com/news/local/article228387809.html (quoting Victoria Hurd, daughter of a murder victim, stating that Senate Bill 1391 "hits victims of atrocious crimes below the belt").

[23] *E.g.*, People v. Superior Court (K.L.), 36 Cal. Rptr. 3d 555 (Ct. App. 2019) (upholding the constitutionality of Senate Bill 1391); People v. Superior Court (I.R.), 251 Cal. Rptr. 3d 158 (Ct. App. 2019) (upholding the constitutionality of Senate Bill 1391); People v. Superior Court (Alexander C.), 246 Cal. Rptr. 3d 712 (Ct. App. 2019) (upholding the constitutionality of Senate Bill 1391); O.G. v. Superior Court, 252 Cal. Rptr. 3d 904 (Ct. App. 2019) (holding that Senate Bill 1391 is unconstitutional).

[24] *See, e.g.*, *People v. Superior Court (K.L.)*, 36 Cal. Rptr. 3d 555; *People v. Superior Court (I.R.)*, 251 Cal. Rptr. 3d 158; *People v. Superior Court (Alexander C.)*, 246 Cal. Rptr. 3d 712.

path. This Part will demonstrate why courts have deemed it appropriate to treat juvenile offenders differently than adult offenders and how juvenile treatment focuses on rehabilitation. This Part will also describe the distinct goals of California's juvenile justice system, as well as how the state has sought to achieve these goals through the Welfare and Institutions Code. Finally, this Part will provide an overview of Section 707 of the Welfare and Institutions Code, which governs the transfer of juveniles to the criminal system, and how it has been amended in recent years, concluding with Senate Bill 1391.

### A. *The United States*

Before the mid-nineteenth century, juvenile justice systems did not exist, and criminal courts tried both minors and adults for their crimes.[25] But the mid-nineteenth century saw a shift in the treatment of juveniles as cities and states throughout the country opened Houses of Refuge.[26] New York State opened the first House of Refuge, or juvenile reformatory school, in 1825.[27] Houses of Refuge were a pretext to juvenile justice systems, with the United States' first juvenile court opening in Cook County, Illinois, in 1899.[28] As juvenile courts were created throughout the nation, the doctrine of parens patriae became prevalent for governing these new juvenile court systems.[29] Under the doctrine of parens patriae, the state—specifically the judge—acted as a "parent" and determined what was in the minor's best interests, focusing specifically on youth offenders' rehabilitation.[30] This doctrine even allowed juvenile courts to curtail the wishes of the biological parent in certain contexts.[31] Because the judge was to act in the minor's best interest, the procedural safeguards and due process rights traditionally afforded to criminal defendants were unavailable to

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25 NAT'L. RESEARCH COUNCIL INST. OF MED, JUVENILE CRIME, JUVENILE JUSTICE: PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, AND CONTROL 157 (Joan McCord et al. eds., 2001).

26 *See* Chaz Arnett, *Criminal Law: Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399, 414 (2018).

27 *Our City Charities.; The New-York House of Refuge for Juvenile Delinquents*. N.Y. TIMES (Jan. 23, 1860), https://www.nytimes.com/1860/01/23/archives/our-city-charities-the-newyork-house-of-refuge-for-juvenile.html.

28 NAT'L. RESEARCH COUNCIL INST. OF MED, *supra* note 25, at 157.

29 *See* Tavil Peterson, *Mandatory Transfer of Juveniles to Adult Court: A Deviation from the Purpose of the Juvenile Justice System and A Violation of Their Eighth Amendment Rights*, 52 REV. JUR. U. INTER. P.R. 377, 378 (2018).

30 *See id.*

31 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well-being, the State as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

juvenile offenders.[32] Under this early, paternalistic version of the juvenile justice system, the primary focus and purpose of the juvenile court were to further the minor's rehabilitation and best interests.[33]

Judicial, cultural, and legislative changes in the late twentieth century created a more punitive juvenile justice system, shifting the system's focus away from rehabilitation and more and more toward punishment.[34] Throughout the 1960s and 1970s, the Supreme Court's decisions in *Kent v. United States*,[35] *In re Gault*,[36] and *In re Winship*[37] likened the country's juvenile justice system to the criminal justice system by extending to juvenile offenders the due process rights afforded to criminal defendants. During the 1980s and 1990s, a national rise in crime led to changing views on juvenile justice and the adoption of "get-tough" laws[38] by states throughout the country.[39] The notion of the juvenile "super-predator," juvenile offenders who committed violent crimes for trivial reasons, became popular, prompting states to change legislation regarding the juvenile justice system.[40] By 1999, all but one state had enacted laws allowing or making it easier for juvenile offenders to be transferred to criminal courts.[41]

Although the attitudes behind "get-tough" laws persist today, recent years have seen a growing movement toward recognizing the differences between minors and adults and how those differences affect juvenile justice. In 2005, the Supreme Court prohibited death sentences for juveniles in *Roper v. Simmons*, which held that death sentences for

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[32] Peterson, *supra* note 29, at 383–84.

[33] *Id.* at 378–79.

[34] DANIELLE MOLE & DODD WHITE, TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 2–3 (2005).

[35] 383 U.S. 541, 561 (1966) (holding that before being transferred to criminal court, juvenile offenders are entitled to a hearing, representation by counsel, access to social records, and a statement of the reasons for the transfer).

[36] 387 U.S. 1, 33, 41, 55–57 (1967) (holding that juvenile defendants are entitled to notice of the charges, a right to counsel, a right to confrontation, and a right against self-incrimination).

[37] 397 U.S. 358, 368 (1970) (holding that proof beyond a reasonable doubt is required in juvenile proceedings).

[38] NAT'L. RESEARCH COUNCIL INST. OF MED, *supra* note 25, at 155 ("In response to the increase in violent crime in the 1980s, state legal reforms in juvenile justice, particularly those that deal with serious offenses, have stressed punitiveness, accountability, and a concern for public safety, rejecting traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment.").

[39] Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 266 (2013).

[40] MOLE & WHITE, *supra* note 34, at 2–3.

[41] *Id.* at 3.

conduct committed as a minor violate the Eighth Amendment's ban on cruel and unusual punishment.[42] Similarly, in 2012, the Supreme Court also prohibited mandatory sentences of life without parole for juvenile crimes in *Miller v. Alabama*.[43] In these cases, the Court focused on three primary distinctions between juvenile and adult offenders to explain why different punishments are warranted: (1) "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often . . . result[ing] in impetuous and ill-considered actions and decisions;" (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures" and "have less control . . . over their own environment;" and (3) "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[44] *Roper* and *Miller* affirmed that despite harsher laws, the primary purpose of the juvenile justice system remains to be rehabilitation.[45] While the rationale and decisions in *Roper* and *Miller* have prevented minor offenders from being sentenced to the most serious criminal punishments, thousands of juveniles continue to be tried and sentenced as adults.[46]

B. *California*

California's juvenile justice system also strives, in theory, to rehabilitate juvenile offenders. California's Legislative Analyst's Office stated that while both the juvenile and criminal justice systems strive to achieve public safety, "California's adult system also has punishment of offenders as a goal, while California's juvenile justice system has a different goal—treatment and rehabilitation of juvenile offenders."[47] The California Legislature explains that, unlike the adult criminal justice system, many agencies (such as schools, social workers, and community

42 Roper v. Simmons, 543 U.S. 551, 573–74 (2005).

43 Miller v. Alabama, 567 U.S. 460, 465 (2012).

44 *Roper*, 543 U.S. 551 at 569–70 (quoting Johnson v. Texas, 50 U.S. 350, 367 (1993) (alteration in original)); *Miller*, 567 U.S. at 471 (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

45 *See Miller*, 567 U.S. at 472 (citing Graham v. Florida, 560 U.S. 48, 71 (2010)) ("Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'").

46 Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201.

47 CAL. LEGIS. ANALYST OFF., JUVENILE CRIME — OUTLOOK FOR CALIFORNIA PART V, https://lao.ca.gov/1995/050195_juv_crime/kkpart5.aspx (1995).

programs) are involved in the juvenile justice system to help facilitate rehabilitation of juvenile offenders.[48]

1. The Welfare and Institutions Code

In California, the procedures for transferring, trying, and sentencing a juvenile in criminal court are governed by the Welfare and Institutions Code.[49] Welfare and Institutions Code § 707 sets out when a juvenile offender may be transferred to criminal court, the procedures by which a judge may transfer the juvenile to criminal court, and the factors a judge should consider when deciding on a motion to transfer a juvenile to criminal court.[50] Section 707 reflects a number of amendments to these procedures made over the past several years.[51] The most significant of these amendments have been Proposition 21 (the Gang Violence and Juvenile Crime Prevention Initiative of 2000),[52] Proposition 57 (the Public Safety and Rehabilitation Act of 2016),[53] and Senate Bill 1391,[54] passed in September 2018 as a part of the Equity and Justice Package and effective as of January 2019.

Proposition 21 exemplified the "get-tough" laws that characterized juvenile justice legislation in the 1990s.[55] It allowed prosecutors to file certain charges against minors directly in criminal court without a fitness hearing or transfer order from a juvenile court judge.[56] Under Proposition 21, minors aged fourteen and older accused of committing major crimes, such as murder and specified sex offenses, could be tried and sentenced in criminal court at the prosecutor's discretion.[57] Proposition 21 contained "a new list of direct file categories and specific provisions making judicial waiver easier for prosecutors by expanding the list of crimes that generate a presumption of transfer and reducing the burden of proof in the judicial proceeding."[58]

48 *Id.*

49 *See generally* CAL. WELF. & INST. CODE (2019).

50 *Id.* § 707(a)–707(b).

51 *Id.*

52 *See generally* Prop. 21 § 26 (2000).

53 *See generally* Prop. 57 § 4.2 (2016).

54 *See generally* Cal. ALS 1012, S.B. 1391 (Cal. 2018).

55 Feld, *supra* note 39, at 266.

56 Jennifer Taylor, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 990–91 (2002).

57 *Id.* at 990.

58 Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 10 (2010).

Proposition 57, which limited the broad prosecutorial discretion allowed by Proposition 21 and put the question of juvenile transfer into the hands of juvenile court judges, amended California's Welfare and Institutions Code § 707 in 2016.[59] Proposition 57 stated five specific goals with regard to sentencing both juvenile and adult offenders:

> (1) Protect and enhance public safety; (2) Save money by reducing wasteful spending on prisons; (3) Prevent federal courts from indiscriminately releasing prisoners; (4) Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles; (5) Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.[60]

Proposition 57 eliminated Proposition 21's "direct file" approach and required a transfer hearing to be held before any juvenile could be transferred to criminal court.[61] This amendment still allowed juveniles under the age of sixteen to be transferred to criminal court for certain crimes pursuant to a transfer hearing.[62] This changed, however, with the enactment of Senate Bill 1391 in 2018.

2. Senate Bill 1391

In September of 2018, California Governor Jerry Brown signed Senate Bill 1391, which flatly prohibits the transfer of juveniles under the age of sixteen to criminal court.[63] Under Senate Bill 1391, juveniles under sixteen years of age must remain in the juvenile system and be sentenced as juveniles, requiring detainment in juvenile correctional facilities rather than adult prisons.[64] According to the Legislative Counsel's Digest on the bill, it

> repeal[s] the authority of a district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction, thereby amending Proposition 57.[65]

With this marked change to the juvenile justice system has come controversy. Even Governor Brown stated that it was a "difficult bill" to

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59 Prop. 57 § 4.2 (2016).

60 *Id.* § 2.

61 Alana Murphy, *Recent Court Decisions and Legislation Affecting Juveniles: United States Court of Appeals, 9th Circuit*, 21 U.C. DAVIS J. JUV. L. & POL'Y 215, 229 (2017).

62 *Id.*

63 Koseff, *supra* note 19.

64 *Id.*

65 LEGIS. COUNS. DIG., Cal. ALS 1012, S.B. 1391 (Cal. 2018).

sign," but ultimately did so, asserting that California "should continue to work toward a more just system that respects victims, protects public safety, holds youth accountable, and also seeks a path of redemption and reformation whenever possible."[66] In the year and a half since Senate Bill 1391 was passed, criticism has included challenges to its constitutionality, leading to a split among California lower courts.[67] This Comment, however, will not address the constitutionality of Senate Bill 1391 and will instead focus on the other arguments against the amendment.

## III. ADDRESSING THE CRITICISM OF SENATE BILL 1391

There are two traditional categories of criminal punishment: utilitarianism and retributivism.[68] Utilitarian purposes seek to achieve benefits for the largest number of people.[69] There are five typical mechanisms of utilitarian punishment: rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation.[70] These purposes tend to have crime-control effects and benefit society at large.[71] Purposes of punishments relating to retribution, on the other hand, have to do with notions of justice rather than practical benefits.[72] There are various versions of retribution, which differ in what exactly the principle entails.[73] Generally, however, the principles of retribution direct that offenders must be punished simply because they deserve to be punished for their crimes.[74] In other words, offenders should be sentenced based on their blameworthiness for their crimes.[75] Section A of this Part will discuss the utilitarian concerns that opponents and supporters have raised regarding Senate Bill 1391, primarily public safety and rehabilitation. Section B will focus on rebutting arguments grounded in retributivism, focusing on accountability for juvenile offenders. Section C will show how prosecutorial and judicial discretion play a large role in how these theories of punishment are applied to

66 Koseff, *supra* note 19.

67 *E.g.*, Brief for Santa Clara County District Attorney's Office, C.S. v. Superior Court, Sixth Appellate District, Case No. H045665 (2018) (arguing to Santa Clara County Superior Court that Senate Bill 1391 is unconstitutional).

68 Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69 (2005) (referring to utilitarian and non-utilitarian, or retributivist, purposes of punishment).

69 *Id.*

70 *Id.* at 70.

71 *Id.*

72 *Id.*

73 *See* discussion *infra*, Section III.C.3.

74 Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 854 (2015).

75 Frase, *supra* note 68, at 73.

juveniles and explain why Senate Bill 1391's removal of discretion altogether is warranted when it comes to juvenile transfer and punishment.

### A. *Utilitarian Concerns: Senate Bill 1391's Response to Juvenile Crime*

#### 1. Senate Bill 1391 Maintains Public Safety by Accounting for Irredeemable, Violent Juvenile Offenders

One argument at the forefront of Senate Bill 1391's criticism is that it will let dangerous juvenile criminals incapable of being rehabilitated serve shorter sentences and get released earlier than they would in the criminal system.[76] At the extreme of this argument are those that raise concerns about letting psychopathic, violent killers back on the streets.[77] Opponents of Senate Bill 1391 rest this argument on the fact that in California's juvenile system, offenders are released by the age of twenty-five.[78] Opponents often point to horrendous crimes by juveniles under the age of sixteen, highlighting calculated, cruel murders to demonstrate that "some hearts cannot be reformed so easily" and that some fourteen and fifteen-year-olds "cannot be rehabilitated in a way that protects the public."[79] In an opinion piece for the San Francisco Chronicle, Santa Clara County District Attorney Jeffrey Rosen argued that Senate Bill 1391 removes a "safety net" previously in place and, under the amendment, the "only choice . . . is to cross our fingers that [these murderers] got killing out of [their] system[s]."[80]

The vast majority of juvenile offenders who are affected by Senate Bill 1391 are not psychopaths. But, in the rare cases in which a psychopathic juvenile does receive the benefit of the amendment, the implications of letting such a dangerous criminal back on the streets are

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[76] *See, e.g.*, Bretón, *supra* note 21 ("The fear is that [Daniel Marsh, who was convicted of murder at fifteen years old] would be released by juvenile detention officials at 25."); Jeffrey Rosen, *Initiative Reformed How California Tries Teens, but New Law Removes Safeguards*, S.F. CHRON. (Nov. 23, 2018), https://www.sfchronicle.com/opinion/article/Initiative-reformed-how-California-tries-teens-13413031.php ("Senate Bill 1391… is based on a dangerous contention about teenagers: that they grow out of murder.").

[77] *See* Bretón, *supra* note 21.

[78] Nate Gartrell, *Two Men Accused of Gunning Down Woman in Richmand Park Could Benefit if Brown Signs Reform Bills*, EAST BAY TIMES (Sept. 28, 2018), https://www.eastbaytimes.com/2018/09/28/a-young-woman-was-gunned-down-in-a-richmond-park-fate-of-both-defendants-may-hinge-on-gov-browns-pen.

[79] Bretón, *supra* note 21.

[80] Rosen, *supra* note 76.

significant. Doing so, however, is not the "only choice"[81] under Senate Bill 1391. The Welfare and Institutions Code provides mechanisms to extend incarceration of juvenile offenders that are deemed "physically dangerous to the public."[82] Under § 1800 of the Welfare and Institutions Code, the Division of Juvenile Facilities may request that the prosecuting attorney petition the court for an order allowing the Division to maintain jurisdiction and control over juveniles "physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her dangerous behavior."[83] The prosecutor may then determine whether or not to file such a petition.[84] Similarly, § 1800.5 allows the Board of Parole Hearings to request the Division of Juvenile Justice to review any case in which the Division of Juvenile Facilities has not filed a request pursuant to § 1800 for any juvenile that the Board deems "physically dangerous."[85]

These safeguards provided for in §§ 1800 and 1800.5 adequately protect public safety from those offenders for whom rehabilitation is unlikely.[86] Under these sections, fourteen and fifteen-year-olds who commit violent crimes and have not been rehabilitated by the age of twenty-five likely will not be released back onto the streets as many opponents of Senate Bill 1391 suggest. Extending incarceration is an option for such offenders, making Senate Bill 1391's impact on public safety minimal. Thus, while such safety considerations are important, other sections of the Welfare and Institutions Code reveal that allowing dangerous murderers back into the public is not a likely effect of the amendment.

Senate Bill 1391 is also not likely to affect the deterrence of juvenile crime, yet another reason that the amendment will not threaten public safety. Current evidence indicates that more severe consequences, such as sentencing juveniles who have committed violent crimes as adults, does not impact deterrence: "The power of deterrence in serious adolescent offenders appears to rest in the perceptions of the certainty, not the severity, of the punishment for criminal involvement . . . . [The]

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81 *Id.*

82 CAL. WELF. & INST. CODE §§ 1800–1800.5 (2019).

83 *Id.* § 1800(a).

84 *Id.* § 1800(b).

85 *Id.* § 1800.5.

86 *See, e.g.*, *In re* Cavanaugh, 44 Cal. Rptr. 422 (Ct. App. 1965) (affirming the trial court's decision to extend the defendant's detention for two years after his twenty-first birthday pursuant to CAL. WELF. & INST. CODE §§ 1800–1803); *In re* J.F., 74 Cal. Rptr. 464 (Ct. App. 1969) (affirming the trial court's decision to extend the defendant's detention under CAL. WELF. & INST. CODE § 1800.).

severity [of sanctions] will do little to change behavior."[87] Thus, although critics of Senate Bill 1391 suggest that punishing juveniles more severely by sentencing them as adults will deter juvenile crime, that notion is contrary to current evidence. In fact, it seems that increasing the *probability* of being punished, rather than the *severity* of the punishment, is a much more effective way to promote deterrence of juvenile crime.[88]

2. Senate Bill 1391 Furthers the Juvenile Justice System's Goal of Rehabilitation

Criticism of Senate Bill 1391 that focuses on the amendment's "soft" approach to juvenile crime fails to fully appreciate another utilitarian principle, which is the ultimate goal of the juvenile justice system, rehabilitation. Both the United States and, specifically, the state of California have specified that rehabilitation is the primary goal of the juvenile justice system.[89] Sentencing juveniles accused of committing serious crimes as adults, rather than allowing them to remain in the juvenile system, undermines the importance of this goal and hinders juvenile rehabilitation. This is because the juvenile justice system is more effective at accomplishing juvenile rehabilitation than the criminal justice system: a 2010 analysis of all existing studies of juveniles in the criminal justice system done by the Department of Justice concluded that juvenile offenders that were transferred to criminal courts had higher recidivism rates than those offenders kept in the juvenile system.[90] The analysis found this to be especially true for juveniles who had committed violent crimes.[91] Similarly, a 2011 regression analysis found that juvenile offenders who were transferred to the criminal

[87] HUMAN RIGHTS WATCH, *supra* note 7, at 12 n.21 (citing Edward P. Mulvey, Carol A. Schubert, Alex Piquero, *Pathways to Desistance—Final Technical Report*, Document No. 244689 (submitted to the U.S. Department of Justice) (Jan 2014), at 13, https://www.ncjrs.gov/pdffiles1/nij/grants244689.pdf); s*ee also* Frase *supra* note 68, at 72 ("[O]ffenders are more sensitive to the probability of punishment than to its severity.").

[88] *Id.*

[89] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 479 (2012) (citing Graham v. Florida, 560 U.S. 48, 75 (2010)) ("'A State is not required to guarantee eventual freedom [for juvenile offenders],' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'); CAL. LEGIS. ANALYST OFF., *supra* note 47 ("California's adult system also has punishment of offenders as a goal, while California's juvenile justice system has a different goal—treatment and rehabilitation of juvenile offenders.").

[90] HUMAN RIGHTS WATCH, *supra* note 7, at 12.

[91] *Id.*

system, and therefore were not placed in the treatment and intervention programs available in the juvenile system, had higher recidivism rates.[92]

These conclusions indicate that juvenile offenders sentenced in the juvenile system, especially those convicted of violent crimes, show more rehabilitative progress than those sentenced in the criminal system. This is unsurprising considering that juveniles sentenced to adult prisons "lose out on the educational and psychological benefits offered by juvenile-detention facilities."[93] Although adult prisons also strive to rehabilitate inmates, juvenile facilities provide more opportunities to do so because rehabilitation is the main goal of the juvenile system, while the criminal justice system is more punitive.[94] While still detaining and punishing minor offenders, juvenile facilities foster environments that are more conducive to rehabilitation by engaging detained youth in "exercise, education, and pro-social activities necessary for proper development."[95] Juvenile facilities offer resources such as increased presence of well-trained staff, dayrooms, classrooms, gyms, and education programs that are less commonly available in adult prisons.[96]

The juvenile justice system's focus on rehabilitation also makes it better equipped to address and treat mental illnesses, which play a significant role in juvenile crime. Placement in adult prison can exacerbate mental illness or, even in seemingly mentally healthy youth, cause mental health issues to arise.[97] A 2002 study published by the National Institute of Health evidences the strong correlation between mental illness and juvenile crime, finding that approximately seventy percent of youth in the juvenile justice system in Cook County, Illinois,[98] which was used as a sample for the United States generally, suffer from at least one mental illness.[99] Among the seventy percent of detained

92 Kristin Johnson, Lonn Lanza-Kaduce, & Jennifer Woolard, *Disregarding Graduated Treatment: Why Transfer Aggravates Recidivism*, 57 CRIME & DELINQUENCY 756, 767–68 (2011).

93 Lahey, *supra* note 46.

94 *See* CAL. LEGIS. ANALYST. OFF., *supra* note 47.

95 *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUSTICE 7 (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

96 *Id.*

97 *See* discussion *infra* Section III.C.3.

98 Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1134 (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2861992/pdf/nihms171651.pdf. The authors chose to use Cook County as a sample because it is urban (and most juvenile offenders come from urban areas), it is ethnically diverse, and Illinois's criteria for detaining juvenile offenders are similar to those of several other states. *Id.* at 1134.

99 *See id.* at 1133.

youth suffering from at least one mental illness, approximately sixty percent met the criteria for three or more psychiatric disorders.[100] The prevalence of mental illnesses among juvenile offenders is another reason to keep juveniles in more rehabilitation-focused juvenile justice systems rather than the criminal system. Minors detained in juvenile facilities are "required to participate in individualized services to address behavioral health, disabilities, trauma, and other needs."[101] Thus, transferring youth offenders that suffer from mental illnesses to criminal court is not likely to address the underlying problem. Remaining in the juvenile system, on the other hand, can give such juveniles a better chance of receiving treatment for their illnesses, allowing them a greater chance of rehabilitation.[102]

Although critics have raised utilitarian concerns about public safety and rehabilitation, the effects of Senate Bill 1391 are consistent with utilitarian theory. According to utilitarian theory, the costs or harms of a given punishment should not outweigh its benefits.[103] Since Senate Bill 1391 leaves §§ 1800 and 1800.5 in place,[104] it does not negatively impact public safety. Additionally, research suggests that it is the probability of punishment, not the severity of punishment, that has the strongest deterring effect.[105] Therefore, punishing juvenile offenders with more severe, criminal sentences likely will not impact deterrence. On the other hand, the juvenile justice system is more effective at rehabilitating juvenile offenders.[106] Since Senate Bill 1391 is unlikely to affect deterrence and public safety while benefiting rehabilitation, it embodies utilitarian principles because its benefits will outweigh its costs.

### B. *Retribution: Accountability in the Juvenile Justice System*

Opponents of Senate Bill 1391 also allege the amendment lacks retribution, suggesting that even if juvenile offenders are not totally "getting away with" their crimes, they are somehow getting off easier

100 *Id.*

101 HUMAN RIGHTS WATCH, *supra* note 7, at 19.

102 *Id.* ("The rehabilitative services available in the adult criminal justice system pale in comparison to what is offered to youth in the juvenile justice system.").

103 Frase, *supra* note 68, at 72.

104 *See* S.B. 1391, 2018 Leg., Reg. Sess. (Cal. 2018); CAL. WELF. & INST. CODE §§ 1800–1800.5 (2019).

105 Frase, *supra* note 68, at 72.

106 HUMAN RIGHTS WATCH, *supra* note 7, at 18 ("The juvenile justice system is designed to address the needs of youth by offering age-appropriate support and rehabilitative services. . . . It is also a system that was designed to address the needs of youth who commit serious crimes.").

than they deserve by being sentenced as juveniles instead of adults. Some challenge Senate Bill 1391 because it allows juveniles accused of heinous crimes to serve out sentences in "comfy juvenile facilities," rather than adult prisons.[107] Critics have even characterized the amendment as a "slap in the face" or "hit below the belt" to victims.[108] These opponents recognize that the goal of the juvenile justice system is to rehabilitate juvenile offenders from their criminal directions but argue that juveniles who commit serious, horrendous crimes like murder, rape, and kidnapping, cannot be rehabilitated and deserve to serve sentences in adult prisons, which are less focused on rehabilitation and more focused on punishment.[109] Critics bolster this argument by noting that juveniles are only tried as adults in "rare"[110] cases when "the crimes are so bad,"[111] particularly in "serious" crimes such as "murder, arson, robbery, rape or kidnapping,"[112] implying that the minors sentenced to adult prisons deserve to be there.

This argument fails to account for many realities of California's juvenile justice system. First, while sentencing only violent juveniles convicted of horrendous crimes as adults may have been a goal of the system, statistics show that goal was not always achieved. From 2007 to 2016, only twenty-eight percent of minors under sixteen years old prosecuted in criminal court were accused of homicide.[113] Robbery accounted for twenty-four percent and assault accounted for eighteen percent, while kidnapping and lewd or lascivious behavior only accounted for two percent each.[114] In 2018, nearly seventy percent of juvenile cases transferred to adult court were for violent offenses.[115] This means that thirty-eight percent of juvenile offenders were still given the most severe and life-altering punishment of being sentenced as adults for nonviolent crimes, undermining the argument that only a few truly dangerous and deserving youth are subject to transfer.

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107 Lloyd Billingsley, *Senate Bill 1391 Functioning as the MS-13 Empowerment Act*, CAL. GLOBE (Aug. 8, 2019), https://californiaglobe.com/section-2/senate-bill-1391-functioning-as-the-ms-13-empowerment-act.

108 Bretón, *supra* note 21; Smith, *supra* note 22.

109 *See* Bretón, *supra* note 21; Rosen, *supra* note 76.

110 Bretón, *supra* note 21.

111 *Id.*

112 Koseff, *supra* note 19.

113 HUMAN RIGHTS WATCH, *supra* note 7, at 8.

114 *Id.* at 8 n.16.

115 CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 92 (2018), https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Juvenile%20Justice%20In%20CA%202018%2020190701.pdf (last visited Jan. 8, 2020).

This argument also fails to recognize that the juvenile justice system can rehabilitate minors while simultaneously achieving some kind of retribution and holding juvenile offenders accountable for their crimes. Harsher punishments can actually violate retributive principles, which help set the outer limits of appropriate punishments based on an offender's blameworthiness.[116] When a punishment goes beyond the limits of the offender's culpability, it no longer conforms with the notion of retribution.[117] Thus, retribution will be different for adult offenders than it is for juvenile offenders, who are inherently less blameworthy for their crimes.[118] Additionally, evidence shows that juvenile correctional facilities are not actually "comfy"[119] but rather resemble adult facilities and face ongoing issues of violence and neglect.[120] Most juveniles who are found to have committed "serious or violent" offenses are placed in state, rather than county, juvenile facilities.[121] The Center on Juvenile and Criminal Justice's report highlights how state juvenile facilities are similar to criminal prisons. For example, the hiring practices of these state facilities prioritize a corrections background over a background in youth development.[122] The report also shows that the remote locations of the facilities keep families apart;[123] that the facilities' schools fail to provide basic education;[124] and that the rehabilitative programs are "rendered less effective by DJJ's [Department of Juvenile Justice] violence and prison-like setting."[125] Findings also show that violence and fear run rampant, requiring juveniles to maintain a level of "hyper-vigilance needed to stay safe."[126] Thus, it is clear that youth held accountable through the juvenile system rather than criminal sentencing are not let off easy for their crimes. State juvenile facilities are not comfy, pleasant places to be; they are

116 *See* Frase, *supra* note 68, at 76 (discussing the theory of limiting retributivism).

117 *See id.*

118 *See* discussion *infra*, Section III.C.3.

119 *See* Billingsley, *supra* note 107 (referring to juvenile facilities as "comfy" in comparison to adult prisons).

120 *See* MAUREEN WASHBURN & RENEE MENART, CTR. ON JUVENILE AND CRIMINAL JUSTICE, UNMET PROMISES: CONTINUED VIOLENCE AND NEGLECT IN CALIFORNIA'S DIVISION OF JUVENILE JUSTICE 7 (2019), http://www.cjcj.org/uploads/cjcj/documents/unmet_promises_continued_violence_and_neglect_in_california_division_of_juvenile_justice.pdf.

121 *See id.*

122 *Id.* at 21.

123 *Id.* at 72.

124 *Id.* at 63–64.

125 *Id.* at 8.

126 WASHBURN & MENART, *supra* note 120, at 26.

overrun with problems of fear, violence, and neglect, implying that reform is needed, not even harsher punishments.[127]

### C. *Senate Bill 1391's Removal of Prosecutorial and Judicial Discretion in Juvenile Transfer*

Under Propositions 21 and 57, prosecutorial and judicial discretion played large roles in whether a juvenile was transferred to criminal court or remained in the juvenile system. Under Proposition 21, the decision to transfer was entirely the prosecutor's, who could directly file certain cases in criminal court.[128] Proposition 57 curtailed the prosecutor's discretion to an extent, as it required a hearing in front of a juvenile court judge before the offender could be transferred to criminal court.[129] Proposition 57 allowed prosecutors to maintain a fair amount of discretion, however, because it was the prosecutor's decision whether to petition the juvenile court for a transfer hearing.[130] Proposition 57 placed the remaining discretion with judges, who then had the responsibility to decide whether or not to order the transfer.[131] Embedded in much of the criticism of Senate Bill 1391 is its elimination of prosecutorial and judicial discretion to individually assess juveniles in favor of a flat ban against transfer for juveniles under sixteen. Opponents argue such transfer decisions should be left in the "capable and independent hands"[132] of judges, giving them the ability to consider "the most dangerous cases" on an individual basis.[133] Under Senate Bill 1391, critics say, "there will be no one left to weigh the danger of an individual criminal."[134]

#### 1. Discretion's Flaws

While the use of discretion can help ensure that individuals receive particularized consideration, it also has several disadvantages. Biases can be a problematic aspect of discretion, especially in the courtroom.

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127 *See* NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON (2014) (describing the ways in which juvenile detention facilities harm minor detainees, both while inside the facility and after release).

128 Prop. 21 § 26 (2000).

129 Prop. 57 § 4.2 (2016).

130 *Id.*

131 *Id.*

132 Rosen, *supra* note 76.

133 *See* Brief for Santa Clara County District Attorney's Office, C.S. v. Superior Court, Sixth Appellate District, Case No. H045665 (2018).

134 Rosen, *supra* note 76.

In addition to lingering explicit biases,[135] the legal field has increasingly recognized another substantial drawback of discretion, implicit biases. Implicit biases are unconscious "implicit social cognitions that guide our thinking about social categories."[136] Our implicit biases help us "naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role."[137] Implicit biases consist of both attitudes, which are associations between a concept or group and an evaluative valence (positive or negative), and stereotypes, which are associations between a concept or group and a certain trait.[138] Although attitudes and stereotypes are often thought to be outwardly held, they may also be implicit.[139] Thus, implicit biases can come into play automatically, "including in ways that the person would not endorse as appropriate if he or she did have conscious awareness."[140]

The American Bar Association has implemented an Implicit Bias Initiative, which contains a "toolbox" for members of the legal profession to use "in exploring implicit bias and approaches to 'debiasing.'"[141] The webpage contains several resources that can be used to understand and test implicit or unconscious biases.[142] In addition to a general toolkit, the page also provides different toolkits specifically tailored for prosecutors, public defenders, and judges.[143] These toolkits contain guidance on how to identify and combat implicit biases in a criminal law setting.[144] Recognizing implicit biases is so important in the legal field because of the role lawyers' (especially prosecutors and judges) decisions play in the lives of others. Implicit biases can influence behavior "in ways that can have real effects on real

135 *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding the New York City police department had violated the Fourth and Fourteenth Amendments by conducting unconstitutional stops and frisks in a racially discriminatory manner).

136 Jerry Kang, *Implicit Bias: A Primer for Courts*, NAT'L CTR FOR STATE COURTS 1 (August 2009), http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf.

137 *Id.*

138 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012).

139 *Id.* at 1129.

140 *Id.*

141 *Implicit Bias Initiative*, AMERICAN BAR ASSOC., https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.

142 *Id.*

143 *See Implicit Bias & Prosecutors*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/diversity/resources/implicit-bias.

144 For example, the prosecutor toolkit explains that taking more time to make decisions and writing or articulating out loud the reasoning for decisions can help combat prosecutors' implicit biases. *See id.*

lives."[145] Studies have illustrated, for example, the role that race can play in criminal sentencing.[146]

Discretion is a subjective concept, and several considerations, in addition to implicit biases, can impact it. For example, prosecutors may consider several variables when deciding whether or not to prosecute a given case. "Legal, experiential, ethical, and political" considerations may all factor into a prosecutor's ultimate decision whether to prosecute.[147] While legal considerations, such as whether the evidence supports the charges, may be more objective, the prosecutor's personal views can also come into play.[148] The prosecutor's own life experiences likely factor into all of his or her decisions, as does the prosecutor's perspective on political consequences and what he or she believes is ethically right.[149] These inevitable considerations show how a prosecutor's subjective experiences and beliefs impact a decision that has the power to change another person's life.

The subjective nature of discretion and implicit biases have a special impact on juvenile proceedings because whether to transfer a juvenile offender to the criminal system is a life-altering decision that relies greatly on the discretion of prosecutors and judges. Some of the ways in which prosecutorial and judicial discretion have impacted juvenile offenders are evident. For example, statistics indicate that across the United States, racial biases have "negatively impacted minority youth" in decisions on whether or not to transfer a juvenile offender to criminal court.[150] A 2000 study published by the Center on Juvenile and Criminal Justice found that the proportions of juveniles transferred to criminal court and left in the juvenile system do not reflect the same racial breakdown as that for violent crime arrests.[151] In Los Angeles, the transfer rate for minority youth accused of violent crimes is approximately double the transfer rate for their white

145 Kang, *supra* note 136, at 4.

146 *Id.* ("[A] few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment.").

147 Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO J. LEGAL ETHICS 739, 744 (2005).

148 *Id.*

149 *Id.*

150 *See* Gabrielle M. Thomas, Note, *The Fate of Black Youth in the Criminal Justice System: The Racially Discriminatory Implications of Prosecutorial Discretion and Juvenile Waiver*, 17 RUTGERS RACE & L. REV. 267, 285 (2016) (noting that minority youth in Florida have a higher likelihood of being tried and sentenced as adults in criminal court than white youth.).

151 Mike Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*, CTR ON JUVENILE AND CRIMINAL JUSTICE 1, 6 (2000).

counterparts.[152] Although most prosecutors pride themselves on making fair decisions, implicit biases are, by definition, biases that we are not aware we carry.[153] Additionally, while prosecutors are typically considered, and often try to be, more neutral than judges or legislatures who traditionally receive pressure to look tough on crime, prosecutors may face this same pressure, but "with the additional burden of lacking experience in and knowledge of dealing with juveniles."[154] Based on all of the considerations, both conscious and unconscious, that factor into prosecutors' and judges' decision-making processes, the question of whether a given juvenile offender will be transferred to criminal court is highly unpredictable, inconsistent, and dependent upon discretion.

### 2. How Discretion Has Produced Disparate Results in Transferring Youth Across California's Juvenile Justice System

The subjective and flexible nature of discretion has led to a glaring lack of consistency and uniformity across California when it comes to which juveniles are transferred to criminal court. Statistics from 2018 show disparities between juvenile offenders of different races: youth of color are transferred to criminal courts at disproportionate rates.[155] From 2007 to 2016, African American juvenile offenders were eleven times more likely to be transferred to criminal court than white offenders, while Latino youth were five times more likely than white youth.[156] Data from 2018 shows that race continued to play a role in juvenile transfer, with Hispanic youth representing more than half of juvenile offenders transferred to adult court (55.9%), followed by African American youth (22.3%), and white youth (17.3%).[157] Disparities also occur along geographic lines, with some counties far more likely to transfer certain minor offenders than others; for example, juvenile offenders in Sacramento County are nearly twice as likely to be transferred to criminal court than the state average, while youth in Yolo County are nearly four times as likely.[158] On the other hand, juveniles in

152 *Id.*

153 Kang, *supra* note 136, at 2.

154 WHITE & MOLE, *supra* note 34, at 9.

155 CAL. DEP'T OF JUSTICE, *supra* note 115.

156 HUMAN RIGHTS WATCH, *supra* note 7, at 14; *Gov. Brown Signs Bills to End Sentencing of 14- and 15-Year-Olds in Adult Criminal Court, Support Exonerated People After Prison*, L.A. SENTINEL (Oct. 4, 2018), https://lasentinel.net/gov-brown-signs-bills-to-end-sentencing-of-14-and-15-year-olds-in-adult-criminal-court-support-exonerated-people-after-prison.html.

157 CAL. DEP'T OF JUSTICE, *supra* note 115, at 47.

158 HUMAN RIGHTS WATCH, *supra* note 7, at 7; L.A. SENTINEL, *supra* note 156.

Los Angeles County are transferred to criminal courts at a rate of about half of the state average, while San Diego County youth are transferred about at approximately a tenth of the state average.[159]

The vast discrepancies in transfer rates along both racial and geographic lines exemplify a critical problem with depending on prosecutors' and judges' discretion in transfer decisions. Such an impactful decision should not depend on arbitrary characteristics such as race and county of residence.[160] Senate Bill 1391 combats this unfairness by implementing an objective standard for juveniles under the age of sixteen: they cannot be transferred to criminal court. In doing so, Senate Bill 1391 takes a major step toward eliminating these arbitrary disparities and effecting uniformity and consistency for juveniles under sixteen years old.

### 3. Senate Bill 1391's Ban on Transfers of Fourteen- and Fifteen-Year-Old Juveniles Appropriately Responds to Discretion-Produced Disparities

While some critics of Senate Bill 1391 have recognized the need to reduce bias in the transfer process for juveniles, they argue that Proposition 57 successfully addressed concerns about prosecutorial discretion by putting the final decision in the hands of a judge. This argument fails to recognize that, under Proposition 57, prosecutors still maintained significant discretion in the transfer process, as they still determined which juveniles would be subject to a transfer hearing.[161] In deciding which juveniles were subject to a transfer hearing, prosecutorial discretion continued to play a large role in determining which juveniles would ultimately be transferred because those subject to a hearing clearly have a far greater chance of transfer. In this way, Proposition 57 did not actually take the decision away from prosecutors and give it to judges; rather, "the judiciary merely acted as a check on the prosecutor's discretionary decision by ruling on the motions for transfer, it did not independently decide which charged youths should be subject to the possibility of transfer."[162]

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159 HUMAN RIGHTS WATCH, *supra* note 7, at 7.

160 *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 7, at 14 (showing that juvenile offenders' chances of being transferred to criminal court are different depending on which California county the prosecution takes place in); Males & Macallair, *supra* note 151, at 6 (showing that youth of color are more likely to be transferred to criminal court).

161 Prop. 57 § 4.2 (2016).

162 People v. Superior Court (K.L.), 248 Cal. Rptr. 3d 555, 563–64 (Ct. App. 2019).

This argument also fails to account for the fact that judges' discretion can be flawed as well. Although we often trust judges to fairly and neutrally carry out the law, they are not immune from implicit bias.[163] The notion that Proposition 57 effectively addressed discretionary issues by putting transfer decisions into the "capable and independent hands" of judges ignores biases in judicial discretion. Additionally, this argument does not consider whether judges have the knowledge of juvenile minds and development that is needed to make informed decisions of long-lasting impact for youth. In *Roper v. Simmons*, the Supreme Court recognized the difficulty of making decisions regarding juvenile sentencing: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[164] If it is difficult for expert psychologists to differentiate between juveniles who can and cannot be rehabilitated, judges, many of whom lack psychological and youth development expertise, undoubtedly will struggle with making these distinctions as well.

The removal of prosecutorial and judicial discretion is warranted in light of the difficulty prosecutors and judges will undoubtedly face in determining whether to transfer juvenile offenders. Today, most states use the theory of limiting retributivism in criminal sentencing.[165] Under this theory, judges follow the principle of retribution to identify a range of appropriate punishments for the crime, "setting upper and lower limits on the severity of penalties that may be fairly imposed."[166] Judges then use their discretion to determine what punishment in the defined range is appropriate for the individual offender.[167] In the criminal justice system, judges' use of discretion to consider the offender's character and any special circumstances is appropriate. Juvenile transfer, however, is a rare case in which the theory of limiting retributivism does not work. Punishments based on retribution are fixed by looking at blameworthiness.[168] Juvenile offenders, just by nature of their youth, are inherently less blameworthy than their adult

163 *See* Kang et al., *supra* note 138, at 1146; *see also Implicit Bias & Judges*, AMERICAN BAR ASS'N, https://www.americanbar.org/groups/diversity/resources/implicit-bias (providing advice for judges to combat implicit bias by taking more time to make decisions, writing more opinions, and participating in statistical trainings).

164 Roper v. Simmons, 543 U.S. 551, 573 (2005).

165 Frase, *supra* note 68, at 76.

166 *Id.*

167 *Id.* at 77.

168 *Id.* at 73.

counterparts for the reasons articulated by the Court in *Roper*[169] and *Miller*.[170] Their youth and immaturity both diminish their culpability in comparison to adults and suggest "a capacity for and a likelihood of change."[171]

The significant and lasting effects that sentencing a juvenile as an adult can have on the minor make Senate Bill 1391's complete ban—as opposed to the criminal justice system's traditional method of living retributivism—an even more appropriate response to the inconsistency that results from discretion and lack of expertise. The "negative labeling" associated with sentencing a juvenile as an adult can have harmful and lasting effects on all aspects of the juvenile's life, including "employment, social life, and education."[172] These effects are exacerbated because adult criminal court proceedings are open to the public, while juvenile proceedings are usually sealed to all but select people.[173] Juveniles who spend time in adult prisons are also more likely to re-offend than those who remain in the juvenile system, making those sentenced as adults more likely to end up back in prison.[174]

In addition to the effects on their lives after prison, juveniles serving sentences in adult prisons are more prone to abuse. Youth offenders incarcerated with adults are at the highest risk of sexual assault.[175] Minors in adult prisons are also nine times more likely to commit suicide than those who are detained in juvenile facilities.[176] Many juveniles who suffer from mental illnesses have less access to treatment in adult prisons and, because of their youth, have little experience managing the symptoms of their disorders.[177] Because their brains, including maturity and coping skills, are still developing, juveniles have a higher tendency to act out with reckless behavior, earning them more aggressive and severe punishments within the prison walls as well.[178]

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169 *Roper*, 543 U.S. at 569–70 (citing Johnson v. Texas, 50 U.S. 350, 367 (1993)); Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing *Roper*, 543 U.S. at 569–70).

170 *See Miller*, 567 U.S. at 472 (citing Graham v. Florida, 560 U.S. 48, 71 (2010)) ("Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'").

171 Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT'G REP. 49, 50 (2010).

172 Peterson, *supra* note 29, at 392.

173 *Id.* at 390.

174 *Id.* at 392.

175 *Children in Adult Prisons*, EQUAL JUSTICE INITIATIVE (2019), https://eji.org/children-prison/children-adult-prisons.

176 *Id.*

177 *Id.*

178 *Id.*

Whether a juvenile will be transferred to criminal court is a decision of the utmost importance in light of these serious and devastating long-lasting consequences for juveniles sentenced to adult prisons. As such, a ban on transferring young juveniles under the age of sixteen is appropriate to ensure that a wrong decision is not made. This is especially true when the severe impact on the young juvenile is compared with the minimal impact that keeping the minor in the juvenile system has on public safety.[179]

## IV. CONCLUSION

A look at the history of the juvenile justice system in America shows that the purpose of the system has been, and continues to be, rehabilitating juvenile offenders.[180] Senate Bill 1391 furthers this objective by ensuring that all juveniles under the age of sixteen stay in the juvenile system,[181] giving them the best chance at rehabilitation. While the constitutionality of the amendment is currently being debated throughout California's lower courts,[182] opponents of Senate Bill 1391 have put forth other arguments regarding public safety,[183] holding violent youth offenders accountable,[184] and the removal of prosecutorial and judicial discretion.[185] This Comment answers those arguments, demonstrating that Senate Bill 1391 is sound both as a matter of public policy and criminal law policy.

Contrary to critics' assertions, Senate Bill 1391 does not harm public safety. Despite the fear that it will let violent offenders back on the street, the amendment does not affect the safety net already in place in §§ 1800 and 1800.5, which allow the juvenile system to retain control

179 CAL. WELF. & INST. CODE §§ 1800–1800.5 (2019).

180 *See* NAT'L. RESEARCH COUNCIL INST. OF MED, *supra* note 25, at 157; Roper v. Simmons, 543 U.S. 551, 573 (2005).

181 CAL. WELF. & INST. CODE § 707 (2019).

182 *See, e.g.*, People v. Superior Court (K.L.), 36 Cal. Rptr. 3d 555 (Ct. App. 2019) (holding that Senate Bill 1391 is constitutional); People v. Superior Court (I.R.), 251 Cal. Rptr. 3d 158 (Ct. App. 2019) (holding that Senate Bill 1391 is constitutional); People v. Superior Court (Alexander C.), 246 Cal. Rptr. 3d 712 (Ct. App. 2019) (holding that Senate Bill 1391 is constitutional); O.G. v. Superior Court, 252 Cal. Rptr. 904 (Ct. App. 2019) (holding that Senate Bill 1391 is unconstitutional).

183 *E.g.*, Rosen, *supra* note 76 ("Proponents of Senate Bill 1391 cannot assure you that this small subset of 15-year-olds will not kill again. Some will.").

184 *E.g.*, Billingsley, *supra* note 107 (characterizing Senate Bill 1391 as "not justice but a travesty").

185 *See, e.g.*, Brief for Santa Clara County District Attorney's Office, C.S. v. Superior Court, Sixth Appellate District, Case No. H045665 (2018) (criticizing the replacement of judicial discretion with "a legislative fiat that prohibits any judge from even considering the issue [of whether a juvenile offender should be tried in juvenile or criminal court] in these most dangerous cases.").

over juveniles who are deemed physically dangerous even after they reach twenty-five years old, the age of release.[186] Additionally, juveniles who are kept in the juvenile system do not "get off easy;" they are still held accountable for their crimes, but in a juvenile facility that is specifically tailored to meet the needs of still-developing young minds.[187] And, in many cases, these juvenile facilities bear a striking resemblance to adult prisons.[188] Finally, Senate Bill 1391 mitigates the disparities among transfers,[189] which are likely a result of prosecutorial and judicial discretion. Removing discretion is appropriate in light of the difficulty of deciding which juveniles deserve to be transferred and the devastating and lasting effects that the criminal system has on juvenile offenders.[190] Thus, Senate Bill 1391's critics fail to account for many practical realities of the juvenile justice system. This Comment responds to such critics by illustrating that Senate Bill 1391 protects juveniles while holding them accountable, maintaining public safety, and reducing problems associated with discretion.

186 CAL. WELF. & INST. CODE §§ 1800–1800.5 (2019).

187 HUMAN RIGHTS WATCH, *supra* note 7, at 17–18.

188 WASHBURN & MENART, *supra* note 120, at 8.

189 HUMAN RIGHTS WATCH, *supra* note 7, at 6–7, 14; L.A. SENTINEL, *supra* note 156.

190 EQUAL JUSTICE INITIATIVE, *supra* note 175.