SEE NO EVIL, HEAR NO EVIL: APPLYING THE SIGHT AND SOUND SEPARATION PROTECTION TO ALL YOUTHS WHO ARE TRIED AS ADULTS IN THE CRIMINAL JUSTICE SYSTEM

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American law treats youths within the criminal justice system with contrasting impulses. In some cases, the law deems youths worthy of special protections and places them within the juvenile justice system. In other situations, however, it views youths as posing distinct dangers and funnels them into justice systems designed for adults. So long as youths remain under the jurisdiction of the juvenile justice system, they are afforded the protections of the Juvenile Justice and Delinquency Prevention Act (JJDPA). One of the JJDPA's core protections, sight and sound separation, aims to prevent youths from having any visual or spoken exchanges with incarcerated adults when they are held in an adult facility. The reauthorization of the JJDPA in December 2018 significantly strengthened sight and sound separation protection for youths tried as adults in the criminal justice system, affording them separation protections that are relatively similar to those afforded to their counterparts tried within the juvenile justice system. However, instead of immunizing all youths tried in the criminal justice system from sight and sound contact with incarcerated adults, the new statutory language includes a loophole for a presiding judge to deem a youth ineligible for sight and sound protection if it is "in the interest of justice" to do so.

The current application of the sight and sound separation protection thus may leave a significant portion of the youth population vulnerable and exposed to the dangers of adult facilities. A presiding judge can now look to factors such as age, mental maturity, delinquency history, and more to determine the rights of an incarcerated youth in an adult facility instead of automatically providing him or her with complete protection. Therefore, this Note argues that sight and sound separation's statutory application should be made even more comprehensive by providing for the unqualified inclusion

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of all youths who are charged and tried as adults within the criminal justice system. Using judicial discretion to deny certain youths sight and sound separation is discordant with the current legal understanding of the emotional, physical, and cognitive vulnerability of youths, as demonstrated in recent U.S. Supreme Court decisions. Therefore, the law should mandate unconditional protection of all youths, as this may decrease the victimization of youths and mitigate other negative consequences from a youth's interactions with incarcerated adults.

INTRODUCTION

In June 2005, just nine days after his seventeenth birthday, Kirk Gunderson was arrested in Onalaska, Wisconsin.[1] Although he was only seventeen years old, Wisconsin law considered Kirk an adult.[2] This made Kirk subject to the jurisdiction of the criminal justice system,[3] and he was incarcerated at La Crosse County Jail—an adult facility.[4] Kirk's mother, Vicky Gunderson, recounts that during his incarceration, older incarcerated individuals—some who were triple Kirk's age—taunted Kirk and called him "immature."[5] An older, convicted sex offender told Kirk that he was "going to have him" and then exposed himself to Kirk.[6] Kirk wanted to continue pursuing a high school diploma while in jail, but the adult facility only provided him with educational materials for four hours per week; the counterpart juvenile facility gave youths of a similar age closer to twenty-five hours of materials per week.[7] As a result, Kirk instead filled the majority of his time learning from his "rotating adult cellmates" about the inner workings of jail culture.[8] He was involved in numerous physical confrontations that left his face bruised, but he refused to tell anyone what happened to him due to his fear of facing repercussions from older incarcerated persons.[9] This was Kirk's life during the four months he was held at La Crosse County Jail waiting for his pending trial date. However, Kirk never found out when his case would go to trial—he committed suicide while waiting.[10]

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1. *See Hearing on Assemb. B. 732 Before the Comm. on Corr. & the Courts*, 2009–2010 Leg., Reg. Sess. (Wis. 2010), http://www.campaignforyouthjustice.org/parent-testimonials/item/vicky-gunderson [https://perma.cc/27Q7-8YCL] [hereinafter *Hearing on Assemb. B. 732*] (statement of Vicky Gunderson).

2. *See* WIS. STAT. § 48.02(2)(1d) (2019) ("'Adult' means a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, 'adult' means a person who has attained 17 years of age.").

3. *See infra* Part I.A.

4. *See Hearing on Assemb. B. 732*, *supra* note 1.

5. *See* NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 11 (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf [https://perma.cc/UKQ9-XQHF].

6. *See Hearing on Assemb. B. 732*, *supra* note 1.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

In the United States, there are roughly 32,000 incarcerated youths,[11] like Kirk, detained in adult facilities[12] every year.[13] Compared to their counterparts who are held in juvenile correctional facilities, youths who are incarcerated with adults face a heightened risk of a multitude of dangers, including sexual assault and suicide.[14] In part to reduce the risk of violence committed against youths in adult facilities, Congress introduced the Juvenile Justice and Delinquency Prevention Act of 1974[15] (JJDPA), a federal law that, among other things, provides funding to states that adhere to its four core protections for incarcerated youth.[16] One of the JJDPA's core protections[17] is sight and sound separation, which mandates that incarcerated youths may not be placed in situations in which they have any clear visual or verbal contact that is "not brief and inadvertent" with adult incarcerated persons.[18] Sight and sound separation is supposed to increase the level of safety for youths who are incarcerated with adults by providing for complete

11. The term "youth" does not simply mean individuals under the age of eighteen. Because some states "extend the legal status" of youth only up to age seventeen, the term "youth" can refer to a different population of individuals depending on applicable state law. For the purposes of this Note, the term "youth" encompasses all individuals under the age of eighteen since, as of 2016, forty-one of the fifty states and the District of Columbia use eighteen as their age of majority. *See Jurisdictional Boundaries*, OFF. JUV. JUST. & DELINQ. PREVENTION (Mar. 27, 2017), https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2016&text=no&maplink=link2 [https://perma.cc/7WTE-JR5L]; *see also* JEFFREY BUTTS & JEREMY TRAVIS, URBAN INST., THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 3 (2002), https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF [https://perma.cc/33Z9-3YP6] ("Although it is convenient to label all offenders under age 18 as 'juveniles,' this is not a legal definition.").

12. For the purposes of this Note, "adult facilities" refer to all jails, prisons, and detention facilities within the criminal justice system. *See* AM. CORR. ASS'N, STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 106–08 (2d ed. 1981), https://www.ncjrs.gov/pdffiles1/Digitization/83419NCJRS.pdf [https://perma.cc/YCQ8-W7TZ].

13. *See* NEELUM ARYA, CRIMINAL JUSTICE REFORM CLINIC, GETTING TO ZERO: A 50-STATE STUDY OF STRATEGIES TO REMOVE YOUTH FROM ADULT JAILS 7 (2018), https://drive.google.com/file/d/1LLSF8uBlrcqDaFW3ZKo_k3xpk_DTmItV/view [https://perma.cc/GEN2-5GZ4]; *see also* Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN ST. L. REV. 233, 242–43 (2005); Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201 [https://perma.cc/7BYB-748F].

14. *See Key Facts: Youth in the Justice System*, CAMPAIGN FOR YOUTH JUST. 5–6 (Feb. 22, 2018), http://www.campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsFeb222018Revised.pdf [https://perma.cc/J38T-HDGM] (last visited Oct. 6, 2019) [hereinafter *Key Facts*].

15. Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of the U.S.C.).

16. *Id.*

17. The JJDPA's other three core protections are: the reduction of disproportionate minority contact, the deinstitutionalization of statute offenders, and the removal of juveniles from adult jails and lockups. *See Compliance with the Core Requirements of the Juvenile Justice and Delinquency Prevention Act*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/compliance/index.html [https://perma.cc/5KUB-QZWD] (last visited Oct. 6, 2019).

18. 34 U.S.C. § 11103(25) (2012).

separation from such adults.[19] Until December 2018,[20] courts interpreted this statutory protection to only cover youths who were detained in an adult facility but were still under the jurisdiction of the juvenile justice system.[21] It did not include youths who were detained in an adult facility but were tried and sentenced under the criminal justice system as adults.[22] However, on December 21, 2018, Congress passed a bill that reauthorized the JJDPA for the first time in sixteen years: the Juvenile Justice Reform Act of 2018.[23] This reauthorization significantly amended sight and sound separation protection by implementing partial sight and sound separation between youths tried as adults and incarcerated adults, an advancement in juvenile rights that juvenile justice advocates had been working towards for almost two decades.

However, instead of providing blanket protection for all youths held within adult facilities, the law now allows judicial discretion in determining whether it is "in the interest of justice" to allow a youth to be excluded from sight and sound separation protection.[24] This new loophole[25] may leave numerous youths vulnerable and unprotected, despite the JJDPA's goal of strengthening both the national standards for youth incarceration and the practices implemented to protect all incarcerated youth.[26]

A youth's age and vulnerability are judicially and scientifically recognized by courts as mollifying sentencing factors for youths who are within in the court system, in large part due to the U.S. Supreme Court's unequivocal recognition of the differences between youth and adult development.[27] However, sight and sound separation, while certainly improved since the JJDPA's 2002 reauthorization,[28] still has an undeveloped legislative appreciation of youth development. This is because of the newly applicable

19. *See* JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 14 (2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf. [https://perma.cc/F5LB-EMTZ].

20. However, states have three years from December 2018 to enact the amended sight and sound separation provision. *See* Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5135 (2018).

21. *Fact Sheet: Jail Removal and Sight & Sound Protections*, ACT 4 JUV. JUST. 1 (2018), http://www.act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Core%20Protection%20Jail%20Removal%20and%20Sight%20Sound%20February%202018%20FINAL%20Revised.pdf [https://perma.cc/L9B7-LYXU] [hereinafter *Fact Sheet*].

22. *Id.*

23. *See* Pub. L. No. 115-385, 132 Stat. 5123 (to be codified in scattered sections of 34 and 42 U.S.C.).

24. *Id.* § 205, 132 Stat. at 5135–36.

25. Before the reauthorization of the JJDPA in 2018, the "federal loophole" used to refer to the fact that youths tried as adults within the criminal justice system were not afforded the sight and sound separation protection. *See* ARYA, *supra* note 5, at 22; *see also* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (amended 2018).

26. Rachel Marshall, Fed. Policy Counsel, Campaign for Youth Justice & Neelum Arya, Author, Webinar at the Coalition for Juvenile Justice: Sight and Sound Separation and Adult Jail Removal (Apr. 18, 2019).

27. *See infra* Part I.C.

28. Juvenile Justice and Delinquency Prevention Act of 2002, Pub. L. No. 107-273, div. C, tit. II, subtitle B, 116 Stat. 1869 (codified as amended in scattered sections of the U.S.C.).

judicial discretion in determining whether it is "in the interest of justice" for a youth to be shielded by sight and sound separation protection.[29]

Thus, in order to preserve the JJDPA's mission of setting exemplary practices for the protection of youth,[30] this Note suggests that sight and sound separation's statutory application should provide a uniform sight and sound contact protection from adult incarcerated persons for all youths under eighteen who are tried as adults, without a judicial hearing to determine whether a particular youth is worthy of such protection based on his or her age, maturity, or any other relevant factor. Part I explores the development of the juvenile justice system and how both statute and common law have used (albeit in different ways) a youth's age as a component in punishment and sentencing determinations. Part II analyzes Congress's implementation of the JJDPA and how sight and sound separation's application has evolved since its inception in federal law. Part III discusses the exception, "in the interest of justice," that courts may use to exclude a youth from sight and sound separation protection, which may leave a sector of the youth population vulnerable while incarcerated in adult facilities. Part IV then proposes dismantling the "in the interest of justice" exception and amending the statute to provide blanket sight and sound protection from contact with incarcerated adults for all youths who are tried as adults in the criminal justice system.

I. THE INCONSISTENT APPLICATION OF AGE AS A COMPONENT FOR SENTENCING DETERMINATIONS

The origins of the juvenile justice system underscore the importance of a youth's age and presumed immaturity.[31] However, this began to shift during the late twentieth century when juvenile crime rates began to increase and the "superpredator" theory of youth crime became widespread.[32] This led state legislatures to react, in part, by abandoning the emphasis on a youth's age and instead implementing various juvenile transfer mechanisms to routinely try more youths in the traditional criminal justice system.[33] As the importance of age as a mitigating factor began to deteriorate in punishment theory, youths were consequently held in, or sentenced to, adult facilities on a more frequent basis.[34] However, after the decisive Supreme Court holdings in *Roper v. Simmons*,[35] *Graham v. Florida*,[36] and *Miller v. Alabama*,[37] which revamped the legal understanding of youth development, courts once again

29. Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5136 (2018).

30. *See* D'lorah L. Hughes, *An Overview of the Juvenile Justice and Delinquency Prevention Act and the Valid Court Order Exception*, 2011 ARK. L. NOTES 29, 29.

31. *See* Green, *supra* note 13, at 242–43.

32. *See id.*

33. *See id.*

34. *See Key Facts*, *supra* note 14, at 4–5.

35. 543 U.S. 551 (2005).

36. 560 U.S. 48 (2010).

37. 567 U.S. 460 (2012).

view age as a mitigating factor at common law within both the juvenile and criminal justice systems.

This Part explores the ebb and flow of the application of age in the juvenile and criminal justice systems. Part I.A examines the original ideology upon which the juvenile justice system was premised and how the importance of individualized sentencing and rehabilitation was paramount to its success. Part I.B analyzes the shifting perception of age within the political and legal sectors due to the "superpredator" rhetoric of the late twentieth century and how this led to a dramatic upsurge in the usage and availability of transfer mechanisms that placed more juveniles into the criminal justice system. Part I.C then explains how three landmark Supreme Court decisions declared that age should be viewed as a mitigating factor in youth sentencing determinations once again.

A. The Origins: Separation of the Juvenile Justice System and the Criminal Justice System

During the late nineteenth century, the juvenile justice system[38] developed out of the notion that it was imperative to separate juveniles in delinquency proceedings from adults subject to the jurisdiction of the criminal justice system.[39] The juvenile justice system was established during the Progressive Era, when the political dialogue surrounding juvenile reform shifted focus from imposing adult punishment on delinquent youths to rehabilitating such youths.[40] This reformative drive stemmed from the public's discontent with the criminal justice system, which, at the time, charged and punished youths in the same manner as it did adults.[41] In 1899, Illinois established the first state system of juvenile courts and granted these courts jurisdiction over "cases of dependency, neglect, and delinquency."[42] By 1945, all fifty states

38. When discussing the juvenile justice system, this Note will primarily refer to delinquency cases. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) defines delinquency as "[a]n act committed by a juvenile that would be criminal if committed by an adult." *See Glossary*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/grantees/pm/glossary.html [https://perma.cc/J82R-7DZJ] (last visited Oct. 6, 2019). Delinquent acts include crimes committed against individuals and property, drug offenses, and "crimes against public order." *Id.* The juvenile justice system has jurisdiction over all delinquency proceedings. *Id.* On the other hand, this Note discusses the criminal justice system as it relates to youth when the youth in question is in a criminal proceeding as opposed to in a delinquency proceeding. *See* U.S. DEP'T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002, at 17 (2010), https://cyfd.org/docs/OJJPD_Guidance_Manual_2010.pdf [https://perma.cc/N2C3-24NG].

39. *See* Green, *supra* note 13, at 239.

40. *See* Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 265 (1999) (The juvenile court's main role was "'to determine what course of treatment was necessary [and most viable] to rehabilitate the juvenile' offender." This indicates that the court's core functions were "clinical" as opposed to "punitive." (quoting Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378)).

41. *See id.* at 264; *see also* William W. Booth, *History and Philosophy of the Juvenile Court*, *in* 1 FLORIDA JUVENILE LAW AND PRACTICE § 1.3 (15th ed. 2018).

42. Booth, *supra* note 41, § 1.3.

had mandated "juvenile court legislation."[43] Judges in the juvenile justice system were expected to handle youth cases differently than criminal court judges handled adult cases by playing a parental role and acting without a punitive mindset during adjudication.[44] As such, juvenile judges primarily focused on ensuring individualized attention to each youth offender's personal interests when formulating an adequate punishment for the youth's offense.[45] Having judges take on this parental role highlighted the important limitations that the juvenile justice system assigned to a youth's culpability level, which centered around how a youth's age was perceived[46]: the system saw delinquent youths as capable of reform due to the qualities associated with adolescence.[47]

B. A Dramatic Shift in the Perception of Age: The "Superpredator" Era

Towards the end of the twentieth century, the public came to view the specialized approach to youth punishment as burdensome due to the upswing in crimes committed by youths.[48] Between 1984 and 1994, the "arrest rates for juveniles charged with violent offenses jumped 78 percent."[49] As a result, the influx of youths passing through the juvenile justice system overburdened judges, leading them to capriciously adjudicate cases.[50] Ultimately, the specialized, rehabilitative view of youth crime and the perception of age as an indication of reform fell by the wayside.[51] This change created parity between adult and juvenile sentencing, mooting the founding goals of the juvenile justice system, as youths were "arbitrarily punished" instead of being provided with opportunities for reform.[52]

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43. *Id.*

44. *See* Green, *supra* note 13, at 240–41.

45. *See* Smallheer, *supra* note 40, at 266. This individualized focus had roots in the English common law parens patriae method, where the judge's obligation to a child was to provide "personalized justice" to cater to the child's best interest. *See* Green, *supra* note 13, at 239–40; *see also* William Hannan, *Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 193, 197 (2008).

46. *See* Green, *supra* note 13, at 240–41.

47. *See id.* at 241.

48. *See id.* at 242; *see also* Smallheer, *supra* note 40, at 266 (explaining that the juvenile justice system "moved toward aggregate treatment as it became over-burdened by growing numbers of juvenile offenders"). However, the reasoning behind this upsurge in youth crime is not clear-cut. *See* BUTTS & TRAVIS, *supra* note 11, at 1 (indicating that it is still up for debate why "violent crime in the United States increased sharply in the 1980s and early 1990s before dropping just as precipitously in the mid-to-late-1990s").

49. JILL WOLFSON, COAL. FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING & SENTENCING YOUTH IN ADULT CRIMINAL COURT 7–8 (2005), https://www.issuelab.org/resources/613/613.pdf [https://perma.cc/5X3Z-NQ38].

50. *See* Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 47 (2013).

51. *See id.*

52. *See* Smallheer, *supra* note 40, at 267. This arbitrariness also led to a greater focus on procedural issues within the juvenile justice system, including juvenile waiver proceedings. *See* Kent v. United States, 383 U.S. 541, 557 (1966).

Media attention exacerbated the juridical reaction to increasing youth crime in the 1980s and 1990s.[53] The rhetoric surrounding the increase in youth crime alarmed the public and certain political scholars promoting theories that youth crime would turn America into a "ticking crime bomb."[54] The speculation that youths were committing heinous crimes became widespread during the Clinton administration, and William J. Bennett, John J. DiIulio, Jr., and John P. Waters's coining of the phrase "superpredator"[55] in their book *Body Count* reinforced this political concern.[56] The authors depicted delinquent youths as lacking any semblance of human decency, describing them as "radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders."[57] The authors claimed that these youth superpredators "d[id] not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience."[58] The authors virtually dehumanized an entire generation of youth and the media picked up on their superpredator rhetoric.[59]

The superpredator theory evolved well beyond a social concept—it became entangled with the legal system as apprehensive politicians bought into the rhetoric in the 1990s.[60] State legislatures began ignoring the age of majority[61] in the criminal justice system and swiftly began to increase the legal outlets for transferring youths from the juvenile justice system to the criminal justice system.[62] The superpredator theory played a considerable

53. *See* Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 538–39 (2013) (describing the coverage and reaction to youth crime in the early 1990s as a "moral panic," where the "media, politicians, and the public interact[ed] in a pattern of escalating alarm in response to a perceived social threat.").

54. WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WATERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 21 (1996).

55. While the superpredator theory also has an ingrained racial component to it, this Note solely focuses on its applicability to the youth population in general. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html [https://perma.cc/AJ2A-SG43].

56. BENNETT ET AL., *supra* note 54, at 27.

57. *Id.*

58. *Id.*

59. *See* Scott, *supra* note 53, at 539 (explaining that the superpredator "stereotype" was used by both the media and politicians alike). *See generally* Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME (Jan. 15, 1996), http://content.time.com/time/magazine/article/0,9171,983959,00.html [https://perma.cc/C2FP-6WTT].

60. *See* Scott, *supra* note 53, at 538–39 ("Prosecutors and politicians, eager to demonstrate their concern for victims and for public safety, promised punishment of offenders and protection from young criminals generally.").

61. *See Jurisdictional Boundaries*, *supra* note 11 (defining the "upper age of jurisdiction" as "the oldest age at which a juvenile court has original jurisdiction over an individual for law violating behavior").

62. *See* Marcy Mistrett & Jeree Thomas, *A Campaign Approach to Challenge the Prosecution of Youth as Adults*, 62 S.D. L. REV. 559, 559 (2017) (explaining that almost every state passed new transfer laws that simplified the process of "exclud[ing] youth from the juvenile system," which made it easier to "prosecute them in the adult criminal justice system").

role in the "dismantling of transfer restrictions . . . and it threw thousands of children into an ill-suited and excessive punishment regime."[63] States grew more lenient in transferring cases from the juvenile system to reduce the political pressure on their courts that stemmed from the growing concern about an influx of youth offenders who were incapable of reform.[64]

State legislatures came up with an abundance of transfer methods that eventually led to an increase of youth incarceration in adult facilities across the country.[65] Regardless of a state's age of majority,[66] by 2011 all fifty states had implemented transfer laws that adjusted the "usual jurisdictional age boundaries" for some cases of youth delinquency by removing youths from delinquency jurisdiction and placing them under the jurisdiction of the criminal justice system.[67] Transferring youths who had committed the most heinous crimes to adult courts has always been an available option, but the increase in youth arrest rates, coupled with the superpredator theory, led to a sweeping increase in state waiver and transfer statutes.[68]

Much is at stake when transferring a youth into the criminal justice system. Not only is the youth eligible to be cellmates with an adult who is possibly twice or even triple his or her age, but the youth is also more likely to end up incarcerated after being tried and processed in the adult criminal justice system rather than through the juvenile justice system.[69] This Note briefly analyzes three main types of transfer mechanisms used in the United States to demonstrate both the increased prevalence of transfer and the mass expansion of ways a youth can end up in the criminal justice system.[70]

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63. *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later [https://perma.cc/S63C-UZN9].

64. Hoeffel, *supra* note 50, at 36.

65. *See* WOLFSON, *supra* note 49, at 5 ("[I]nstead of celebrating a court that endeavors to protect our communities by rehabilitating youth, a wave of legislative change has threatened to dismantle it.").

66. Although eighteen is typically thought of as the age where "childhood ends and adult criminal responsibility begins," this is not true for all states. In 2007, fourteen states automatically excluded youths ages sixteen and seventeen from juvenile court jurisdiction. ARYA, *supra* note 13, at 39. However, as of 2017, only four states continue to automatically exclude seventeen-year-old youths from juvenile court jurisdiction: Texas, Georgia, Michigan, and Wisconsin. *Id.*; *see also* U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf [https://perma.cc/VY49-Q8BA].

67. U.S. DEP'T OF JUSTICE, *supra* note 66, at 2.

68. *See* WOLFSON, *supra* note 49, at 13 (explaining that when a juvenile court judge is deciding whether to transfer youths into adult courts, he or she "takes many complex, interwoven issues into consideration" such as age, criminal record, maturity, seriousness of offense, and risk to the public).

69. *See* U.S. DEP'T OF JUSTICE, *supra* note 66, at 24 (demonstrating that, when comparing data on juveniles from 1990, 1992, and 1994, the National Judicial Reporting Program found that 68 percent of transferred youths received a sentence including incarceration and only 40 percent of youths who were not transferred into the criminal justice system received a sentence including time in a juvenile correctional facility).

70. *See* Terry A. Maroney, Essay, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 787 (2011) (explaining that transfer mechanisms are essentially solidified in the U.S. criminal justice system and acknowledging the court's "evident comfort level" with its usage, even for youths who are "very young").

The first transfer method is judicial waiver, where a presiding judge has the discretion to decline jurisdiction in juvenile court for a youth.[71] The judge has broad leeway during the decision-making process, and state statutes provide a wide range of guidance to determine if a youth should be transferred.[72] The judge will typically "weigh the interests of the child against the interests of society" to reach what he or she deems the appropriate conclusion.[73] Approximately 7500 cases are judicially waived to criminal court each year.[74] As of 2018, forty-six states and the District of Columbia use judicial transfers to remove youths to the adult court system.[75]

The second transfer mechanism is prosecutorial waiver, also called "direct file," wherein the prosecutor has the authority to determine whether a particular case will initially be brought in juvenile court or criminal court.[76] Because the procedures laid out in *Kent v. United States*[77] are not binding on prosecutors, they retain a considerable amount of discretion in these cases.[78] As of 2018, thirteen states and the District of Columbia use prosecutorial discretion as a transfer mechanism.[79]

The third transfer mechanism is legislative exclusion, where "a legislature is free to limit juvenile court jurisdiction by completely removing some offenders who would otherwise be classified as juveniles from that jurisdiction."[80] Consequently, many youths are mandatorily excluded by statute from the juvenile court's jurisdiction for certain offenses, as Kirk

71. *See* Hannan, *supra* note 45, at 203.

72. *See* ARYA, *supra* note 5, at 16; *see also* Hannan, *supra* note 45, at 203. As transfer and punishment-focused justice became more prevalent, the Supreme Court in *Kent v. United States* laid out "condition[s] to a valid waiver order," in order to remain within the constitutional bounds of due process, which include entitlement "to a hearing, including access by [petitioner's] counsel to the social records and probation or similar reports . . . and to a statement of reasons for the Juvenile Court's decision." 383 U.S. 541, 557 (1966).

73. *See* Hannan, *supra* note 45, at 203; Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 379 (1998) (explaining that a significant number of states have adopted the *Kent* criteria for waiver of juvenile jurisdiction into their statutes, sometimes verbatim).

74. *See* WOLFSON, *supra* note 49, at 8.

75. ARYA, *supra* note 13, at 12; *see* JEREE THOMAS, CAMPAIGN FOR YOUTH JUSTICE, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015–2017) 41 (2017), http://www.campaignforyouthjustice.org/images/StateTrends_Repot_FINAL.pdf [https://perma.cc/6TY5-B853].

76. *See* WOLFSON, *supra* note 49, at 14–15.

77. 383 U.S. 541, 557 (1966).

78. *See id.*; *see also* WOLFSON, *supra* note 49, at 15.

79. ARYA, *supra* note 13, at 12. The states include Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia, and Wyoming. For an extended argument on why prosecutorial waiver "does not serve justice," see Stacey Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2446 (1996).

80. *See* Klein, *supra* note 73, at 390.

Gunderson was.[81] As of 2018, twenty-eight states use statutory exclusion as a transfer mechanism.[82]

The increased ease of transfer has fallen short of achieving the deterrent effect sought by state legislatures. In a 2005 Office of Juvenile Justice and Delinquency Prevention (OJJDP) study of young offenders, where half of the subjects were transferred to adult court and the other half remained under juvenile jurisdiction, the study found that 49 percent of the transferred youths recidivated compared to 35 percent of youths who remained within the juvenile system.[83] Additionally, although transfer was seemingly created to waive jurisdiction for youths who commit the most serious offenses, research indicates that a significant number of transferred youths are charged with "nonviolent property and drug offenses," indicating that transfer is not solely administered for the worst youth offenders.[84]

Transfer mechanisms increased the number of youths removed from juvenile court jurisdiction. At the same time, the political zeitgeist surrounding the superpredator theory simultaneously decreased the importance of a youth's age as a rationale for relief from the adult criminal justice system. However, the inevitable rise in crime predicted by the authors of *Body Count* never occurred.[85] The authors themselves later discredited and regretted their idea that youths were superpredators.[86] Juvenile crime had peaked around the time that *Body Count* was published;[87] in 1994, the violent crimes index reached 497.4 arrests per 100,000 persons between the ages of ten and seventeen.[88] By 2012, the juvenile arrest rate was at a historic low, coming in at 182.4 arrests per 100,000 persons between the ages of ten

81. *See id.* (explaining that the factors considered for legislative exclusion may vary by state, but many include the youth's "age, crime committed, past record, or some combination of these three").

82. ARYA, *supra* note 13, at 12; *see also* Klein, *supra* note 73, at 390 ("The effect of statutory exclusion is that many more children who would otherwise remain in juvenile court will automatically be transferred to criminal court with no *Kent* hearing and with the only basis for the decision an impersonal, generalized offense-based criteria.").

83. *See* U.S. DEP'T OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 5 (2010), https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf [https://perma.cc/S8UY-SE7X].

84. *See infra* Part III.D.3; *see also* Randall T. Salekin et al., *Juvenile Waiver to Adult Criminal Courts*, 7 PSYCHOL. PUB. POL'Y & L. 381, 383 (2011).

85. *See* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/F25K-827D].

86. *See id.* (explaining that DiIulio stated that he "wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators'").

87. *See* ALBA MORALES, HUMAN RIGHTS WATCH, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE 15 (2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf [https://perma.cc/EA7B-G9DK].

88. *See Juvenile Arrest Rate Trends*, OFF. JUV. JUST. & DELINQ. PREVENTION (Oct. 22, 2018), https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201 [https://perma.cc/63FP-BCVA]; *see also* MORALES, *supra* note 87, at 15.

and seventeen.[89] Further, there was a roughly 50 percent drop in the number of youths held in juvenile residential placements from 1999 to 2013.[90] It became clear that the superpredator rhetoric was "unduly alarmist" and a critically inaccurate representation of the youth population.[91]

Though the superpredator theory has been discredited, its effects are still prevalent in juvenile policy. Human Rights Watch has directly cited the superpredator hysteria as a predominant reason for the expansion of transfer statutes.[92] While there has been "some softening" of transfer statutes in the post-superpredator era, many transfer laws are still intact across the United States.[93] Consequently, the meanings of age and youthfulness in the criminal justice system have been fundamentally shifted—the "focus on doing what was best for the child was practically abandoned, while a new philosophy of getting tough on juvenile offenders and protecting society was adopted."[94]

C. The Use of Age as a Mitigating Factor: Roper*,* Miller*, and* Graham*, and the Importance of Empirical Data Relating to the Cognitive Development of Youths*

The "superpredator" rhetoric led to an increase in the use of transfer mechanisms that placed youths in a criminal justice system meant for adults, but the legal momentum again shifted at the end of the superpredator era. Beginning in 2005, the Supreme Court decided three cases that restored the view of age as a mitigating factor.

The first of these cases was *Roper v. Simmons*,[95] which eliminated the death penalty for those under eighteen years old.[96] *Roper* explicitly listed three pivotal differences between youths under eighteen and adults that show why youths "cannot with reliability be classified among the worst offenders."[97] First, in the majority opinion, Justice Anthony Kennedy referred to "scientific and sociological studies" that concluded that a "lack of maturity and an underdeveloped sense of responsibility" are more often found to be youthful traits that frequently lead to audacious decision-making.[98] Second, Justice Kennedy noted that youths are more susceptible to "negative influences and outside pressures" and therefore "lack the freedom that adults have to extricate themselves from a criminogenic

89. *See Juvenile Arrest Rate Trends*, *supra* note 88; *see also* MORALES, *supra* note 87, at 15.

90. *See* ARYA, *supra* note 13, at 17.

91. *See* Becker, *supra* note 86.

92. *See* MORALES, *supra* note 87, at 2 (stating that Florida's prosecutorial waiver law is a "remnant" of the superpredator era).

93. *See id.* at 16. However, some states have made significant efforts over the last few years to decrease the use of the more critically questioned forms of waiver, like direct file. For example, in 2016, Vermont passed a bill to put a stop to direct file, making it the first state to "roll back prosecutorial power." *See* THOMAS, *supra* note 75, at 37.

94. *See* Hannan, *supra* note 45, at 201.

95. 543 U.S. 551 (2005).

96. *See id.* at 567.

97. *Id.* at 569.

98. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

setting."[99] Third, a youth's character is less formulated than an adult's, lending to the conclusion that his or her conduct is "not as morally reprehensible" as an adult's.[100] As a result of these findings, the Supreme Court solidified the "relevance of youth as a mitigating factor" in punishment theory, and further addressed the potential counterargument that "youth" has an arbitrary cutoff age of eighteen within the criminal justice system.[101]

In 2010, *Graham v. Florida*[102] continued the Supreme Court's recognition of the important traits associated with adolescence in juvenile sentencing. *Graham* eliminated sentences of life without parole for youths in nonhomicide cases.[103] Again writing for the majority, Justice Kennedy partly relied on advances in psychological development to differentiate youths from adults.[104] He cited a study by the American Medical Association that reported that "parts of the brain involved in behavior control continue to mature through late adolescence" and that this contributes to the innate differences between youth and adult criminal activity.[105]

Finally, the Supreme Court decided *Miller v. Alabama*[106] in 2012, the third groundbreaking case in the series that definitively stated that youth are intrinsically different than adults in the eyes of the judicial system.[107] In *Miller*, a fourteen-year-old boy was charged with capital murder, transferred into criminal court, and sentenced to life without parole.[108] The Court eliminated the possibility of giving a youth a mandatory life sentence without the possibility of parole as a violation of the Eighth Amendment.[109] Writing for the majority, Justice Kagan emphasized how the legal interpretation of age has transformed, so that cases involving youths and life without parole are decided based on "the evolving standards of decency that mark the progress of a maturing society."[110] Even DiIulio himself signed and endorsed an amicus brief for the case in favor of Miller.[111] As a result of the Court's holding in *Miller*, youths are now deemed constitutionally distinct from adults due to the mental and emotional attributes of youthfulness.[112]

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99. *Id.* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

100. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

101. *Id.* Justice Kennedy stated that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn." *Id.* at 574.

102. 560 U.S. 48 (2010).

103. *See id.* at 70–71.

104. *See id.* at 68.

105. *Id.*

106. 567 U.S. 460 (2012).

107. *See* Stephanie Tabashneck, *"Raise the Age" Legislation: Developmentally Tailored Justice*, CRIM. JUST., Winter 2018, at 13, 17–18.

108. *Miller*, 567 U.S. at 465–66.

109. *Id.* at 469–70; *see also* MORALES, *supra* note 87, at 15.

110. *Miller*, 567 U.S. at 469–70 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

111. *See generally* Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10–9646), 2012 WL 174240.

112. *Miller*, 567 U.S. at 471.

Instead of perceiving age as a simple number in the criminal justice system, youthfulness is now associated with "immaturity" and "recklessness."[113]

Empirical research has comprehensively supported the Court's holdings in *Roper*, *Graham*, and *Miller*.[114] Specifically, the Supreme Court has held that youth are substantially different from adults because of "structural differences" in the brain.[115] Research indicates that youthfulness makes an individual more susceptible to making bad decisions, and as a youth grows older and into his or her twenties, the "risk of faulty decision making decreases."[116] Important psychological differences also exist between youth and adults that likely have an impact on the youth's ability to make rational judgments.[117] Delinquent behavior is typically "transitory," and most youths who commit crimes before eighteen do not go on to be criminals once they are adults.[118] In addition to psychological and structural differences in the brain, the cognitive differences between youths and adults may also be attributed to "psychosocial immaturity," which can have a significant impact on a youth's ability to think about the outcomes of his or her decisions.[119]

Though recent Supreme Court decisions and accompanying scientific data have allowed the judicial branch to move towards reestablishing the importance of a youth's age as a mitigating factor, many statutes, including the JJDPA,[120] continue to reflect outdated modes of thinking. Although the law protects youths tried as adults as of December 2018 more extensively under sight and sound separation, a youth may still be judicially waived from the protection "in the interest of justice,"[121] despite numerous studies delineating the significant mental and emotional differences between a youth and an adult. This new iteration of the JJDPA thus reflects the

113. *Id.* at 476 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)); *see also* Johnson v. Texas, 509 U.S. 350, 368 (1993) (explaining that adolescence is a period of life "when a person may be most susceptible to influence and to psychological damage"); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1977 UTAH L. REV. 709, 724 ("Research in the areas of decision making, psychosocial development, and sociological influences is relevant to the issue of whether adolescents are as culpable as adults for their crimes.").

114. *See* Hoeffel, *supra* note 50, at 40 ("Copious, peer-reviewed scientific research, some of which has recently been emphasized and relied upon by the Supreme Court, has established developmental differences in adolescents that greatly impact their culpability, [and] their susceptibility for deterrence."). For examples of studies on which the Supreme Court relied, see generally Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003). *See also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992).

115. *See* Tabashneck, *supra* note 107, at 17.

116. *Id.* at 16.

117. *See* Redding, *supra* note 113, at 728.

118. *See id.* at 729.

119. *See* Steinberg & Scott, *supra* note 114, at 1012 (stating that the "psychosocial factors that are most relevant to understanding differences in judgment and decision making are (a) susceptibility to peer influence, (b) attitudes toward and perception of risk, (c) future orientation, and (d) the capacity for self-management").

120. *See infra* Part II.B.

121. Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5135 (2018).

inconsistencies between the judicial and legislative branches in how age is considered and applied in the criminal justice system.[122]

II. SIGHT AND SOUND SEPARATION: AN EFFORT TO REDUCE YOUTH INCARCERATION WITH ADULTS

Since its enactment in 1974, the JJDPA has made strides in advancing the protection of incarcerated youth in the United States. However, this Note argues that there are still steps that need to be taken to fully realize the JJDPA's goals.[123] Part II.A analyzes the JJDPA in general, and discusses how state compliance with the statute's provisions is paramount to the successful implementation of the Act. Part II.B then discusses sight and sound separation and its current implementation across the United States after the JJDPA's 2018 reauthorization.

A. An Overview of the Juvenile Justice and Delinquency Prevention Act

As more youths were incarcerated in the United States, the physical and emotional integrity of such youths became an important aspect of prison reform. This catalyzed the JJDPA's enactment in 1974.[124] Congress passed the JJDPA to address the disparities between state systems with respect to incarcerating youths and to further "support local and state efforts to prevent delinquency and improve the juvenile justice system."[125] This legislation is "the only federal law that sets out national standards for the custody and care of youth in the juvenile justice system."[126] With the complex variations in state laws regarding whether a youth may be placed in an adult facility, the JJDPA's core protections become even more imperative to the criminal justice system.[127] Though state adherence to the JJDPA is voluntary, the Act creates a partnership between states and the federal government to enhance the regulation of youth offenders.[128] Even though the JJDPA expired in 2008,[129] its importance to states is displayed by the fact that, despite the expiration, Congress still administered appropriations for the JJDPA's provisions every year since the expiration.[130]

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122. *See generally* Tabashneck, *supra* note 107.

123. *See* Hughes, *supra* note 30, at 29.

124. *See Legislation/JJDP Act*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/about/legislation.html [https://perma.cc/QQ43-LVT4] (last visited Oct. 6, 2019).

125. *See id.*

126. *Fact Sheet*, *supra* note 21, at 1.

127. *See* ARYA, *supra* note 13, at 11. For example, four states explicitly ban the practice of placing youths prosecuted as adults in adult jails. However, twelve states have state laws that require youths, under certain circumstances, to be placed in adult facilities. *Id.*

128. *See* COAL. FOR JUVENILE JUSTICE, A PIVOTAL MOMENT: SUSTAINING THE SUCCESS AND ENHANCING THE FUTURE OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT 12 (2009), https://juvjustice.org/sites/default/files/resource-files/resource_265.pdf [https://perma.cc/7ZRA-FZBN].

129. *See* KRISTIN FINKLEA, CONG. RESEARCH SERV., RS22655, JUVENILE JUSTICE FUNDING TRENDS 1 (2016), https://fas.org/sgp/crs/misc/RS22655.pdf [https://perma.cc/R8PV-K9YF].

130. *See id.*

Congress reauthorized the JJDPA in 2002 and did not reauthorize it again for sixteen years.[131] In 2018, Congress passed the Juvenile Justice Reform Act of 2018.[132] The bill passed with "overwhelming bipartisan support" and implemented strengthened core requirements for state facilities to adhere to over the course of the next three years.[133]

Since the United States has no national juvenile justice system and only independently run state and local systems,[134] the Office of Juvenile Justice and Delinquency Prevention (OJJDP) was formed within the Department of Justice to create a more unified system of standards and to allocate funds to state systems via federal grants for JJDPA programs.[135] For states to receive such funding from the OJJDP,[136] they must satisfy the "four core protections" set out in the JJDPA, one being sight and sound separation.[137] The purpose of the four core protections is to "ensure appropriate, safe and rehabilitative treatment" for incarcerated youth.[138] If a state is not compliant with the each of the JJDPA's four core protections, the state's allocation of funds is reduced by 20 percent for each protection it fails to implement.[139]

In 2008, the Coalition for Juvenile Justice administered a survey identifying each state's compliance standards for the JJDPA's core protections, and the results revealed that "55 of 56 states and territories voluntarily participate[d]" in the JJDPA's core protection programs.[140] Additionally, 85 percent of respondents were in compliance with the four core protections set out by the JJDPA and received full federal funding.[141] Thus, while it is still voluntary to comply with the JJDPA, and therefore with sight and sound separation, an overwhelming majority of states are

131. *See Legislation/JJDP Act*, *supra* note 124.

132. *See* Lacey Johnson, *JJDPA Reauthorization Passes Congress After 16 Years*, JUV. JUST. INFO. EXCHANGE (Dec. 13, 2018), https://jjie.org/2018/12/13/jjdpa-reauthorization-passes-congress-after-16-years [https://perma.cc/78L2-GN79]; *see also JJDPA Reauthorized After 16 Years, Preserving Core Protections for Youth*, PAC. JUV. DEFENDER CTR. (Jan. 1, 2019), https://www.pjdc.org/jjdpa-reauthorized-after-16-years-preserving-core-protections-for-youth [https://perma.cc/KG2J-HKD3] [hereinafter *JJDPA Reauthorized*].

133. *See Overview of the Juvenile Justice Reform Act of 2018*, ACT 4 JUV. JUST. (Dec. 2018), http://www.act4jj.org/sites/default/files/resource-files/JJDPA%20Reauthorization%20Summary%20December%202018.pdf [https://perma.cc/L5Z4-9GA5].

134. *See* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 17; *see also* FINKLEA, *supra* note 129, at 1.

135. *See* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 13.

136. *See* FINKLEA, *supra* note 129, at 1 ("Funds are allocated annually among the states on the basis of relative population of people under the age of 18, and states must adhere to certain core mandates in order to be eligible for funding.").

137. *See infra* Part II.B. Only sight and sound separation will be analyzed in this Note. *See History of the JJDPA*, COALITION FOR JUV. JUST., http://www.juvjustice.org/federal-policy/juvenile-justice-and-delinquency-prevention-act [https://perma.cc/V73S-F3MA] (last visited Oct. 6, 2019); *see also* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 12 ("In support of these efforts, OJJDP provides oversight, technical assistance and other supports to the field, and advances research and evaluation initiatives to identify and replicate best practices in juvenile justice and delinquency prevention.").

138. *See* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 17.

139. *See* Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5139 (2018).

140. *See* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 12.

141. *See id.* at 12–13.

consistently compliant and receive the full amount of funding to implement the statutory protections provided to incarcerated youth.

B. Sight and Sound Separation: A Core Protection

After sixteen years of juvenile justice advocates working to curtail Congress's "outmoded perceptions" of impactful protections for delinquent youth, Congress finally reauthorized the JJDPA, and thus sight and sound separation, in December 2018.[142] For purposes of the statute, sight and sound means "any physical, clear visual, or verbal contact that is not brief and inadvertent" with an adult incarcerated person, including incarcerated adult trustees.[143] Sight and sound separation is now applicable, albeit in different ways, to two groups of youths. First, the JJDPA demands sight and sound separation between youths and adults when youths prosecuted in juvenile court are sanctioned to be placed in an adult facility for the purpose of being processed, waiting for transfer to a juvenile facility, or awaiting a court appearance—or when a youth falls under the "rural exception" and can be in an adult facility until subsequent transport to a juvenile facility is feasible.[144] This sector of youths account for approximately 20 percent of all youths held in adult facilities.[145] Second, sight and sound separation now applies to youths who are tried as adults in the criminal justice system, although the law does not afford them the same blanket protection from sight and sound contact with adults provided to their juvenile counterparts under juvenile court jurisdiction.[146] This population of incarcerated youths accounts for approximately 80 percent of youths held in adult facilities.[147]

Throughout the United States, many adult facilities have "impermissible contacts" between youths and adults that transpire during admissions procedures, meal times, and more.[148] The JJDPA aims to eliminate such contacts.[149] The OJJDP has advised that sight and sound separation must be "accomplished architecturally or through policies and procedures in all secure areas of the facility which include, but are not limited to, such areas as admissions, sleeping, and shower and toilet areas."[150] Many states adhere to the sight and sound separation provision and have codified the protection.[151] As of 2014, thirty-four states and the District of Columbia

142. *See JJDPA Reauthorized*, *supra* note 132.
143. § 205, 132 Stat. at 5124; *see also* U.S. DEP'T OF JUSTICE, *supra* note 38, at 11.
144. *See* 34 U.S.C. § 11133(a)(13) (Supp. 2017); *see also* ARYA, *supra* note 13, at 11.
145. *See* ARYA, *supra* note 13, at 11.
146. *See* 34 U.S.C. § 11133(a)(11)(B)(i) (Supp. 2017).
147. *See* ARYA, *supra* note 13, at 11.
148. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 14.
149. *See id.*
150. 28 C.F.R. § 31.303 (2019); *see also* U.S. DEP'T OF JUSTICE, *supra* note 38, at 16; *Status Offenders*, OFF. JUV. JUST. & DELINQ. PREVENTION 1 (Sept. 2015), https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf [https://perma.cc/2CGK-MBGL] (explaining that the OJJDP defines a status offense as "a noncriminal act that is considered a law violation only because of a youth's status as a minor").
151. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8–305(B) (2019) ("A juvenile who is confined in a jail or lockup in which adults are confined shall be kept in a physically separate section from

used language in their statutes to require sight and sound separation from incarcerated adults for youths detained in adult facilities.[152]

The implementation of the 2018 amendments to the JJDPA will take place over the next three years.[153] All states are now required to provide sight and sound separation for youths who are awaiting trial in the adult criminal justice system, provided that a judge does not find against such protection.[154] This remodeling of sight and sound protection will significantly protect more incarcerated youths than ever before.

III. A FEDERAL LOOPHOLE: IS THE CURRENT APPLICATION OF SIGHT AND SOUND SEPARATION LEAVING THE VERY YOUTHS IT SEEKS TO PROTECT VULNERABLE AND EXPOSED?

Although the 2018 JJDPA reauthorization provides more security for youths tried as adults within the criminal justice system, there are outstanding exceptions that hinder the JJDPA's progression towards suitable and systemic protection for youths. More specifically, the amended sight and sound separation section of the JJDPA now codifies the opportunity for a court to deny sight and sound separation for a youth tried as an adult if it is "in the interest of justice" to do so.[155] This new "in the interest of justice" loophole to sight and sound separation is a hindrance to the complete protection of vulnerable youths in America's prison system.

To that end, Part III.A examines the new language of the JJDPA and how it has impacted youths awaiting trial within criminal courts across the country. Part III.B analyzes the relevant ramifications of the underinclusiveness of sight and sound separation's current application. Part III.C explains how the 2018 amendment to sight and sound separation protection creates a chasm between congressional and Supreme Court interpretations of the ascribed meaning of a youth's age in sentence-related practices. Part III.D then outlines potential criticisms and possible reasons why the statute continues to have an exception to an otherwise blanket protection of youths tried as adults, despite the relevant data of youth abuse within adult facilities.

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any adult who is charged with or convicted of a criminal offense, and no sight or sound contact between the juvenile and any charged or convicted adult is permitted, except to the extent authorized under federal laws or regulations.").

152. *See JJDPA Core Requirements*, OFF. JUV. JUST. & DELINQ. PREVENTION (Apr. 27, 2015), https://www.ojjdp.gov/ojstatbb/structure_process/qa04306.asp?qaDate=2014 [https://perma.cc/U8MG-9EZD] (stating that in addition, six states (Connecticut, Massachusetts, Missouri, Rhode Island, West Virginia, and Wyoming) have explicitly codified in their statutes that youths are never allowed to be detained in an adult facility, thus making the application of sight and sound separation unnecessary).

153. *See supra* note 20.

154. *See Overview of the Juvenile Justice Reform Act of 2018*, *supra* note 133.

155. *See supra* note 24 and accompanying text.

A. Sight and Sound Separation's Current Application

Before the 2018 JJDPA reauthorization, the OJJDP stated in its Guidance Manual for Monitoring Facilities that "[a] juvenile who has been transferred or waived or is otherwise under the jurisdiction of a criminal court does not have to be separated from adult criminal offenders" with respect to JJDPA compliance.[156] However, after the 2018 reauthorization, the sight and sound separation provision now reads that "juveniles awaiting trial or other legal process who are treated as adults for purposes of prosecution in criminal court and housed in a secure facility shall not have sight or sound contact with adult inmates."[157] Though the new language is vastly more inclusive, an exception to sight and sound separation remains to an otherwise comprehensive statute for youths tried as adults. This exception gives a presiding judge the discretion to determine where it is "in the interest of justice" to allow a youth "to be held in any jail or lockup for adults, or have sight or sound contact with adult inmates."[158]

Upon deciding whether a youth should not be afforded sight and sound separation protection, a judge may consider seven factors in his or her decision: (1) the youth's age; (2) the youth's mental and physical maturity level; (3) the youth's current mental state, including consideration of whether the youth "present[s] an imminent risk of harm" to themselves; (4) the "nature and circumstances" of the offense for which the youth is being tried; (5) the youth's history of any previous delinquent behavior; (6) the "relative ability of the available adult and juvenile detention facilities to not only meet the specific needs of the juvenile, but also to protect the safety of the public as well as other detained youth"; and (7) any other relevant factor.[159] If the presiding judge determines, after balancing these factors, that it is in fact "in the interest of justice" to hold a youth in an adult facility, this is a statutorily acceptable result.[160] However, the judge must further hold a hearing at least every thirty days[161] in order to "review whether it is still in the interest of justice" to allow the youth to have sight and sound contact with adults.[162] Finally, the statute states that a youth cannot be held in an adult facility for longer than 180 days unless the judge "determines there is good cause for an extension" of such detainment.[163]

Therefore, when a judge determines that a youth, based on the seven factors provided, should not be afforded sight and sound separation protection, the state with jurisdiction over the matter is not in violation of the JJDPA's core requirement and will not lose federal funding. The outcome of the new statute's mandate is that an unascertained segment of the youth

156. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 17.
157. Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5135 (2018).
158. *Id.* § 205, 132 Stat. at 5136.
159. *Id.*
160. *Id.*
161. For a "rural jurisdiction," the statute indicates that every forty-five days is acceptable. *See id.*
162. *See id.*
163. *See id.*

population may be legally deprived of this critical JJDPA protection based on judicial discretion.[164] Instead, such youths, like incarcerated adults, would only be shielded by the protections provided by the Eighth and Fourteenth Amendments.[165] This new "federal loophole"[166] may thus leave a portion of the youths that the JJDPA aims to protect vulnerable and exposed to the dangers of adult facilities.

B. Relevant Repercussions of Sight and Sound Separation's Current Application

The sight and sound separation loophole will have a far-reaching impact, as evidenced by statistics regarding youths who are held in adult facilities.[167] One research study found that youths incarcerated in adult facilities are "19 times more likely to commit suicide in jail than youth[s] in the general population and 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility."[168] Incidents of physical abuse are also significantly higher for youths who are held in adult facilities. The OJJDP has found that such juveniles are "twice as likely to be beaten by staff, and 50 percent more likely to be attacked with a weapon than their counterparts in a juvenile facility."[169] Sexual victimization is another obstacle that youths face when incarcerated with adults. In 2005, incarcerated individuals under eighteen years old accounted for 21 percent of all reported victims of sexual violence in jails, even though they only accounted for approximately 1 percent of the incarcerated population.[170] Youths who are incarcerated with adults are five times more likely to be victims of sexual assault than youths in juvenile facilities.[171] Of the youths who are sexually assaulted, 75 percent reported "experiencing physical force or threat of force" and over 25 percent of such victims "reported being injured in at least one of the incidents."[172]

The impact goes even further than physical and emotional abuse, however. Many of the youths who are housed with adults end up having their cases dismissed or may even be transferred back to juvenile court jurisdiction.[173]

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164. *See* Amanda M. Kellar, Note, *They're Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U. L. REV. 155, 169 (2006).

165. *See id.* For example, the Eighth Amendment's protection against cruel and unusual punishment applies to state jails and prisons through the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Jordan v. Fitzharris, 257 F. Supp. 674, 679–80 (N.D. Cal. 1966) (holding that a strip cell in California prison constituted cruel and unusual punishment, which was applied to the state's incarcerated adults through the Fourteenth Amendment's Due Process Clause).

166. *See* ARYA, *supra* note 5, at 22.

167. *See Fact Sheet*, *supra* note 21, at 2.

168. *Id.*

169. *See Juvenile Transfer to Criminal Court*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/pubs/reform/ch2_j.html [https://perma.cc/S2L8-TMET] (last visited Oct. 6, 2019).

170. *See* ARYA, *supra* note 5, at 13.

171. *See Juvenile Transfer to Criminal Court*, *supra* note 169.

172. *Fact Sheet*, *supra* note 21, at 2.

173. ARYA, *supra* note 5, at 8.

The effects of incarceration with adults, however, have a lasting impact on a youth's life once he or she is released.[174]

Thus, the new application of sight and sound separation can have serious consequences for a youth. This is especially apparent when considering that, in some cases, the determination of whether youths are waived into the adult system can rely solely on differing state transfer statutes.[175] This signals that youths who are from different states but have committed the same crime could be afforded different legal protections based on what the presiding judge determines is in "the interest of justice."[176] In addition to different transfer statutes, the age of majority is still not uniform across the United States. This increases the disparate treatment of youths regarding sight and sound separation. As of 2018, four states have limited juvenile court jurisdiction to the age of seventeen.[177] This means that, no matter how minor the crime in question, seventeen-year-old youths in Georgia, Michigan, Texas, and Wisconsin will be housed in adult facilities if convicted.[178] Additionally, in twenty-eight states, a youth who is arrested for a "specified offense" that is excluded from juvenile court jurisdiction will be automatically placed in an adult facility when booked by law enforcement.[179] Therefore, some youths, above the age of majority and charged with specific offenses, will not receive sight and sound protection simply because of the state their case is in.

C. Sight and Sound Separation's Application Is Not Aligned with the Supreme Court's Interpretation of the Implications of a Youth's Age

Denying certain youths sight and sound separation protection based on a judicial determination is not consistent with the current legal understanding of the emotional, physical, and cognitive vulnerabilities of youths as

174. *See, e.g.*, *id.* (providing a first-hand account of a youth's experience while incarcerated with adults, in which he indicates that "it was me against the world and out of necessity I was transformed into a rough creature").

175. *See, e.g.*, THOMAS, *supra* note 75, at 25–27 (demonstrating the differences between many states' transfer statutes and acknowledging that some states have been aiming to reform their statutes to be more amenable to youths involved in the justice system).

176. *See id.*

177. *See* ARYA, *supra* note 13, at 39; *see also Jurisdictional Boundaries*, *supra* note 11 (defining juvenile as "a youth at or below the upper age of original jurisdiction in a State"). However, statutory exclusion may still come into play and remove certain youths to adult criminal court. *See supra* Part II.B.1.

178. *See* ARYA, *supra* note 13, at 39.

179. *See id.* ("This may be true even in States which have a reverse waiver statute or a state jail law that allows a hearing for the child to return to juvenile court. The interaction between the statutory exclusion law and state jail law can lead to some absurd scenarios where children as young as 10 have been admitted to adult jails."). When states began to statutorily implement sight and sound separation, youths were frequently "deprived of constitutional liberties" in order for states to remain compliant with the statute. *See* Kellar, *supra* note 164, at 168–69. The facilities were forcing youths into isolation as an alternative to holding them in the same area as adults. As a result, the JJDPA's sight and sound separation protection was amended in 1980 by the OJJDP, which asserted that youths may be held in adult prisons for the few hours immediately preceding and following their court hearings in order for states to remain compliant and to avoid solitary confinement during such times. *See id.*

demonstrated in recent Supreme Court decisions.[180] The Court altered the way youthfulness should be viewed through a policy lens, and its conclusions were reached in part through empirical research regarding youths' cognitive functioning.[181] Not only are youths considered "constitutionally" different in the eyes of the Court, but there are established "fundamental differences" between youths and adults.[182] Thus, if such findings regarding the importance of age have led to significant transformations in common law that protect all youths, the question remains as to why sight and sound separation, a facet of postsentencing procedure, has not been modified to provide unqualified protection to all youths in correctional facilities as well.

The Supreme Court made great strides in linking the up-to-date scientific research on a youth's cognitive and emotional development with procedural components for youth sentencing. On the other hand, while Congress did amend the JJDPA in 2018 in part to make an effort to subscribe to the scientific research on youth development,[183] they did not provide the same all-encompassing procedural protections to youths that the Supreme Court did. For instance, there are no statutory exceptions to the ban on the youth death penalty or life without the possibility of parole sentencing determinations.[184] This is because of the knowledge our society now has about the cognitive and psychological differences between youths and adults.[185]

Regardless of whether a youth is tried in the juvenile or adult court system, a youth still has the same scientific brain development patterns and psychological capabilities.[186] In *Roper v. Simmons*, Justice Kennedy discussed how even expert psychologists have a difficult time determining the distinction between a "juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[187] Because of the innate difficulty in differentiating between youths capable of reform and those who are past the point of rehabilitation, it is not clear why Congress has not provided "developmentally appropriate justice" in calling for unqualified protection from sight and sound contact with incarcerated adults for all incarcerated youths, like the Supreme Court held for certain sentencing determinations.[188]

180. *See supra* Part I.C.

181. *See* Graham v. Florida, 560 U.S. 48, 68 (2010) (declaring that advancements in "psychology and brain science continue to show fundamental differences between juvenile and adult minds").

182. Miller v. Alabama, 567 U.S. 460, 471–72 (2012).

183. *See Overview of the Juvenile Justice Reform Act of 2018*, *supra* note 133.

184. *See supra* Part I.C.

185. *See supra* Part I.C.

186. *See Miller*, 567 U.S. at 476–77.

187. *See* Roper v. Simmons, 543 U.S. 551, 573 (2005).

188. *See* Tabashneck, *supra* note 107, at 19.

D. Plausible Challenges to Remodeling Sight and Sound Separation's Current Statutory Application

Despite the relevant youth victimization statistics and the Supreme Court's use of age for mitigating sentencing practices, there may be notable reasons for why blanket sight and sound separation protection could pose challenges. Before endorsing the removal of the sight and sound separation protection exception in the 2018 amendment, this Note surveys the conceivable barriers to implementing a blanket protection. Part III.D.1 analyzes some of the potential increases in costs associated with sight and sound protection. Part III.D.2 explores the structural hardships a facility may face when imposing an expanded version of sight and sound separation. Part III.D.3 dissects the theory that only the worst youth offenders are transferred to adult facilities and therefore are befittingly denied sight and sound separation protection. Part III.D.4 then discusses the potential for state noncompliance with the JJDPA as a result of statutory expansion.

1. An Increased Fiscal Responsibility for Facilities

Cost is always at the forefront of arguments against a change in government policy. Depending on the systems and structural capabilities a facility already has in place,[189] the range of associated costs could vary significantly due to a statutory change. Therefore, it is infeasible to accurately account for the increases in spending for the closure of the sight and sound separation loophole. Nevertheless, there are ways around significant increases in costs for implementing an expanded version of sight and sound separation that may further the argument for statutory redevelopment, some of which have been acknowledged within the statute itself and by the OJJDP's guidance manual.[190]

A natural result of implementing a heightened version of sight and sound separation is the need to hire extra security officers within a facility to implement the expansion.[191] A 2015 study by the Vera Institute of Justice found that a facility's employment costs accounted for approximately 68 percent of a state prison's spending, making employment expenditures from a potential increase in security one of the most significant concerns when considering a statutory expansion of the sight and sound separation.[192] However, hiring more staff may not be necessary, as the JJDPA explicitly states that there can be officers working in "collocated facilities,"[193] so long

189. *See infra* Part III.D.2.

190. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 17.

191. *See id.* at 26.

192. *See* CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 9 (2017), vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf [https://perma.cc/VRE4-BV9K].

193. The JJDPA defines collocated facilities as "facilities that are located in the same building, or are part of a related complex of buildings located on the same grounds." 34 U.S.C. § 11103(28) (Supp. 2017).

as the officer has been "trained and certified to work with juveniles."[194] If facilities are allowed to collocate common areas, it may be unnecessary to increase the number of correctional officers, which will significantly reduce the largest cost of statutory expansion.[195] Instead, certifying or training current employees would be the direct cost associated with a statutory expansion and could cut the need for additional hiring within a facility.[196]

The OJJDP guidance manual also provides for significant reductions in spending regarding architectural obstacles a facility may face for the implementation of an expanded sight and sound separation protection.[197] The sight and sound separation expansion would likely not cause any issues for other expenditures, as recognized by the Vera Institute of Justice. Costs such as health care, boarding payments, and the general "average cost per inmate" would cause only a minor, if any, increase in a facility's spending with regard to a statutory expansion.[198] Thus, the arguments that the expansion of sight and sound protection will significantly increase costs of facilities are overstated.

2. A Facility's Structural Incapability and Separation

A significant obstacle that state legislatures face in expanding sight and sound separation protection is that adult facilities may not be structurally capable of completely separating adults and youths.[199] However, the JJDPA does not specify that youths and adults must be held in separate buildings—youths simply cannot have sight and sound contact with adults.[200]

This Note explains that sight and sound separation can be implemented in two distinct ways without having to change the physical layout of a facility.[201] First, separation can be completed through regulated time phasing policies by facilities, which is a method recognized by the OJJDP guidance manual.[202] Time phasing refers to monitoring common areas shared by all incarcerated individuals to eliminate concurrent use of such areas by youths and adults.[203] Thus, while a specific area of a facility could not be occupied by youths and adults at the same time, there would be no need to build new facilities or purchase new equipment, since any resources from the communal spaces could be used by both groups of incarcerated persons at

194. *Id.* § 11133(a)(12)(B).
195. *See* MAI & SUBRAMANIAN, *supra* note 192, at 9.
196. *See Corrections Officer Training*, CORRECTIONALOFFICEREDU.ORG, https://www.correctionalofficeredu.org/training [https://perma.cc/FVT4-5AY2] (last visited Oct. 6, 2019) (explaining that correctional officers who work directly with youth offenders must complete "training programs that emphasize juvenile psychology, family therapy and social welfare").
197. *See infra* Part III.D.2.
198. *See* MAI & SUBRAMANIAN, *supra* note 192, at 7, 22.
199. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 17.
200. *See id.* at 16.
201. Though there are certainly other ways to remain compliant with an updated sight and sound protection, this Note only discusses two particular ways.
202. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 16.
203. *See id.*

different times.[204] Time phasing is implemented as a strategy for sight and sound separation in various state facilities between adults and youths still under the jurisdiction of the juvenile justice system, including Florida.[205] This lends credence to its likely success if it were to be implemented on a larger scale to include youths transferred into the adult criminal justice system as well.

A second method that can be used, as demonstrated in Massachusetts, is the use of sound blocking products in lieu of unworkable architectural changes to a facility.[206] While Massachusetts has implemented the use of sound-reducing curtains in order to eliminate sight and sound contact between youths who are still under the jurisdiction of the juvenile justice system and adults, there are other products that could be used, such as sound silencer panels and PVC barriers.[207]

Finally, some may also argue that juvenile facilities lack the necessary space to house juveniles currently residing in adult facilities. However, data indicates that there is substantial space within juvenile facilities in which to incorporate the youth population currently housed in adult facilities.[208] As of 2013, states likely have enough beds and space to hold even a large inflow of youths from adult facilities because of the nearly 50 percent decrease in the number of youths housed in juvenile facilities since 1999.[209]

3. Youths Who Are Transferred to Adult Facilities Are the "Worst of the Worst" Offenders and Therefore Should Be Treated Like Adults: A Theory

Those opposed to statutory expansion may argue that youths who are tried in the adult criminal justice system are not entitled to the same uncontested sight and sound separation protection as those who are tried in the juvenile justice system, because the former are considered the "worst of the worst"

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204. *See* DANA SWAYZE, MINN. DEP'T OF PUB. SAFETY, THE FEDERAL JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT VS. MINNESOTA STATUTES AND RULES OF JUVENILE PROCEDURE 46 (2010), https://dps.mn.gov/divisions/ojp/forms-documents/Documents/JJDPA%20vs%20MN_FINAL.pdf [https://perma.cc/E6B3-7RYB].

205. *See, e.g.*, FLA. DEP'T OF JUVENILE JUSTICE, FLORIDA GUIDANCE MANUAL FOR MONITORING ADULT JAILS, LOCKUPS, AND COURT HOLDING FACILITIES UNDER THE JUVENILE JUSTICE & DELINQUENCY PREVENTION ACT (JJDPA) OF 2002, at 12 (2014), http://www.djj.state.fl.us/docs/jjdp-performance-measurement/2014-jjdpa-jail-lockup-manual.pdf?sfvrsn=0 [https://perma.cc/HTN4-EXTA].

206. *See* MASS. JUVENILE JUSTICE ADVISORY COMM., MASSACHUSETTS JUVENILE JUSTICE ADVISORY COMMITTEE ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 9 (2014), https://archives.lib.state.ma.us/bitstream/handle/2452/724982/ocn190626099-2014.pdf?sequence=1&isAllowed=y [https://perma.cc/PBU7-T47T] ("Where renovations have been deemed to be infeasible, several of the facilities have been identified for non-renovation remedies such as the use of strategically-placed, sound-reducing curtains to mitigate sight and sound contact between detainees in the facilities . . . .").

207. *See Soundproofing Correctional Facilities*, ACOUSTICAL SURFACES, INC., https://www.acousticalsurfaces.com/correctional-facilities [https://perma.cc/EK7Z-PE4P] (last visited Oct. 6, 2019).

208. *See* ARYA, *supra* note 13, at 17.

209. *See supra* Part I.B.

offenders.[210] Under this theory, these offenders do not deserve the protections provided to other youths under the JJDPA and, thus, should not have sight and sound protection while incarcerated.[211]

However, research indicates that not all youths who are transferred to the criminal justice system have committed what society considers the worst crimes.[212] In fact, many such youths have been charged with nonviolent drug offenses or property crimes, contradicting the notion that only the most serious youth offenders are transferred into the criminal justice system.[213] In 2007, the Department of Justice estimated that, of the 8500 cases judicially waived[214] to the criminal justice system, 27 percent of cases were property offenses, 13 percent of cases were drug offenses, and 11 percent of cases were "public order" offenses—none of which are crimes against persons.[215]

Some states even have statutory exclusion[216] laws that completely exclude "juvenile-age offenders" from being placed under the jurisdiction of the respective juvenile court for "less serious offenses, especially where older juveniles or those with serious delinquency histories are involved."[217] For example, a Montana state law[218] automatically excludes any seventeen-year-old accused of attempted burglary or attempted drug possession from the jurisdiction of the juvenile justice system.[219] Mississippi state law excludes any youth aged thirteen and older who commits an armed felony from juvenile jurisdiction.[220] With data indicating that transfer is not solely used for the very worst youth offenders and that in some cases, it can be used for youths significantly younger than seventeen, the theory that transferred youths should be treated as adults with regards to sight and sound separation during their incarceration loses credibility.

4. The Threat of State Noncompliance with the JJDPA

An indirect cost that facilities may face is that, with an increased demand for sight and sound separation, there may be greater noncompliance with the JJDPA than in the past. This would lead to noncompliant states receiving a 20 percent funding cut towards all four JJDPA core requirements.[221] However, most states view the OJJDP as a "critical partner" in their efforts

210. *See* Lonn Lanza-Kaduce et al., *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 277, 280 (1999).
211. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 17.
212. *See* Salekin et al., *supra* note 84, at 383.
213. *See id.*
214. This statistic does not include other transfer mechanisms discussed in Part I.B.
215. *See* U.S. DEP'T OF JUSTICE, *supra* note 66, at 10.
216. *See id.* at 6 ("Murder is the offense most commonly singled out by statutory exclusion laws. In Massachusetts, Minnesota, and New Mexico, exclusion laws apply only to accused murderers. In all other states with exclusion statutes, murder is included along with other serious or violent felonies.")
217. *See id.*
218. *Id.*
219. *Id.*
220. *See id.*
221. *See* Pub. L. No. 115-385, § 205, 132 Stat. 5123, 5139 (2018).

to improve the juvenile justice system,[222] and past deficits in state funding for JJDPA protections have yet to significantly deter state adherence to the Act.[223] Between 2010 and 2015, the funding appropriated to the OJJDP to fund such juvenile justice programs declined each year.[224] In the 2016 fiscal year, Congress's funding of juvenile justice programs at $270.2 million was at its highest level since 2005, though the budget was nearly $154 million lower than in 2010.[225]

However, in 2016, the OJJDP reported that only six states received a reduction in funding for noncompliance with the JJDPA's core protections, and, further, only three states received a funding reduction due to noncompliance with sight and sound protection.[226] In 2017, only one state received a funding reduction due to noncompliance with sight and sound protection.[227] Despite the decrease in the JJDPA budget, there has not been an outstanding issue with noncompliance.[228] This may indicate that, if there was a slight increase in implementation costs, this would not be enough to drive state noncompliance.[229]

Each of the compliant states and territories have assembled a State Advisory Group on Juvenile Justice composed of a minimum of fifteen individuals whose role is to make sure the state remains compliant with the JJDPA and to determine the most effective use of federal funds from the OJJDP to reach such goals.[230] Since the inception of the JJDPA in 1974, there have been numerous amendments to the Act,[231] and even though many of the amendments have expanded the duties of the states, compliance has not been a serious issue across the board. Therefore, an amendment to expand sight and sound separation to all youths would likely have no effect on state compliance with the JJDPA.

IV. SIGHT AND SOUND SEPARATION SHOULD BE STATUTORILY EXPANDED TO INCLUDE EVERY YOUTH TRIED AS AN ADULT IN THE CRIMINAL JUSTICE SYSTEM UNDER ITS SPHERE OF PROTECTION

Despite the advances made in juvenile justice sentencing practices by the Supreme Court over the last fifteen years, the application of sight and sound separation—a facet of sentencing—remains problematic. This leaves a

222. *See supra* Part II.A; *see also* COAL. FOR JUVENILE JUSTICE, *supra* note 128, at 13.
223. *See generally* FINKLEA, *supra* note 129, at 1.
224. *See id.* at 3.
225. *See id.* at 4.
226. *See id.* at 3; *see also State Compliance with JJPD Act Core Requirements*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/compliance/compliancedata.html [https://perma.cc/9PXJ-XKLY] (last visited Oct. 6, 2019) (stating that the three states that received a cut in funding were Massachusetts, North Carolina, and Wisconsin).
227. *See State Compliance with JJPD Act Core Requirements*, *supra* note 226 (stating that the only state to receive a funding cut was Massachusetts).
228. *See* FINKLEA, *supra* note 129, at 1.
229. *See generally* COAL. FOR JUVENILE JUSTICE, *supra* note 128.
230. *See id.* at 22.
231. *See Legislation/JJDP Act*, *supra* note 124 (indicating that changes have been made to the JJDPA in 1977, 1980, 1984, 1988, 1992, 2002, and 2018).

complicated divide in how age is used as a factor for punishment in the criminal justice system.[232] To rectify the schism in the meaning ascribed to age within the justice system, the JJDPA should broaden its sight and sound separation protection to cover every youth who is tried and sentenced as an adult in the criminal justice system, without opportunity for judicial discretion.[233]

The rationale for applying sight and sound separation to youths who are still under the jurisdiction of the juvenile justice system, such as the reduction in sexual and physical violence by incarcerated adults, applies to youths who are transferred and tried in the criminal justice system as well.[234] The placement of a youth within an adult facility with no sight and sound protection based on the "interest of justice" can lead to youth victimization by adult incarcerated persons, regardless of whether the youth is tried as a juvenile or an adult. In the sentencing context, the difference between a youth tried as an adult versus a juvenile is simply procedural. Therefore, taking away blanket protection for all youths tried as adults leads to inconsistent sentencing practices throughout the United States. For example, under Mississippi state law, if a thirteen-year-old is charged with an armed felony, the youth is automatically and procedurally under the jurisdiction of the criminal justice system and could thus be judicially excluded from sight and sound separation protection if it is found to be in the interest of justice to do so.[235] However, if a youth in a neighboring state committed the same crime, he or she might be procedurally classified as a juvenile and therefore automatically subject to sight and sound separation while incarcerated.[236] The difference between the two crimes is simply applicable state law. Instead, sight and sound separation should be applicable to all incarcerated youths, regardless of how a youth is procedurally classified by state law.

The OJJDP has expressed that one of the primary goals of the JJDPA is to protect youths "from inappropriate placements and from the harm—both physical and psychological—that can occur as a result of exposure to adult inmates."[237] But this objective should be expanded to the entire youth community involved with the justice system. This would further the JJPDA's ultimate focus of improving the youth delinquency and justice systems. It should not be left open to a judge to determine if it is "in the interest of justice" for a youth to be afforded basic sight and sound separation protection while incarcerated.[238]

Since the Supreme Court determined that youths are "constitutionally different from adults for purposes of sentencing,"[239] it is logical to extend that rationale to postsentencing aspects of a youth's safety while

232. *See supra* notes 120–22 and accompanying text.
233. *See supra* Part II.A.
234. *See generally* U.S. DEP'T OF JUSTICE, *supra* note 38.
235. *See supra* note 220 and accompanying text.
236. *See supra* notes 218–20 and accompanying text.
237. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 5.
238. *Id.*
239. Miller v. Alabama, 567 U.S. 460, 471 (2012).

incarcerated. If Kirk Gunderson had been protected by sight and sound separation as a seventeen-year-old while incarcerated, he would not have faced physical and emotional abuse from incarcerated adults and his life may have been spared.[240] Kirk was considered an adult under Wisconsin law at age seventeen and "drawing the line" at eighteen for more age-appropriate incarceration practices would help to further eliminate youth abuse within the criminal justice system.[241] If eighteen is the cutoff that the Supreme Court declared as the distinction between "childhood and adulthood" for criminal procedure purposes, then the same rationale should apply for sight and sound separation, a procedure that occurs after sentencing determinations.[242]

The physical and emotional abuse a youth faces when incarcerated with adults can occur no matter how a youth is defined by law.[243] If anything, it is worse for those youths who are tried as adults and afforded no sight and sound protection, as empirical research demonstrates that youths held in adult facilities have an increased chance of suicide, sexual victimization, recidivism, and physical assault compared to those youths incarcerated in juvenile facilities.[244] The dangers a youth faces while in an adult facility forces many to succumb to a criminal lifestyle in order to protect themselves while incarcerated.[245] Violence typically becomes the ordinary way of life, as youths learn from adults that this is the best mode of survival and way to fit in.[246] However, this lifestyle, and the youth victimization that is usually a part of it, can be avoided by completely separating all impressionable youths under eighteen from incarcerated adults.

The JJDPA will never reach its expected level of effectiveness if a vast number of youths are continuously left unprotected by sight and sound separation once they are incarcerated. Within the JJDPA, there appears to be no explicit justification to support the difference in the implementation of sight and sound separation between youths under the jurisdiction of the juvenile justice system and those within the criminal justice system. Because not all transferred youths have committed the most serious offenses,[247] the distinction drawn by the JJDPA between youths in a criminal proceeding and youths in a delinquency proceeding with regard to sight and sound separation is, to an extent, arbitrary. Just because a youth has been waived into the criminal justice system does not make him or her less likely to become a victim of abuse by older incarcerated individuals. Therefore, using eighteen as a sight and sound separation threshold would be appropriate to evenly

240. *See supra* notes 1–10 and accompanying text.
241. Roper v. Simmons, 543 U.S. 551, 554 (2005).
242. *Id.*
243. *See supra* notes 167–72 and accompanying text.
244. *See supra* notes 167–72 and accompanying text.
245. *See* ARYA, *supra* note 5, at 7–8.
246. *See id.* ("By exposing juveniles to a criminal culture where inmates commit crimes against each other, adult institutions may socialize juveniles into becoming chronic offenders when they otherwise would not have.").
247. *See supra* Part III.D.3.

protect youths across the United States, much like the Supreme Court used in *Roper v. Simmons* to eliminate the death penalty for youths under eighteen.

The OJJDP acknowledges that incarcerating youths with adults is a "criticized" practice.[248] Such statements by the OJJDP indicate that there is no foundational or systematic rationale for why youths tried as adults are not afforded the same sight and sound separation protection as youths tried in the juvenile justice system and, further, why Congress has not implemented a statutory amendment to the sight and sound separation protection. It should not be left up to a judge to determine, based on a youth's age, maturity level, or any other factor the judge sees fit, whether such youth should be protected from incarcerated adults. Thus, this discrepancy in the amount of protection available to youths tried as adults needs to be rectified in order for the JJDPA to fulfill its ultimate goal of ensuring protection to all youths within the legal system.

CONCLUSION

The JJDPA has made significant advances in the protections afforded to incarcerated youths in the United States. However, the JJDPA will inevitably continue to fall short of reaching the goal of shielding all youths from the various harms of being incarcerated with adults when a portion of youths are not included in the statutory application of sight and sound separation. Just because a youth is tried as an adult does not mean he or she should not be protected from the physical and psychological harms associated with being incarcerated with adults. All youths involved in the justice system deserve to have their vulnerabilities legally protected. The JJDPA can protect them from the identified harms by expanding sight and sound separation's legal application and by closing the federal loophole that grants judges the power to determine whether it is in the interest of justice to allow a youth to be in contact with incarcerated adults. Doing so will provide a significant reduction in youth victimization and could even save lives within adult facilities.

248. *See* U.S. DEP'T OF JUSTICE, *supra* note 38, at 6.